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The Workmen's Compensation Law Journal

Reports of All Decisions Rendered in Compensation and Federal Employers' Liability Cases in the Federal Courts and in the State Appellate Courts

William Otis Badger, Jr., Editor
R. M. Chandor, Manager

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The Workmen's Compensation Law Journal

Volume VII *January, 1921* *No. 1*

Reports of All Decisions Rendered in Compensation and Federal Employers' Liability Cases in the Federal Courts and in the State Appellate Courts.

E. CLEMENS HORST CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL. (S. F. 9319.)

(Supreme Court of California. Oct. 20, 1920. Rehearing Denied Nov 18, 1920.)

193 Pacific Reporter, 105.

1. MASTER AND SERVANT—EMPLOYER'S "SERIOUS MISCONDUCT" WITHIN COMPENSATION ACT DEFINED.

"Serious misconduct" of an employer within Workmen's Compensation Act, § 6b, authorizing increased compensation, means conduct which the employer either knew or should have known to be conduct likely to jeopardize the safety of his employees.

(For other cases, see Master and Servant, Dec. Dig. § 352.)

2. MASTER AND SERVANT — EMPLOYER'S "WILLFUL MISCONDUCT" WITHIN COMPENSATION ACT DEFINED.

An employer's serious misconduct, causing injury to his employee and justifying the award of increased compensation under Workmen's Compensation Act, § 6b, is "willful," particularly with reference to the requirement of knowledge to the employer, though the evidence does not show positively that the employer was notified of the unsafe condition, if it appears from the circumstances that the acts of omission or commission evinced a disregard for the safety of others and willingness to inflict the injury complained of, as a failure to guard shafting, in direct violation of a general safety order of the Industrial Accident Commission.

(For other cases, see Master and Servant, Dec. Dig. § 352.)

(For other definitions, see Words and Phrases, First and Second Series, Willful.)

3. MASTER AND SERVANT — EMPLOYER'S "OFFICER" CHARGEABLE WITH MISCONDUCT WITHIN COMPENSATION ACT DEFINED.

Workmen's Compensation Act, § 6b, authorizing increased compensation where the employee is injured by reason of serious and willful misconduct on the part of an executive or managing "officer" of a corporation, by "officer" means a person in the corporation's employ, either elected or appointed, invested with the general conduct and control in a particular place of the business, the word not being used in its technical, legal sense as one elected or whose office is provided for by articles of incorporation or by-laws.

(For other cases, see Master and Servant, Dec. Dig. § 352.)

(For other definitions, see Words and Phrases, First and Second Series, Officer.)

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4. MASTER AND SERVANT—EVIDENCE HELD TO SHOW ACCIDENTAL INJURY BY "SERIOUS AND WILLFUL MISCONDUCT OF EXECUTIVE OR MANAGING OFFICER," WITHIN COMPENSATION ACT.

Evidence *held* to sustain the Industrial Commission's finding that the accidental injury to an employee caught in a revolving shaft was the result of the "serious and willful misconduct of an executive or managing officer" of the corporate employer, justifying increased compensation under Workmen's Compensation Act, § 6b.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

6 MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT PROVISION FOR ADDITIONAL ALLOWANCE FOR WILLFUL MISCONDUCT OF EMPLOYER HELD CONSTITUTIONAL.

Const. art. 20, § 21, empowering the Legislature to create a liability on the part of employers to compensate employees for injuries received irrespective of the fault of either party, authorized the enactment of Workmen's Compensation Act, § 6b, providing for compensation, increased by one-half in case the injuries were caused by willful and serious misconduct of the employer.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

In Bank.

Application for certiorari by the E. Clemens Horst Company, a corporation, the employer, to review an order of the Industrial Accident Commission of the State of California, awarding compensation for injuries to Mrs. La Verne Hamilton, the employee. Award affirmed.

Rehearing denied in bank; Angellotti, C. J., dissenting.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco (Arthur W. Bolton, of San Francisco, of counsel), for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

LAWLOR, J. This cause is before us on a writ of certiorari issued upon the application of petitioner, E. Clemens Horst Company, a corporation, to review an award made on October 24, 1919, by the respondent Industrial Accident Commission in favor of respondent Mrs. La Verne Hamilton as compensation for injuries sustained by her on June 7, 1919, while in petitioner's employ. The sum of $8.89, payable weekly in advance, was awarded to her against the Ocean Accident & Guarantee Corporation, petitioner's insurance carrier, as "a temporary total disability indemnity," and one-half of that sum, $4.45, also payable weekly in advance, was awarded her against petitioner as additional compensation by reason of the fact, as found by the commission, that her injuries were occasioned by petitioner's "serious and willful misconduct."

The said insurance carrier is not a party to this proceeding, and the only question presented is as to the validity of the award of additional compensation against the petitioner. The latter's contentions are: (1) That section 6(b) of the Workmen's Compensation Act (St. 1917, p. 834) is unconstitutional, and (2) "that even if this section were valid there is no evidence of 'serious and willful misconduct * * * on the part of an executive or managing officer' of the petitioner corporation, and that therefore the commission was without jurisdiction to make the award."

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At the date of the accident Mrs. Hamilton was employed in petitioner's vegetable drying plant near Wheatland, Yuba county, which had been built about three months before. E. Clemens Horst was petitioner's president and general manager. George E. Miller was general superintendent of petitioner's ranches. It appears that he was not a director or stockholder of petitioner. T. L. Conrad was superintendent of the plant at Wheatland, and was neither a director nor a stockholder of petitioner. When Mrs. Hamilton was injured she was working on a small platform raised about two feet from the floor of the plant. It was her duty to watch a conveyor belt which passed in front of her, and upon which potatoes were being carried from a peeling machine to a "slicer" about two feet to her left, and to pick out and pare those potatoes which had not been properly treated by the peeling machine. Directly over, and parallel to the conveyor belt, and about 5½ feet above the platform on which she was standing, was a rapidly revolving shaft which operated the various machines in the plant. This shaft was protected by a board on the side nearest the employee, but was unprotected below. The accident occurred under these circumstances: About 8 p. m. the mouth of the "slicer" at Mrs. Hamilton's left became clogged. Leaning over the belt and under the shaft she reached out to clear the potatoes away from the "slicer." In this position her hair was caught by the shaft and pulled from her head, so that she was completely scalped. It is admitted by petitioner that "the accident happened in the course of her employment, and no question is made of her right to recover compensation."

1. We shall first consider petitioner's claim that the finding that the injury was caused by the employer's serious and willful misconduct is not supported by the evidence. Section 6(b) of the Workmen's Compensation Act (Stats. 1917, p. 834; Deering's General Laws, Consol. Supp. 1917–1919, Act 2143c, p. 1392), as it stood at the time of the accident, read in part:

"Where the employee is injured by reason of * * * serious and willful misconduct * * * on the part of an executive or managing officer [of a corporation], the amount of compensation otherwise recoverable for injury or death, as hereinafter provided, shall be increased one-half: * * * Provided, however, that said increase of award shall in no event exceed twenty-five hundred dollars."

The commission has found on this point:

"(8) That at the time of said injury, the employer was a corporation. That the employer by its executive and managing officers constructed said plant and placed therein the transmission shafting upon which applicant was injured, parallel to and directly over the belt upon which applicant worked, at a height on a level with her eyes and without any guard or protection on the under side thereof. That applicant's work required her to bend forward with her head beneath said shafting, and it was necessary for her to stoop to do so. That her hair was thereby brought into close proximity to the unguarded portion of said shafting, which was at all times revolving rapidly. That said shafting was at all times herein mentioned maintained in said condition by said employer through its executive and managing officers and by said Miller and Conrad. That said construction and maintenance were, and each of them was, a direct and open violation of the provisions of sections 33, 34, 35, and 36 of the Workmen's Compensation, Insurance, and Safety Act of 1917. That the duty owed by said employer and its executive and managing officers to employees, under the said provisions, cannot be delegated by them, or any of them so as to free them, or any of them, from responsibility for the violation of said duty, and under the ruling in the case of Fidelity & Deposit Co. of Maryland v. Industrial Accident Commission, 171 Cal.

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728, 154 Pac .834, L. R. A. 1916D, 903, constituted serious and willful misconduct on the part of said employer. That said serious and willful misconduct was the proximate cause of said injury.

"That said construction and maintenance were further in violation of General Safety Order No. 6(a) of the Industrial Accident Commission, then in full force and effect, which provides that: '* * * All transmission shafting, either horizontal or vertical, in workrooms * * * and located within seven feet of the floor or platform, must be guarded.'

"That said violation of said safety order constituted serious and willful misconduct on the part of the executive and managing officers of said corporation, and of said corporation, and was the proximate cause of said injury.

"That therefore applicant is entitled to have her compensation for said injury increased one-half under section 6(b) of said act, said increase to be paid by said employer, and not by said insurance carrier."

The question, then, is: Does the evidence sustain this finding?

Mrs. Hamilton testified that she had been engaged in this particular work for ten days prior to the accident; that on the day in question two foreman had told her "to watch to see that it [the belt] didn't stop up at the end," where it dumped the potatoes into the "slicer"; that she could not reach that end of the belt without stooping under the shaft; that when she commenced to work at this plant she had been told "the general nature of the work, but not just what I was to do"; that she had not seen any signs on the premises warning employees against approaching the machinery; and that she had not "tried to take potatoes out of the slicer" except on the occasion when she was injured.

Mrs. Daisy Cope testified that she had been working on the same belt as Mrs. Hamilton; that the revolving shaft which caused the latter's injuries was "right over the belt" on a level with her eyes; that no one had called her attention to any danger signs in the plant, and that she had seen none; that prior to the accident she herself had felt the suction from the revolving shaft tugging at her hair, but had not spoken about it to her fellow employees; that she had not been warned "to look out for the shaft"; that "the shaft is right over the belt, and if you are not careful you would raise up under it"; that the board protecting the shaft on the side nearest her was "right even" with her head; that there was sufficient distance between the shaft and the belt at the point where the witness worked so that her hair would not become entangled in the shaft unless she leaned over the belt, but that the belt ran "upward" as it approached Mrs. Hamilton's position, "and it was closer to the shaft there than it was where I was."

Mrs. A. M. Parker stated that at the time the applicant was injured she was "forelady, overseeing the work"; that she had not instructed Mrs. Hamilton "to be careful or about the machinery in any way"; that she did not remember seeing any warning signs in the plant; that the "slicer" frequently became clogged; that she did not know whose duty it was to clear the machine in such cases, but that the "day boss" had told Mrs. Hamilton to do so; that in order to do so she would have to lean over the belt so that her head "came right under the shaft"; that within a few days after this accident the shaft was boxed in; that she (the witness) had a pole which she often used to clear potatoes from the "slicer," but that this was not generally known among the employees, and that "the most of the time I used it was after she got hurt"; and that the pole was not located so that Mrs. Hamilton could use it. When recalled by petitioner, she admitted that no instructions had been given to any one except to the applicant to clear the "slicer," and stated that she

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herself had not been told to do it until after Mrs. Hamilton was injured, but that during the 10 days prior to the accident she frequnetly used the pole to keep the mouth of the machine clear.

Mrs. Marion Sherman, who was working about 5 feet from Mrs Hamilton when the latter was hurt, testified that she had not been instructed as to whose duty it was to keep the "slicer" clear, but tha "any one who was working on that end of the belt, right there, they was to keep the potatoes moving"; that she, too, had noticed the effect of the shaft on her hair when she stood erect; that the shaft was about 2½ feet above the belt; and that any one working in front of the belt would naturally stoop under the shaft in order to reach the mouth of the "slicer."

T. L. Conrad testifying for petitioner, stated that he was "fairly familiar" with conditions at the plant; that the distance between the shaft and the platform on which Mrs. Hamilton was working was about 5½ feet; that after the accident the shafting was boxed in at his direction; that one Boyd was the night foreman at the plant under him; that the "slicer" occasionally became clogged; that it was Mrs. Parker's duty to keep it clear, and not the duty of an employee stationed where Mrs. Hamilton was; that he did not know whether or not his foremen, who were "supposed to instruct these employees when they went to work about their duties," had given these or other instructions; that "we had signs up in regard to the safety of the machinery"; that, so far as he knew, Horst himself had no knowledge of the dangerous position of the shaft; that surface of the shafting was smooth; that he had never seen "any woman working in the same position Mrs. Hamilton was cleaning the slicer";; that "she had no business there," clearing the mouth of the machine; and that a woman working "below" Mrs. Hamilton on another belt had been instructed by him and by the foreman to keep the "slicer" from becoming clogged. On cross-examination he stated that prior to the accident he had frequently noticed the position of the shaft; that he had been on the platform where Mrs. Hamilton worked, and had seen that the shaft was "open underneath and on the back," although there were two boards "in front"; that he had never called the attention of Horst or Miller to the position of the shaft; that he had never told any other foreman "to cover it up or box it in"; that he thought Horst was in the East. and had not been in the plant before the accident; and that he himself had considered the plant "as ready to run and absolutely safe."

George E. Miller, also a witness for petitioner, testified that he had inspected the Wheatland plant "simply in a general way by going through it and seeing it in operation. The instruction to the builders at the time it was built was to house in everything they considered dangerous * * * I know that we didn't consider it was necessary to inclose shafts where the shafts was over the belt, so that one would have no business to be in there. Of course, there are dangerous places in any plant or any machine when you get in that dangerous position, but we did'nt consider it was necessary to put boards underneath the shaft where the shaft was back of or over the conveyor." He further testified that the plant had not been built from plans or specifications, but from general instructions; that he had never made a special survey of the plant; that he frequently visited the various ranches under his supervision, and "had them make changes wherever I thought they were necesssary"; that he had seen the revolving shaft, but had not noticed there was no guard underneath it; and that "the handling of the plant and operation of it" was left to Conrad.

Horst testified that he had given Miller instructions "to look out for the safety" of the employees; that no report had been made to him as to any dangerous conditions in this plant; that he knew practically no-

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thing of the exact condition of the works other than as he was advised by Miller and Conrad; that prior to the injury his attention had not been called to this shafting, although on many occasions he had been through the plant "in a casual way"; and that his custom was to give Miller "general instructions," and "leave it up to his judgment to see that the work is carried out." As to Miller's powers as superintendent he stated "he has got no authority except what authority I gave him."

Miss Viva Jessup, who worked next to Mrs. Hamilton, stated that she had not known of any instructions being given to any one as to the cleaning of the "slicer"; that she did not remember seeing any "safety signs" in the building; and that she had never heard any one say that the shaft was in a dangerous position.

Subdivision (2) (a) of section 1 of the English Workmen's Compensation Act of 1906 (St. 6 Edw. VII, c. 58) provided that if the injury to an employee "is attributable to the serious and willful misconduct of that workman, any compensation * * * shall, unless the injury results in death or serious and permanent disablement, be disallowed." In discussing what is meant by "serious and willful misconduct," Beven, in his Workmen's Compensation, page 394, considers separately the terms "serious" and "willful," and we think our consideration of the evidence may properly be thus divided.

[1] The first question presented is, then, Was the commission justified in finding that the petitioner was guilty of "serious misconduct"? There is no statutory definition of this term. In this connection we may again quote from Beven, page 401:

"To constitute 'serious misconduct,' it is probable that the Legislature intended to signify conduct that an average workman in being guilty of either would know, or ought to know, if he turned his mind to consider the matter, to be conduct likely to jeopardize his own and his fellow workman's safety."

In our opinion the serious misconduct of an employer under our statute may be similarly defined. There should be no difference in principle between the degree of care required of an employer and that exacted from an employee. "Serious misconduct" of an employer must therefore be taken to mean conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees. It seems clear that, accordingly to this test, the commission was amply warranted in finding that the maintenance of the improperly protected shafting, immediately over, and in close proximity to, the conveyor belt, was such serious misconduct. Mrs. Hamilton's testimony that she had been instructed to keep the belt and the "slicer" clear is uncontroverted, and it plainly appears from the testimony of the other employees that in order to do so it was natural that she should lean over the belt, thereby bringing her head in dangerous proximity to the revolving shaft. Mrs. Sherman testified that it was the custom in the plant for the employee who worked in Mrs. Hamilton's position to "keep the potatoes moving," and she and Mrs. Cope stated that they had frequently felt the suction of the revolving shaft tugging at their hair. From the evidence which we have summarized we cannot hold that the commission was not justified in finding that the place at which the employee was required to work was unsafe. Under the evidence the finding of serious misconduct implies that the conditions of the employment were patently unsafe. If this be true, we know of no rule under which petitioner may claim that, passing for the time being the question of the penalty, it is not primarily liable for resulting injuries. It is so well settled as to require no citation of authority that petitioner was charged with the duty of maintaining a safe place for its employees to work, and we do not think it can be said the

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evidence is insufficent to establsh serious misconduct, in that petitioner's officers knew, or ought to have known, if they had turned their minds to consider the matter, of the conditions under which Mrs. Hamilton was required to work.

[2] Next, as to whether such serious misconduct was "willful." It has frequently been said that willful misconduct involves the knowledge of the person that the thing which he is doing is wrong. Lewis v. G. W. Ry. Co., L. R. 3 Q. B. D. 195; In re Burns, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787; Riley v. Stand. Acc. Ins. Co., 227 Mass. 55, 116 N. E. 259; Beckles' Case, 230 Mass. 272, 119 N. E. 653. Conceding that knowledge is required, it seems to us that in order to prove the requisite knowledge, it is not necessary for the evidence to show positively that the person was notified of the unsafe condition of his premises, but that it is sufficient if it appears that the circumstances surrounding the act of commission or omission are such as "evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of." Railway Co. v. Bryan, 107 Ind. 51, 7 N. E. 807. See, also, Pittsburgh, C., C. & St. L. Ry. Co. v. Judd, 10 Ind. App. 213, 36 N. E. 775. According to the findings, the failure to guard the shafting was in direct violation of a general safety order of the commission. It is not contended that the making of this regulation was not within the power of the commission, and, by sections 48 and 49 of the Workmen's Compensation Act, such orders "are conclusively presumed to be reasonable and lawful." In the face of the evidence it cannot be held that the finding that petitioner was guilty of serious and willful misconduct in maintaining the unguarded shafting is without support.

[3] It only remains to consider in this connection whether such misconduct was that "of an executive or managing officer" of petitioner. It is to be noted that section 12, subdivision (b), of the act of 1913 (Stats. 1913, p 283), specified that the willful misconduct of a corporate employer which should entitle an injured employee at his option either to claim compensation under the act or to sue at law for damages, must be that of an elective officer. This provision was repealed by the act of 1917, supra, and under the corresponding section of that statute—the section here under consideration—the willful misconduct which entitles the injured employee to additional compensation is that of an executive or managing officer of a corporation. It is significant that in this section it is not prescribed that such misconduct be that of an elective officer, and it is to be deemed that in enacting the act of 1917 the Legislature was fully advised of the changes being made in the language of the corresponding provisions of the act of 1913. Under the prior statute an injured employee, in order to recover for the willful misconduct of his corporate employer, was required to bring home such misconduct to an elective officer. Under the 1917 statute, however, the Legislature has seen fit to require that a corporation shall be liable for the willful misconduct of an executive or managing officer, and has not specified that the officer shall be an elective one. It seems clear, therefore, that the Legislature by this section did not use "officer" in its technical, legal sense as one who has been elected, or whose office is provided for by the articles of incorporation, or the by-laws, but that by an "executive or managing officer" was meant a person in the corporation's employ, either elected or appointed, who is invested with the general conduct and control at a particular place of the business of a corporation.

[4] Applying this reasoning to the facts herein, it is plain that Conrad was a managing officer of the petitioner, for whose willful misconduct the company is responsible. The by-laws were not introduced in evidence, and it cannot be determined from the record whether Conrad was elected or appointed as manager of the Wheatland plant. But, as

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has been shown, Miller testified that the operation of the Wheatland plant was entirely intrusted to Conrad. According to the testimony of Conrad himself, he knew of the position of the shafting, and had been on the platform where the injury was received; that he observed it was "open underneath and on the back"; that he neither remedied the conditions nor reported them to his superiors; that immediately after the accident the shafting was boxed in at his direction; and that as superintendent he was fairly familiar with conditions in the plant. It is not necessary, in order to support the finding, that there be direct evidence that Conrad knew of the dangerous condition of the premises and intentionally failed to remedy it; it is sufficient if the existence of either his knowledge, or intention, or both, may be inferred. The commission may have decided that Conrad could not have failed to observe that an operator tending the belt was in perilous proximity to the unguarded shafting. From all the evidence we cannot say the commission may not have inferred that he must have known of the dangerous conditions of the employment. If he did, as matter of law he would be guilty of willful misconduct if he failed to take proper precautions to remove the danger. It may be observed that if Conrad's testimony as to whether he knew of the situation is to be accepted, the conclusion is inevitable that petitioner in the operation of the plant failed to place responsibility for the working conditions upon any one. In any event, we are not prepared to hold that the superintendent of the plant is not to be charged with knowledge of conditions which are in gross violation of prescribed safety regulations, or that under the evidence he is not "an executive or managing officer" within the meaning of the statute.

And it is only necessary to refer to the testimony of the various employees that the unguarded shafting was on a level with Mrs. Hamilton's eyes, that several of the employees themselves had felt the suction from the shaft, that Mrs. Hamilton had been instructed to clean the "slicer," and that in so doing it was to be expected she would lean over the belt and under the shaft, in order to justify the conclusion of the commission that her injuries were due to the dangerous conditions under which she was required to work. It must be held, therefore, that the evidence is sufficient to sustain the finding that the accident was the result of the "serious and willful misconduct of an executive or managing officer" of petitioner.

[5, 6] 2. We now turn to consider petitioner's claim that section 6(b) is unconstitutional. The Constitution, as it stood at the time the legislation in force on June 7, 1919, was enacted, empowered the Legislature to create a liability on the part of employers "to compensate their employees" for any injury received in the course of their employment, "irrespective of the fault of either party." Article 20, § 21. This language does not authorize the creation of a liability for anything more than compensation. If the 50 per cent. to be added in cases where the injury is caused by the willful misconduct of the employer is given as a penalty on the employer for such misconduct, and not as compensation to the employee for his injury, the provision is not within the power given to the Legislature by said section, and if it has no other sanction, it is beyond the legislative power and void.

It would be within the general power of the Legislature, under section 1, article 4, to provide that in any case of injury to an employee from willful misconduct of the employer, the amount found as the actual damage sustained by the employee should be increased by adding 50 per cent. thereto as a penalty for the misconduct and by way of exemplary damages. But that part of the award would not be given as compensation, and the jurisdiction to enforce the liability for the exemplary damages would be in the ordinary courts established by section 1, article 6 of

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the Constitution. That section vests the whole judicial power of the state in the courts there mentioned, except such as may be placed in other tribunals by the subsequent constitutional amendments providing for the giving of special powers of a judicial nature to the railroad commission and to the Industrial Accident Commission. Article 12, §§ 22, 23; article 20, § 21 Section 21, article 20 does not authorize the Legislature to commit to the Accident Commission the enforcement of any liabilities except those created by it against employers to the employees for compensation for injuries. Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 Pac. 24; Western Metal Supply Co. v. Pillsbury, 172 Cal. 413, 156 Pac. 491, Ann. Cas. 1917E, 390; Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218. Hence it does not authorize the giving of jurisdiction to enforce a liability for punitive damages, not given as compensation, but as something over and above compensation for the injury.

But the provision in question is founded upon a different theory. It is obvious from the language of sections 6 and 9 of the act of 1917, supra, and from the act as a whole, that the ordinary schedule of compensation there established was not considered to be full and complete compensation for the injuries received. The purpose was to take a part of the burden imposed by the injury from the injured employee, and transfer that part to the employer to be ultimately borne by the community in general as an addition to the cost of production. In Western Indemnity Co. v. Pillsbury, 170 Cal. 693, 151 Pac. 398, three of the justices of the court, in upholding the constitutionality of the act, said, with regard to the compensation allowed to employees in addition to medical and surgical expenses, that the indemnity based upon the loss of earnings "covers not the whole, but only a part or a percentage of such loss. The risk of actual injuries is thus shared by employer and employee." The opinion of the other three justices, upholding the act for somewhat different reasons, confirms the foregoing statement. All presumptions are to be indulged in favor of the validity of an act of the Legislature. It is therefore to be assumed the Legislature found that the actual injury by loss of earnings and other elements of damage, not including expenses for costs of treatment and the like, would be at least 50 per cent. more than the fixed schedule would come to, and that it was deemed just, if the injury was caused by willful misconduct of the employer, he should be made to pay a greater proportion of the burden, and the allowance in such a case should be increased by adding 50 per cent, thereto. Thus considered, the additional allowance is really for additional compensation in the strict sense, and not for exemplary damages. This being, the case, the power to enforce it was properly given to the commission under the provision of section 21, article 20, of the Constitution.

The award is affirmed.

We concur: Angellotti, C. J.; Shaw, J.; Olney, J.; Wilbur, J.; Lennon, J.; Sloane, J.

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QUONG HAM WAH CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA ET AL. (S. F. 9090.)

(Supreme Court of California. Oct. 5, 1920.)

192 Pacific Reporter, 1021.

2. MASTER AND SERVANT—"RESIDENT" INJURED OUTSIDE STATE, WITHIN COMPENSATION ACT, INCLUDES ONLY CITIZENS AND RESIDENT ALIENS.

Within Workmen's Compensation Act, § 58, authorizing compensation for injuries received outside the state, where the employees were residents of the state and the contract of employment was made therein, the term "resident" applies only to citizens or to aliens domiciled within the state.

(For other cases, see Master and Servant, Dec. Dig. § 369.)

(For other definitions, see Words and Phrases, First and Second Series, Resident.)

5. MASTER AND SERVANT — COMPENSATION ACT PROVISION FOR INJURIES OUTSIDE STATE WITHIN STATE'S POWERS.

Workmen's Compensation Act, § 58, authorizing compensation to an employee for injuries received outside the state, where the contract of employment was made within the state, merely attaches an additional incident to a contract made within the state, and is within the powers of the state to enact.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

In Bank.

Proceeding by Owe Ming under the Workmen's Compensation Act against the Quong Ham Wah Company. Compensation awarded by the Industrial Accident Commission, and the Quong Ham Wah Company brings certiorari against the Commission and others. Award affirmed.

Gorrill & Trowbridge and Delger Trowbridge, all of San Francisco, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

LENNON, J. Certiorari to review the action of the Industrial Accident Commission in making an award pursuant to the terms of section 58 of the Workmen's Compensation, Insurance and Safety Act. Stats. 1917, p. 870. Upon the first hearing in this court, the award was annulled upon the theory that said section 58 of the Workmen's Compensation Act granted to citizens of this state a privilege which it denied to noncitizens, and was, therefore, violative of section 2, cl. 1 of article 4 of the federal Constitution. Quong Ham Wah Company v. Industrial Accident Commission, 59 Cal. Dec. 18. Upon petition for rehearing, the judgment of this court in the first instance was set aside, and the cause set down for a rehearing for the purpose of considering the following questions:

"(1) To what extent may the state give extraterritorial effect to its laws fixing the incidents of the relation of employer and employee, when such relation has its inception within the state?

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"(2) Assuming that the state has the power to give extraterritorial effect to its laws in such a case, and assuming that a discrimination is made between residents and nonresidents of the state by the provisions of the Workmen's Compensation Act extending the incidents of the relation of the employer and employee therein provided for to residents, but not to nonresidents, when the relation has its inception within the state, but the injury to the employee occurs elsewhere, is such discrimination contrary to the federal Constitution, and, if so, does the federal Constitution have the effect of rendering invalid that portion of the Workmen's Compensation Act providing for such extension in the case of residents, or (a point not made in the original briefs) does it have the effect of allowing this portion of the act to stand as effective and valid, but of extending the incdents of the relation under similar circumstances to nonresidents, although there is no provision in the act for such extension to nonresidents?"

Minutes of the Court, 59 Cal. Dec. No. 3111.

In keeping with the order granting a rehearing, counsel for the respective parties briefed the case anew, painstaking directing their efforts, in addition to a discussion of the points originally made, to an exhaustive exposition of the law appertaining to the subject-matters designated in the order granting the rehearing. Therefore, aside from the recognition due the commendable efforts of counsel to facilitate the avowed purpose of the order, a discussion, not only of the points originally made, but also of those designated in the order, would seem to be necessary to a decision of the case as now presented, even though the latter points were not necessarily involved in the case as prepared and presented in the first instance.

Section 58 of the Workmen's Compensation Act reads as follows:

"The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state, and any such employee or his dependents shall be entitled to the compensation or death benefits provided by this act." Stats. 1917, p. 870.

[1] Petitioner, the employer of the injured workman attacks the validity of this statute on the ground that it violates section 2 cl. 1 art. 4, of the Constitution of the United States, which provides that—

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

At the outset we are confronted again, as we were in the first instance, with the contention that the petitioner cannot be heard to question the constitutionaliy of the statute in controversy, because it is not one of the class claimed to be discriminated against by the statute. The provision of the Workmen's Compensation Act now under attack is identical in phraseology with that considered by this court in Estabrook Company v. Ind. Acc. Comn., 177 Cal. 767, 177 Pac. 848. In that case this court expressly declared that it was not required to pass upon the constitutional question sought to be raised, and declined to discuss that question upon the merits, because, as was held:

"A contention that a statute denies equal rights and privileges by discriminating between persons and classes of persons 'may not be raised by one not belonging to the class alleged to be discriminated against.' " Estabrook v. Ind. Acc. Comn., supra.

Such, undoubtedly, is the general rule; but the Estabrook Case is fundamentally wrong, if it is to be taken as definitely deciding that there are no exceptions to the general rule enunciated therein and, if that be

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its purport, it should be flatly overruled, as was done by a majority of the court in the opinion rendered in the first instance in the instant case. Quong Ham Wah Company v. Ind. Acc. Comn., supra.

Apparently, however, the court in the Estabrook Case did no more than declare and apply the general rule that a statute purporting to make an unconstitutional discrimination between persons or classes of persons cannot be assailed on the ground of unconstitutionality by a person not belonging to the class discriminated against. This general rule, however, is not a hard and fast rule which must be arbitrarily and inflexibly applied to every situation involving the constitutionality of a statute, regardless of contingencies which may extend its operation beyond the confines of the classes which it was aimed to cover and control and which ultimately culminates in a grievance against persons not originally within the contemplation of the statute. In other words, the general rule under discussion and decision in the Estabrook Case must necessarily be subject to certain well-defined exceptions which, in so far as a persual of the record in the Estabrook Case shows, were not, in that case, pressed upon the attention of the court. Clearly the petitioner in the instant case has brought itself within the scope of one or more of the recognized exceptions to the general rule enunciated in the Estabrook Case.

Thus, where no member of a class alleged to be unlawfully discriminated against by a statute is in a position to raise the constitutional question, then any person affected by the application of the statute can urge its unconstitutionality. In Greene v. State, 83 Neb. 84, 119 N. W. 6, 131 Am. St. Rep. 626, the plaintiff in error was convicted under a statute making it a penal offense to commit "blackmail" against citizens or residents of the state of Nebraska. On appeal he urged that the statute was unconstitutional by reason of the fact that it operated to protect only citizens and residents of the state of Nebraska, and therefore unlawfully discriminated against the citizens and residents of all other states. In upholding this contention the court said:

"We have not overlooked those cases which hold that a court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has, therefore, no interest in defeating it. Where the constitutional objection is that the penalties of the law are directed against a certain class without any just reason for such discrimination, it is safe to leave the question of the constitutionality of such laws to be raised by the parties against whom the discrimination is made; and such have been the facts in all the cases we have examined laying down this rule. It is inapplicable to a case where the vice of the law consists in an unwarranted discrimination between the individuals against whom the aggression thereby forbidden is committed. In such cases there is no way by which any person within the jurisdiction of the state denied the protection of its criminal law could bring the question before a court for its determination. If the Legislature should enact a law amending our Criminal Code, so that the crimes therein specified should be crimes only when committed against citizens or residents of the state, such an act would be absolutely void; but its invalidity could never be brought before the court by any person belonging to the classes thereby denied the protection of the criminal law. If we apply to such a law the rule that its constitutionality would only be considered when the objection was made by a party discriminated against, there could be no objection to its validity. When such a law is sought to be enforced against any person, whether belonging to the classes discriminated against or not, it should be declared void."

Respondents suggest that the reasoning of this case is based upon an inaccurate conception of the nature and effect of an unconstitutionally discriminatory statute. Such statute is, they contend, not merely

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presumptively valid until it is set aside by the courts; but, unlike other statutes which offend against the Constitution, it is actually and legally valid until set aside. Were this view of the nature of a discriminatory statute to be accepted, the doctrine of Greene v. State, supra, might be paraphrased thus: That such a law is in fact valid as to all classes except the class discriminated against, unless that class is precluded from making a complaint, in which event the law is invalid as to every class. Such a doctrine would assuredly be strange and indefensible. The truth of the matter is, however, that a discriminatory law is, equally with the other laws offensive to the Constitution. no law at all. Buchanan v. Warley, 245 U. S. 60, 72, 38 Sup. Ct. 16, 62 L. Ed. 149, L. R. A. 1918C, 210, Ann. Cas. 1918A, 1201. Whatever validity it may be said to possess, it has such validity merely by virtue of the presumption of validity attaching to the acts of the legislative branch of the government. This presumption, being rebuttable, may be attacked by a litigant whenever it is material to his case, unless he is prevented from doing so by some special exception. Such exceptions possess no peculiar sanctity, and invest the law with no actual validity; they should naturally be confined by the limits of the reasons which occasioned their adoption, and should give way to considerations of policy paramount to those reasons. Such an exception exists in the matter of attack upon the presumptive validity of a discriminatory statute, and is to the effect that only a member of the class discriminated against can attack the presumption. The reason for the exception is to be found in the rule that the courts will consider questions of the constitutionality of statutes only when such consideration is a necessity in the determination of a real earnest and vital controversy between individuals. The exception, if literally accepted in its general form, is broader than the reason upon which it is based; but, independently of this consideration it must yield to a policy paramount to the reason itself where no member of the class discriminated against can raise the question.

The reason for the exception is in the nature of a rule developed for the regulation of the ultimate and supreme function of the courts to declare unconstitutional statutes to be void and of no effect; and such a regulation rule must itself be subject to exception where it would otherwise operate to prevent altogether the exercise of this function, a function which it is the most solemn duty of the courts to exercise in a state governed under a written Constitution which is the supreme law of the land. Where no member of a class discriminated against could ever attack the constitutionality of the discriminatory statute, the rule reserving to such persons the right to raise the constitutional question would totally prevent the exercise by the court of its function of passing upon that question, and would place it in a position where it would for all time enforce rights and obligations created by an obviously void enactment. In such case any litigant to the determination of whose claim the constitutional question is fairly relevant should be permitted to raise the constitutional question. In the instant case, the Compensation Act does not give the commission jurisdiction over controversies arising out of injuries sustained abroad by workmen who are not residents of California. It is clear, therefore, that a nonresident would have no standing before the commission or before any court to make a claim under the act; and, not having jurisdiction over his injury, neither the commission nor the courts could entertain or adjudicate his claim for compensation, nor the constitutional question involved. Since, therefore, no member of the class discriminated against can ever raise the constitutional question, the petitioner is entitled to assail the constitutionalty of the statute, since a determination of that question is clearly relevant in determining its rights herein.

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Moreover, the fact that the constitutional rights of petitioner are directly affected by the statute here in question shows that the determination of the constitutionality of a discriminatory statute may be a necessity in the determination of a real and vital controversy between parties, neither one of whom is a member of the class discriminated against, and that, therefore, the general rule that only members of the unfavored class may attack the enactment is broader than the reason upon which it is based. In this behalf respondents suggest that the cases indicate that the constitutionality of a discriminatory statute can be raised only by one injured by the *discrimination*, and in no case by one whose constitutional or other rights are injured by the *legislation*. A careful analysis of the cases presented fails to support this theory.

Moreover, the Supreme Court of the United States has announced and acted upon the contrary rule in Buchanan v. Warley, supra, a decision which is precisely in point in the instant case. In that case a vendor of land, a white man, sued to compel the vendee, a colored person, to receive and pay for a certain parcel of land which he had agreed to buy. Defendant had judgment in the lower court solely because of the effect of an ordinance making it illegal for colored persons to reside upon the property in question. Plaintiff contended that the ordinance was unconstitutional, for the reason that persons of color were unlawfully discriminated against. His right to assail the statute on the ground stated was questioned, on the theory that he was not a member of the class discriminated against. The court clearly recognized, as it has done both in earlier and in subsequent cases, that in general one cannot assail the constitutionality of a statute in reliance upon the grievance of another; but it pointed out that, while plaintiff had no grievance by reason of the discrimination, he had a grievance by reason of the legislation, which by narrowing the market for his land deprived him of property; such deprivation being without due process of law in event the statute was for any reason unconstitutional. The court proceeded, therefore, to consider the merits of the constitutional question of discrimination.

That case is precisely in point here, for, in the instant case, while petitioner has no grievance by reason of any discrimination, it has a grievance by reason of the legislation, which, by imposing upon it the liability of an insurer for certain classes of its employees, operates to deprive it of property; such deprivation being without due process of law in event the statute is for any reason unconstitutional. The constitutional question of discrimination must therefore be discussed and decided.

[2] Section 58 of the Workmen's Compensation, Insurance and Safety Act of 1917 restricts the right to claim the benefit of the act in the case of injuries suffered abroad to employees who are residents of California at the time of the injury. Since the act assumes that at the time of the injury the employee will be beyond the boundaries of the state, the word "residents" must necessarily have been used to designate "persons domiciled in" California. Citizens of the United States domiciled in California are citizens of the state. Pol. Code, Cal. § 51. The benefits of the act are therefore extended solely to citizens of California and to aliens domiciled within the state. It follows that there is a direct discrimination against aliens not domiciled in California, with which we are not concerned, and against citizens of other states of the Union, which, if without legal justification, renders the statute unconstitutional. Blake v. McClung, 172 U. S. 239, 247, 19 Sup. Ct. 165, 43 L. Ed. 432; Id., 176 U. S. 59, 67, 20 Sup. Ct. 307, 44 L. Ed. 371.

Respondents contend that the discrimination is justified upon the ground that the obligation imposed upon employers by the act is created as an incident to the status of master and servant, and is therefore an obligation which can be created only by the law of the place of injury

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or by the law of the place of the servant's domicile. Were this reasoning sound, it would follow that, in making the discrimination in section 58 of the act upon the basis of domicile, the Legislature was merely recognizing a jurisdictional limit upon its power. Respondents' theory is based, however, upon a misconception of the nature of the statute and of the meaning of the term "extraterritorial," as that term is used in describing the operation of the statute.

[3, 4] The theory of territorial sovereignty has been too long established as a principle of international law to admit of question at this time. Rights created by one state may be recognized and enforced by another state at its pleasure, and likewise a status attached to a person by one state may be recognized by another state, into which that person may travel, at the pleasure of the latter state; but as law the mandates of the sovereign of a given state can have no effect beyond the territorial limits to which his rule is extended. When, therefore, it is said that a statute, such as the Workmen's Compensation Act, has an extraterritorial effect, it cannot mean that the law does, or attempts to, create rights abroad; it can only mean that an act occurring beyond the geographical limits of the state is recognized as the basis for the creation, or condition for the enforcement, of a right created and enjoyed within this state. The power of an absolute sovereign to thus sanction the enforcement, within the territory subject to the jurisdiction of that sovereign, of rights based upon acts occurring abroad cannot be questioned upon the ground of any inherent deficiency. It is therefore a power which may be exercised by this state, subject only to the restrictions of the state and federal Constitutions.

We may assume, in accordance with the contention of respondents, that if the imposition of the obligation to compensate a servant not domiciled within the state, for injuries sustained without the geographical limits of the state, were an attempt to create an obligation merely as an incident to a status, such legislation would conflict with well-defined legal principles. Whether such a law would amount to a mere regulation of status, or to an expression of a positive duty, the breach of which would be tantamount to a tort, it may be conceded that a law of that nature would not lie within the law-making province of a state which was neither the domicile of the servant nor the locus delicti. The effect and purpose of the act now under consideration, however, cannot be held to be the regulation of a status or imposition of a tort liability. It is true that the extension of the liability imposed by the act to acts occurring beyond the territorial limits of the state cannot be supported on the simple theory that the obligation so imposed is, strictly speaking, purely a contractual liability, for the proposition that a compulsory statute is a contract has been definitely repudiated by this court. North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 162 Pac. 93, L. R. A. 1917E, 642.

[5] But the statute which is now before us assumes to extend its effect only to those cases where the contract of hire was made in this state. It is therefore not an attempt to create an obligation merely as an incident to a status, but is, in form and substance, a genuine regulation of contracts subject to the sovereignty of the state. The liability which it imposes is, so as to speak, in a class by itself, being neither strictly contractual nor delictual, and it may, for want of a better term, be described as quasi ex contractu. Post v. Burger, 216 N. Y. 544. 550, 111 N. E. 351, Ann. Cas. 1916B, 158; Berton v. Dry Dock Co. (D. C.) 219 Fed. 763. The contract creates a relationship under the sanction of the law and the same law attaches as an incident thereto an obligation to compensate for injuries sustained abroad, amounting to a sort of compulsory insurance. The Legislature may lawfully impose that right and duty upon those operating under a contract subject to the legislative

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power, and no principle of law is defeated by attaching to such contracts the same duties and rights as incidents to acts abroad that are lawfully imposed as incidents to the same acts occurring within the geographical limits of the state. Angell on Recovery under Workmen's Compensation Law for Injuries Abroad, 31 Harvard Law Review, 16; Smith v. Heine Safety Boiler Co., 224 N. Y. 9, 119 N. E. 878, Ann. Cas. 1918D, 316; Jenkins v. T. Hogan & Sons, 177 App. Div. 36, 163 N. Y. Supp. 707.

It is at once apparent that the Legislature has equal power to provide for the creation of a compulsory obligation to compensate for injury suffered elsewhere as a regulation of contracts subject to the sovereignty of the state whether the contracting employee be domiciled in this state or not. Story on Conflict of Laws (8th Ed.) p. 375; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 416, 156 Pac. 491, Ann. Cas. 1917E, 390. Since, therefore, the right is created only in favor of citizens of the state and domiciled aliens, there is a direct discrimination against citizens of sister states.

[6] The right of the Legislature to impose reasonable regulations upon contracts subject to its sovereinty is unquestioned. When, however, the Legislature attempts to provide that a substantial privilege shall be incident to certain contracts of employment, when entered into in this state by citizens of this state, and that that privilege shall not be incident to identical contracts of employment when entered into in this state by citizens of other states of our Union, the enactment is clearly in contravention of section 2, cl. 1, art. 4, of the federal Constitution.

"Different states may have different policies, and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land." Chambers v. B. & O. R. Co., 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143.

It is true that many procedural discriminations between citizens and noncitizens have been upheld, but the rule applied in such situations has no application where a substantial substantive right is granted to citizens and under like circumstances is denied to citizens of other states. The statute here in question provides for the creation within this state of a right to accident insurance as an incident to certain contracts of employment in favor of citizens, and opens the doors of its courts and commissions to citizens to enable them to enforce that right. This right is not accorded to citizens of other states. A privilege and protection of the laws of a substantial nature is thereby accorded to citizens of this state and denied to citizens of other states. This is forbidden by the federal Constitution. Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432.

[7] The Constitution provides that—

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The provision appears without qualification. Its effect is not limited to those cases where its operation will not interfere with the internal policy of the state or with considerations which appear to affect the general welfare. Its mandate is absolute. It is true that a state may, in the valid exercise of its police power, limit the right of individuals to engage in certain professions or callings. Such regulations will be upheld, even though their effect is indirectly to place noncitizens at a disadvantage, but the regulation must be inherently reasonable. Ex parte Spinney, 10 Nev. 323; La Tourette v. McMaster, 248, U. S. 465, 39 Sup. Ct.

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160, 53 L. Ed. 362. The principles applied in these cases cannot be invoked under the facts presented here. No reasonable ground can be found for the classification.

Respondents make the contention that the court should uphold the right of the state to require compulsory compensation for its citizens alone, inasmuch as it is only citizens or their families who are likely to become a public charge upon the state as a result of injuries sustained abroad. The argument expresses a very excellent reason for requiring compulsory compensation for citizens, but it expresses no reason at all for denying the same right to citizens of other states. In the cases of which Ex parte Spinney and La Tourette v. McMaster, supra, are examples, restraints upon engaging in certain occupations which bore more heavily upon citizens of other states were upheld, upon the ground that the public good required that the occupations in question be opened only to those having had business or professional experience within the state; the general safety and welfare necessitating the exclusion of others. In none of these cases was the rule sanctioned that a privilege could be granted to a citizen of one state and denied to citizens of other states, for the reason that public policy did not require that the privilege be extended to the latter class of persons. Such a rule would be manifestly unsound, and altogether in conflict with the constitutional provision here in question. No consideration of public policy requires that citizens of sister states be excluded from the benefits of the act here under consideration. The fact that considerations of public policy do not affirmatively require the extension of the benefits in question to citizens of sister states as strongly as they requiire their extension to citizens of this state furnishes absolutely no sound reason for the exclusion of the former, and affords no reasonable basis for the discrimination.

It follows that the discrimination made in section 58 of the Workmen's Compensation Act contravenes the provisions of the federal Constitution.

[8] It is contended, however, and correctly, that the provisions of the federal Constitution do not have the effect of rendering invalid that portion of the Workmen's Compensation Act providing for an extension of its benefits to residents who are injured abroad, but that it allows this portion of the act to stand as effective and valid, and automatically and without regard to the intent of the state Legislature extends the benefits created by the act to nonresidents, or rather to such nonresidents as are citizens of sister states. In support of this contention respondents rely upon Estate of Johnson, 139 Cal. 532, 73 Pac. 424, 96 Am. St. Rep. 161. No good reason has been advanced for departing from the doctrine therein declared as follows:

"It will be noted, not only that the constitutional provision is not restrictive, but that it is neither penal nor prohibitory. It nowhere intimates that an immunity conferred upon citizens of a state, because not in terms conferred upon citizens of sister states, shall therefore be void. Some force might be given to such an argument, were the constitutional provision couched in appropriate language for the purpose. If, for example, it had said, 'No citizen of any state shall be granted any immunity not granted to every citizen of every state,' or had it begun its declaration by saying that 'it shall be unlawful to grant to citizens of any state any privilege or immunity not granted to citizens of every state,' it might then have been argued that a legislative attempt so to do would be declared violative of the express mandate of the Constitution, and therefore void. But such is neither the scope, purpose, nor intent of the provision under consideration. It leaves to the state perfect freedom to grant such privileges to its citizens as it may see fit, but secures to the citizens of all the other states, by virtue of the constitutional enactment itself, the same

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rights, privileges, and immunities. So that, in every state law conferring immunities and privileges upon citizens, the constitutional clause under consideration, ex proprio vigore, becomes an express part of such statute. * * * The Constitution itself becomes a part of the law. And this, in giving operation to that constitutional provision, is what the courts have always done. They have never stricken down the immunity and the privilege which a state may have accorded to its own citizens. They have never annulled the exemption. They have always construed the law so as to relieve the citizens of other states, and place all upon equal footing."

This is in harmony with and declaratory of the principle laid down by the United States Supreme Court in the Slaughter-House Cases, 16 Wall. 36, 77 (21 L. Ed. 394) in the following words:

"The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states. * * * Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

[9] The discrimination complained of in the instant case is to be found in the fact that the state statute under consideration confers upon the citizens of the state privileges and immunities which are not extended by the terms of the statute, either expressly or impliedly, to nonresidents of the state, and clearly the statute in question does not impose nor attempt to impose upon noncitizens of the state burdens or exactions not imposed upon citizens of the state. This difference is all important in controlling the construction and application of that provision of the federal Constitution which declares that—

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

For, where a state endeavors to place a burden upon noncitizen of the state which is not put upon citizens of the state, obviously the effect of the federal constitutional provision is to abort the endeavor of the state On the other hand, however where a state by statute endeavors to confer and does confer upon its citizens privileges and immunities not accorded by the statute to citizens of other states, the federal Constitution operates, by the very force of its own language, to place citizens of other states in the same category and upon the same footing as citizens of the state, in so far as concerns the right to have and enjoy the privileges and immunities conferred by the state upon its own citizens. In other words, the federal constitutional provision was designed for the protection of noncitizens. and therefore, in any given case calling for its application, the case and the application must be considered from the viewpoint and in the light of the welfare of the noncitizen.

Viewed in this light, it is clear that, when a state statute imposes a burden on a noncitizen which is not imposed on the citizen of the state, the noncitizen may have relief from the burden thus imposed by invoking the provision of the federal Constitution for the nullification of the discriminatory legislation. But, when a privilege is granted to a citizen and withheld from a noncitizen, the latter finds relief in the provision of the federal Constitution which, by operation of law, so to speak, extends the privilege to him. The obvious resulting difference in the operation and effect of the federal constitutional provision under discussion, is the paramount point of the decision in the Estate of Johnson, supra, and it cannot be said that the extension to noncitizens of a statutory privilege granted only to citizens is judicial legislation, for clearly

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it is the federal Constitution itself, and not the courts, which declares that, if citizens of a state are by statute granted privileges and immunities, noncitizens of the state shall likewise be "entitled" to them. The case of Spraigue v. Thompson, 118 U. S. 90, 6 Sup. Ct. 988, 30 L. Ed. 115, which enunciates the principle that the courts cannot eliminate a discriminatory statutory exception, and thereby make the statute effective as to a class which the Legislature did not have in mind, has application only to that class of cases where it is attempted by the state to put a burden upon nonresidents. That case has no application to the extension to nonresidents of a privilege granted to residents, and, apparently, has never been applied to the latter situation.

The very recent case of Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 40 Sup. Ct. 228, 64 L. Ed. —, is relied upon in support of the contention that Estate of Johnson, supra, has been overruled by the Supreme Court of the United States. At first blush this case would seem to weaken the ruling of this court in Estate of Johnson. However, upon a close analysis of the Travis Case, it will be found that it in no wise affects the doctrine of Estate of Johnson. The facts of the former case, substantially stated, were that the state of New York had imposed an income tax upon residents and nonresidents, but granted an exemption to residents of the state on the first $1,000 of their incomes, and further provided that every "withholding agent" (including employers) should deduct and withhold 2 per centum from all salaries, wages, etc., payable to nonresidents, where the amount paid to any individual equaled or exceeded $1,000 in a year, and should pay the tax to the state comptroller. The court held, in affirmance of the judgment of the District Court of New York made in the first instance, that in granting to residents exemptions denied to nonresidents the statute violated the provisions of section 2, cl. 1, art. 4, of the federal Constitution; but a careful reading of the decision in that case reveals the fact that the court did not hold that the entire statutory scheme involved in that case was altogether void and nugatory. That is to say, the court did not declare that the statute was invalid in so far as it related to the imposition of a tax which, when freed and cleared of the attempted unwarranted discriminations, operated uniformly upon residents and nonresidents alike. True it is the court did not, in holding the attempted discrimination unwarranted, declare in terms that the exemptions granted to residents should by the conjunctive operation of the state statute and the fundamental law of the land be extended to nonresidents; but in this behalf it is important to note that neither did the court decide that the statute was wholly invalid—that is to say, that residents and nonresidents entirely escaped the burden of taxation because of the attempted discrimination. That it was not the purpose of the court to so declare is manifest, we think, by the decree rendered in the first instance by the United States District Court of New York and affirmed by the Supreme Court of the United States.

That decree, although not set out in the opinion of the Supreme Court, is before us by the courtesy and consent of counsel for the respective parties in the instant case, and may therefore, we take it, be rightly referred to in aid of the ascertainment of the scope and effect of the opinion of the Supreme Court. The decree mentioned does not, as counsel for the petitioner here contend, enjoin the state of New York from in any way collecting all or any part of the tax in question from nonresidents. While it does enjoin the collection of the state tax from the complainants, who were the "withholding agents" and the source of the income upon which the tax was levied, nevertheless it does not purport to enjoin the collection of the tax, with the discriminations eliminated, directly from resident and nonresident taxpayers. In short, the decree and its affirmance indicate that the court intended to do no more than de-

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clare that the discrimination in the granting of exemptions to residents and denying them to nonresidents was, in the language of the Supreme Court itself, "an unwarranted *denial* to the citizens of Connecticut and New Jersey of the privileges and immunities enjoyed by the citizens of New York." (Italics ours.) In other words, it was the denial to residents of other states of exemptions provided in the statute for residents of the state of New York which was declared to be invalidated by the provision of the federal Constitution. Inasmuch as the court did not strike down the exemptions in so far as they applied to residents, it follows by necessary implication that, if the exemptions could not be denied to nonresidents, and were still extant as to residents, they must be available to nonresidents. This conclusion is confirmed by a perusal of the opinion rendered in the first instance by the District Court, where it was carefully said that—

"Nothing herein * * * is meant to be decided as to the validity of the statute so far as it relates to residents of the state of New York." Yale & Towne Mfg. Co .v. Travis, 262 Fed. 576.

This can mean but one thing, and that is that the act was valid as to residents, and binding to the same extent, and only to the same extent, upon nonresident citizens of other states. While the opinion of the District Court cannot, of course, control the interpretation to be put upon the opinion of the Supreme Court, nevertheless it is illuminating and persuasive when considered in conjunction with the unqualified affirmance by the court of last resort of the decree of the lower court, despite the limitations which the latter court explicitly put upon its judgment.

In any event, it cannot be said from anything contained, either expressly or impliedly, in the Travis decision, that the court there went so far as to say that the act in its entirety was invalid and could not be enforced against residents of the state of New York. Therefore it seems that the Travis Case in no way contravenes the rule and the reason for the rule enunciated in Estate of Johnson, supra, and, bound as this court is by the authority of the decision in that case until definitely overruled by the Supreme Court of the United States, it must apply the rule thereof to the instant case. It follows that, despite the invalidity of the discrimination, the statute itself is valid, and may be made to apply uniformly to citizens of California and the citizens of the other states.

The award is affirmed.

We concur: Lawlor, J.; Sloane, J.

OLNEY, J. I concur. I agree, for the most part, with the main opinion, but I am not in accord with its discussion of Estabrook Co. v. Industrial Accident Commission, 177 Cal. 767, 177 Pac. 848, and I would prefer to state as briefly as possible my own views for concurring in the result reached.

The law under discussion extends the benefits of the Workmen's Compensation Act to citizens of this state, but not to others, who are injured abroad in the course of their employment, when the employment was originated by contract within the state. The general questions are as to the power of the state to pass such a statute, and, if its power is limited, the exact effect of the limitation upon the statute. These general questions resolve themselves into a series of more particular questions:

First. Has the state any power whatever to prescribe the incidents of the relation of employer and employee, when the employment—that is, the actual rendition of services by the employee—is without the state? If the state has no such power, then the present law is wholly void. That a state has no power to prescribe what the law of another sovereignty shall be is, of course, plain. In this sense, and the true sense, a state can give no extraterritorial effect to its laws whatever. But the present law

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does not attempt to do this. What it attempts to do is to prescribe what shall be the incidents within this state and according to its own law of a relation existing without its boundaries. So far as I know, an independent sovereign state has the power to prescribe what incidents it pleases shall attach within its own boundaries to any relation, or to any set of facts or happenings, whether existing or occurring within or without its own boundaries. This is nothing more than saying that it has the power to determine what shall be the law within its boundaries. As to this there is no one to say it may as a matter of legal right. There is a decided practical limitation, that of the comity of nations; but this is not a limitation imposed by superior law and binding upon the state, but is only a limitation by way of policy, which the state may or may not observe.

The present law, therefore, does not transcend the power inherent in a wholly independent sovereign, and if the state of California has no right to prescribe what shall be the incidents within its borders of an employment abroad, it must be because of some limitation upon its sovereignty. The only limitations of this character are those imposed by the federal Constitution upon it as a constitutent member of the Union, and, so far as I know, there is no general limitation in the federal Constitution upon the power of a state to prescribe the incidents which shall attach within its boundaries and by its own laws to happenings or events occurring elsewhere. I conclude, therefore, that the state had the power to pass the law in question, subject only to such special limitations as the federal Constitution may contain.

Second. Is the law in conflict with any special limitation of the federal Constitution? The only limitation of the federal Constitution which it is claimed the law transcends is that which provides that a citizen of one state shall be entitled to have within another state all the rights and privileges of citizens of the latter. Putting it in a negative way, this constitutional provision means that no state shall discriminate in favor of its own citizens as against those of other states. By the present law our state extends the benefits to its Workmen's Compensation Act to employees who are its own citizens and are injured abroad in an employment originating here, but not to the citizens of other states injured under similar circumstances. It is apparent at once that there is present just the discrimination which the federal Constitution seeks to prevent, unless:

(1) There is valid reason for making in this case a distinction between citizens of this state and those of other states, or

(2) The state was without power to pass such a law effective as to citizens of other states.

As to the first of these alternatives, the only reason advanced to justify the distinction is that it is only in the case of injuries to citizens that they or their families are likely to become public charges. There might be some ground, possibly, for this contention, if the primary object of the law were to prevent injured employees or their families from becoming public charges But this is not its purpose, except in a very remote degree, and, since it is not, the argument entirely fails.

As to the second alternative, it seems to me clear enough from what has already been said that the state has the power to prescribe what shall be the incidents within its own borders and according to its own laws as to every one within it, citizens or noncitizens, of the relation of employer and employee, whether that relation be engaged in abroad or not. Certainly our attention has been called to no provision of the federal Constitution to the contrary, and in the absence of such provision I can see no reason why the inherent sovereign power of the state to make what laws it chooses respecting the rights and obligations of those within its jurisdiction should be limited in this particular. The necessary conclu-

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sion, or rather the statement in a slightly different way of what has already been said, is that since, so far as the objects of the act are concerned, there is no reason for making a difference between citizens and noncitizens, and since it was within the power of the state to make the law apply to the latter as well as to the former, the act purports to make a discrimination which is not permitted by the federal Constitution. This leads to the third question, which is:

Third. What, under these circumstances, is the effect of the provision of the Constitution upon the act? Does it destroy it, so that neither citizens nor noncitizens shall have its benefits, or does it operate to extend the benefits to noncitizens, so that they, as well as citizens, are "entitled" to its privileges, and the unlawful discrimination is thus removed Upon this point I agree thoroughly with both the discussion and the conclusion of the main opinion, and with the Estate of Johnson, 139 Cal. 532, 73 Pac. 424, 96 Am. St. Rep. 161, to which it refers, and upon which it relies The constitutional provision is couched in the affirmative, that—

"The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

When a sate endeavors to place a burden upon noncitizens, but not upon citizens, the necessary effect of the provision is to strike down the burden, to nullify the law which imposes it. But when the state endeavors to confer upon its citizens privileges or benefits not conferred on others, the effect is just the opposite. The citizens of other states become "entitled" to those privileges or benefits, not by the operation of the statute, but by operation of a superior legislative enactment, the federal Constitution, which declares in so many words, that they shall be so entitled. The constitutional provision, in other words, is a declaration that, whatever rights or privileges the citizens of a state may enjoy, the same rights or privileges shall likewise be extended to and enjoyed by the citizens of other states, regardless of the desire of the state that they shall or shall not enjoy them. The result is that employees, both citizens of this state and those of other states, are entitled to the benefits of the act.

Fourth. In the answer just given to the third question lies, it seems to me, the true explanation of such decisions as those of Estabrook v. Industrial Accident Commission, supra. It is there said that an employer may not question the validity of such a law as the present, because he does not come within the class discriminated against, to wit, noncitizen employees. Now, it cannot, in the very nature of things, be true that, when it is attempted to charge a man, an employer for example, with liability under an invalid statute, a statute void because unconstitutional, he cannot question the validity of the statute upon which his liability depends, simply because he is not one of the class discriminated against. If the law is a nullity and void, he of necessity is not liable, and is entitled in all reason so to claim and show. If there are decisions to the contrary, nothing can be said of them, except that they are fundamentally wrong. But the point in such instances as the Estabrook Case is that the statute is not void. It is perfectly valid. It is true it contravenes the federal Constitution in attempting to withhold its benefits from noncitizens. But it is its attempt to withhold, not to confer, that alone contravenes he Constitution, and is therefore invalid and ineffective. The law stands as a valid enactment as to citizens, and the Constitution operates to destroy its attempt to withhold its benefits from noncitizens and to extend those benefits to them. This being the true operation of the Constitution upon the law which attempts to contravene it, it is plain that it is properly said in such a case that one not a member of the class discriminated against may not raise the question of constitutionality. It does not affect

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his liability in the slightest if the law is unconstitutional in the respect claimed, for the effect of the unconstitutionality is not to destroy the law, but to extend it. As to him, the constitutional question is purely moot.

The recent decision of the Supreme Court of the United States in Travis v Yale & Towne Co., referred to in the main opinion, is an exceedingly good illustration of this. New York passed an income tax law allowing certain exemptions as to citizens, not allowed to others. Plainly, no citizen of New York could complain of this discrimination, because it was in his favor. The law was valid as to him. It was invalid as to noncitizens only, and as to them only to the extent of the discrimination. This much, and nothing more, was held in that case, and to this the decree was carefully limited, as the main opinion shows.

SHAW, J. I concur on the ground that the statute merely confers upon employee's residing in this state the privilege of resorting to the Workmen's Compensation Act of this state to obtain compensation for injuries received while in the course of their employment, in all cases where the contract of employment was made in this state, whether the injury was received within or without this state, and that the provision of the Constitution of the United States, ipso facto, carries his privilege to and confers it upon every citizen of any other state whose contract of employment is made in this state, and thus prevents the statute from being discriminatory in effect. It must be observed that the statute does not purport to withhold this privileges from citizens of other states; it is merely silent with regard to them. If it had contained a clause withholding it from others than residents, such clause would be void. But, as it does not, the result is that the federal Constitution prevents the statute from having the effect of withholding the privilege to citizens of other states. Estate of Johnson, 139 Cal. 532, 73 Pac. 424, 96 Am. St. Rep. 161.

To the objection that the statute in effect withholds the privilege from persons who are neither citizens of any state nor residents of this state, the answer is that no provision of the federal or state Constitution conains any limitation upon the power of the state Legislature to make such discrimination, and that, unless it is so limited, the power is plenary. Const., art. 4, § 1; Mitchell v. Winnek, 117 Cal. 525, 49 Pac. 579; Sheehan v. Scott, 145 Cal. 686, 79 Pac. 350; Mendenhall v. Gray, 167 Cal. 236, 139 Pac. 67.

I am also satisfied that it is within the legislative power of the state, by appropriate laws, to attach to any personal relation created in this state, such as that of employer and employee, or master and servant, liabilities upon one party to such relation to the other, and corresponding rights relating thereto, in addition to the mutual liabilities and rights arising from such relation at common law. The provision of the Workmen's Compensation Law extending its benefits to employees injured outside of this state, where the contract of hire is made in this state, merely attaches to the relation created by such contract rights and liabilities additional to those arising under the common law, anad it is therefore valid. This was decided by this court in Western Indemnity Co. v. Pillsbury, 170 Cal. 698, 699, 151 Pac. 398; and Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 415, 156 Pac. 491, Ann. Cas. 1917E, 390.

I agree with the conclusion that the petitioner has the right to attack the validity of section 58 of the act. These propositions are in my opinion decisive of the case.

Upon other matters stated in the opinion of Mr. Justice Lennon in his argument upon these questions I prefer to express no opinion.

I concur: Angellotti, C. J.

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WILBUR, J. (concurring). I adhere to the views expressed in Estabrook v. Industrial Accident Commission, 177 Cal. 767, 177 Pac. 848. I do not, therefore, agree with that portion of the opinion of Mr. Justice Lennon discussing that case and the rule of law which it announces. I concur with what is said by Mr. Justice Lennon in reference to the jurisdiction of the state of California. I concur in that portion of his opinion in which he bases the constitutionality of the statute upon the principle announced in Estate of Johnson, supra. I agree with the majority of the court in holding that, notwithstanding the language of the statute with reference to residents, by virtue of the federal Constitution a nonresident of California, if a citizen of the United States, is entitled to the same remedies as a resident, and for that reason the Industrial Accident Commission had jurisdiction of the complaint of a resident of California, and would also have jurisdiction of a similar complaint by a nonresident, and that there is therefore no such discrimination as is prohibited by the federal Constitution.

MIDGET CONSOL GOLD MINING CO. ET AL. v. INDUSTRIAL COMMISSION OF COLORADO ET AL. (No. 9829.)

(Supreme Court of Colorado. Nov. 8, 1920.)

193 Pacific Reporter, 493.

1. MASTER AND SERVANT — COMPENSATION AWARD NOT REVIEWABLE BY COURT WITHOUT APPLICATION FOR REVIEW BY COMMISSION.

Without an application to the commission for review of a proceeding under the Workmen's Compensation Act, no case can be reviewed by the district court, and, under sections 97, 98, such application for review must be made within 10 days.

(For other cases, see Master and Servant, Dec. Dig. § 417[1].)

3. MASTER AND SERVANT—COURT REVIEW OF COMPENSATION AWARD DISMISSIBLE FOR WANT OF PETITION FOR REVIEW BY COMMISSION.

No application for review having been made to the Industrial Commission, as required and within time prescribed by Workmen's Compensation Act, §§ 97, 98, a suit in the district court to review the decision of the commission is unlawfully brought, and the court should dismiss it, instead of affirming the award.

(For other cases, see Master and Servant, Dec. Dig. § 417[1].)

4. MASTER AND SERVANT — JURISDICTIONAL QUESTION IN COMPENSATION CASE, NOT BEFORE COURT BELOW, WILL NOT BE CONSIDERED.

On error to the district court, which upon a writ of review to the Industrial Commission affirmed the commission's award of compensation, the Supreme Court cannot determine the question whether the commission had jurisdction; claim being that the parties were not within the terms of the Workmen's Compensation Act, where no application for review was made to the commission as required by sections 97, 98, the district court not having such question before it to determine by reason of the failure to apply to the commission for review.

(For other cases, see Master and Servant, Dec. Dig. § 418[5].)

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Department 2.

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Proceeding by Mariellan Mishey under the Workmen's Compensation Act to obtain compensation for the death of her husband, Calvin H. Mishey, opposed by the Midget Consolidated Gold Mining Company and others. There was an award of compensation, and on suit for review, an affirmance of the award, and the employer and others bring error. Action of court in affirming award reversed, and cause remanded, with directions to dismiss the suit without affirmance.

Boswell F. Reed and Robert W. Steele, Jr., both of Denver, for plaintiffs in error.

Victor E. Keyes, Atty. Gen., and John S. Fine, Asst. Atty. Gen. (H. E. Curran, of Denver, of counsel), for defendants in error.

DENISON, J. This case is brought here on error to the district court of Denver, which upon a writ of review to the Industrial Commission affirmed the commission's award.

Mariellan Mishey instituted proceedings before the Industrial Commission to get compensation from plaintiffs in error for the death of her husband, Calvin H. Mishey, and on October 8, 1919, was awarded $2,500. One Doepke was acting in the matter for the plaintiffs in error. On October 9th, at Cripple Creek, he received notice of the award, and under date of October 10th wrote to the commission at Denver, asking "the number of days which the law permits me to file an appeal." The commission appears not to have received this till October 16th. They replied October 21st, inclosing blanks for a petition for review, saying:

"Petition for review should be filed within 10 days from the date of the referee's award."

[1] The court held that their suit could not be maintained, because the petition for review was not filed within the 10 days provided by statute. In this the court was right, following sections 97, 98, chapter 210, Laws of 1919, and Passini v. Ind. Comm., 64 Colo. 349, 171 Pac. 369, and Stacks v. Ind. Com., 65 Colo. 80, 170 Pac. 588, which hold that, without an application to the Commission for review, no case can be reviewed by the district court.

[2] Doepke and the other plaintiffs in error are presumed to know the law. They could actually have known it within a few hours, without writing to Denver. Neglect, discourtesy, or inefficiency on the part of the commission, if there was such, cannot relieve them from this presumption, nor from the necessity of compliance with the statute.

[3] The court, however, affirmed the award of the commission. We think it should have dismissed the suit. Section 98, above cited, provides:

"No action, proceeding or suit to set aside vacate or amend any finding, order or award of the commission, or referee * * * shall be brought unless the plaintiff shall have first applied to the commission for a review as herein provided."

No application for review having been made to the commission within 10 days prescribed by section 97, the suit in the district court was unlawfully brought, and we think the district court rightly so decided, and in consequence thereof that court could do nothing then but send the plaintiffs out of court.

[4] It is strongly urged that we ought to determine the question whether the commission had jurisdiction, because the claim is made that under the circumstances of this case the parties were not within the

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terms of the Workmen's Compensation Act, that consequently the Industrial Commission had no jurisdiction over the matter, and that therefore we should set aside the action of the commission as void.

This argument is unsound. The question before us is whether the judgment of the district court was right. It follows, from what has been said above, that neither the question of the jurisdiction of the commission nor any other question, was before the court below, and, if not before that court, then not before this court.

We think the case should be remanded, with directions to dismiss the case without affirmance thus leaving the award standing.

Reversed and remanded, with directions.

Teller and Bailey, JJ. (sitting for Garrigues, C. J., and Scott, J.), concur.

AISENBERG v. C. F. ADAMS CO., INC., ET AL.

(Supreme Court of Errors of Connecticut. Nov. 10, 1920.)

111 Atlantic Reporter 591.

1. MASTER AND SERVANT—BURDEN ON CLAIMANT TO SHOW RELATION, WITHIN COMPENSATION ACT.

The burden of sustaining the proof of the relation of master and servant is upon the claimant under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

2. MASTER AND SERVANT—CONCLUSION OF TRIAL COURT ON ISSUE OF RELATION WITHIN COMPENSATION ACT REVIEWABLE.

Conclusion of trial court, in a proceeding under the Workmen's Compensation Act, that deceased was an employee, is a conclusion to be drawn from the facts found, and is not controlling upon the Supreme Court of Errors, but is reviewable.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

3. MASTER AND SERVANT—"INDEPENDENT CONTRACTOR" AND "EMPLOYEE" DEFINED.

To determine whether one is an employee within Workmen's Compensation Act or an independent contractor, the test is the employer's right to direct what should be done, and when and how it should be done, the right to general control, an independent contractor being one who contracts to produce a given result by methods under his own control, and an employee being one who contracts to produce a given result subject to the orders and control of his employer in the means and methods used, and who may be discharged; but, as a rule, it is immaterial how payment is made, whether in wages, salary, or commission, or by the piece or job.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Employee; Independent Contractor.)

4. MASTER AND SERVANT—SALESMAN HELD AN "EMPLOYEE" WITHIN COMPENSATION ACT, AND NOT AN "INDEPENDENT CONTRACTOR."

A salesman for a company engaged in selling goods on the insallment plan through salesmen, *held* an employee within the Workmen's Compensation Act, and not an independent contractor, where the company re-

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tained control over the goods, fixing all the terms of sale, the collection of the selling price with right to discharge him at any time, although he could sell anywhere in the state that he desired and used his own wagon.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

Appeal from Superior Court, Hartford County; William M. Maltbie, Judge.

Proceeding by Bertha Aisenberg under the Workmen's Compensation Act to obtain compensation for the death of an employee, opposed by the C. F. Adams Company, Incorporated, and others. There was an award of compensation which was affirmed by the superior court, and the employer appeals. No error.

Richard H. Deming, of Hartford, for appellant.
Bernard F. Gaffney, of New Britain, for appellee.

WHEELER, C. J. The principal assignment of error is the conclusion of the commissioner that upon the facts found the deceased was an employee of the Adams Company within the meaning of that term as used in our Compensation Act (General Statutes, § 5388, as amended by chapter 142, § 18 of the Public Acts of 1919). Our act provides that—

"Employee shall mean any person who has entered into or works under any contract of service or apprenticeship with an employer."

So that compensation can be awarded in this case, provided the deceased had entered into or was working under any contract of service with the Adams Company when he received his injuries.

[1, 2] The burden of sustaining the proof of this is upon the plaintiff-claimant And we agree with the respondents that the question, whether the deceased was an employee when he met his injuries is a conclusion to be drawn from the facts found, and that the conclusion of the trial court that the deceased was an employee is not controlling, but is reviewable.

The defendants read the finding as leading to the conclusion that the relationship between the deceased and the Adams Company was that of an independent contractor, and not that of an employee. The determination of this relationship in the light of the finding settles, adversely to the defendants' contention, the ground of appeal that the injuries did not arise "out of and in the course of the employment."

[3] Recent cases (Kinsman v. Hartford Courant Co, 108 Atl. 562, Thompson v. Twiss, 90 Conn. 444, 447, 97 Atl. 328, L. R. A. 1916E, 506, and Alexander v. R. A. Sherman's Sons Co., 86 Conn, 292, 85 Atl. 514) make definite and clear the tests of our law as to whether in a given case the relation be that of employment or that of independent contractor. The true test we hold is, Had the employer the "right to direct what shall be done and when and how it shall be done, the right to the general control?"

The independent contractor contracts to produce a given result by methods under his own control. The employee contracts to produce a given result, subject to the lawful orders and control of his employer in the means and methods used in that employment. He is bound in some degree to the duty of service to the employer. Wood on Master and Servant, 317.

The Adams Company was engaged in selling goods in Connecticut on the installment plan, through salesmen whom it selected and whom it had the right to discharge. It employed the deceased as one of the salesmen of its goods. We can ascertain whether the deceased was an independent contractor or an employee by applying our test and finding whether the

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deceased in the means and methods used in the sale of these goods was subject to the orders and control of this company. The goods were sold on lease by the deceased, and remained the goods of the company until paid for. They came into the possession of the deceased on bailment. The company made the terms of all sales, and this we regard as a very important feature of control. It furnished the blanks for leases, accountings, and reports, and these were used by the deceased. It provided the horse used by the deceased in the business and paid its board; it employed assistants for deceased, if any were required; its rule required accountings by deceased weekly, and this was customarily done; it carried on all transactions, including payments, subsequent to the contract of sale made between it and its customers, without the knowledge of the deceased except in the occasional instance. The means and method of conducting this business, as we have in part detailed, comprise the essence of this business. The subject of sale, the terms of sale, and the proceeds of sale remained in the control of the company. Practically this constituted a general control.

The facts from which the respondents claim to find evidence of control resting in the decease d salesman are few. It is said the fact that the deceased could sell the goods of the company in any part of Connecticut indicates his control over the sales. His control does not differ, unless in degree, from the control of the ordinary salesman on the road, who is expected to call on old customers, perhaps required to call on special customers. Aside from these restrictions the ordinary salesman is at liberty to sell to any responsible party in the locality covered by him. In this case the selling zone is more extensive, but the nature of the control is the same. Indeed, in the case of this deceased the company co-operated in the sales by giving him the name of prospective purchasers from time to time. But the liberty to go anywhere in the entire state enlarged the freedom of action of this salesman over that of the ordinary salesman, but it did not enlarge his control over the goods sold, the terms of sale, or the proceeds of the sale. The fact that the deceased could regulate his own hours of work is without significance. His pay depended upon the results of his sales. The particular hours he worked were unimportant to his employer, provided adequate sales were made. When this did not result, the company was at liberty at any time to discharge the deceased from their employment. The right of discharge is one of the strong indications that the relation was one of employment. An independent contractor must be permitted to finish his contract in the absence of breach on his part. That the deceased was paid by commission is not a determining test, but, as a rule, it is quite immaterial how the payment is made, whether in wages, salary, or commission, or by the piece or job. The use of the deceased's wagon in the sales of the goods was an inconsequential detail of the business

Whatever the other conditions of a contract may be, if in its essential features it provides that the employer retain no control over the details of the work, but leaves to the other party the determinaton of the manner of doing it, without subjecting him to the control of the employer, the party undertaking to do the work is a contractor, and not a mere employee. Pace v. Appanoose County, 184 Iowa, 498, 168 N. W. 916.

There is and can be no controversy concerning the principles of law applicable. The difficulty is the common one of applying to the facts the correct principle. When the respondents say the facts found are absolutely devoid of any control of details which the Adams Company might have exercised over the dceased as to his course of conduct in procuring contracts with third parties, they overlook a large part of the finding; the retention ofcontrol over the goods, the fixing of all terms of sale, the collection of the selling price, and the retention of the right to discharge

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the saleseman at any time are certainly details of control over this business, which the company continue dto exercise up to the deceased's injuries. When the course of this business is subjected to analysis, the deceased must be held to have been engaged in his master's business, acting for and in his place and in accordance with his will, and at no time doing his own business or acting for his own ends.

There is no error.

The other judges concurred.

PROCACCINO v. E. HORTON & SONS ET AL.

(Supreme Court of Errors of Connecticut. Nov. 10, 1920.)

111 Atlantic Reporter 594.

MASTER AND SERVANT—INJURY TO EMPLOYEE ON WAY TO WORK HELD TO ARISE IN "COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Where manufacturing plants maintained footbridges over a canal which their employees used indiscriminately, and it was then necessary for them to pass over private property and railroad tracks, an employee killed by train on his way to work must be deemed to have met the injury within the course of his employment within the Workmen's Compensation Act, though he used that bridge which the master did not own.

(For other cases, see Master and servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from Superior Court, Hartford County; William M. Maltbie, Judge.

Proceedings by Sylvia Procaccino under the Workmen's Compensation Act for compensation against E. Horton & Sons, employer, for the death of Vitiantonio Procaccino employee. The Compensation Commissioner of the First District refused to award compensation, and claimant appealed to the superior court, which affirmed the decision, and claimant again appeals. Error.

This is a proceeding under the Workmen's Compensation Act (Pub. Acts 1913, p. 1735) by Sylvia Procaccino, widow and dependent of Vitantonio Procaccino, the decedent, against E. Horton & Sons.

The decedent was employed in a manufacturing establishment conducted by the defendants in Windsor Locks. At Windsor Locks a canal runs southerly parallel to the Connecticut river, and between the canal and the river are manufacturing plants of the defendant and others. Running paralled to the canal and directly west of it are the tracks of the New York, New Haven & Hartford Railroad Company. Running parallel to both tracks and canal and directly westward of the tracks is the main street of Windsor Locks. The village of Windsor Locks lies westward of its main street. Several manufacturing plants occupy positions between the canal and the river. Directly to the north of the defendants' plants is the plant of the American Writing Paper Company, while directly south of the defendants' plant is the plant of the J. R. Montgomery Company.

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There is a footbridge across the canal about opposite the Montgomery plant, leading across the canal with a pathway across the railroad tracks to Main street. This bridge was owned and controlled jointly by the defendants and the Montgomery Company. There is also a footbridge and pathway leading across the canal and railroad tracks to Main street about opposite the plant of the American Writing Paper Company.

There is a highway which leaves Main street at a right angle at a point south of all the aforesaid plants and crosses the railroad tracks, the canal and the Connecticut river, and eads into Warehouse Point. Apparently from the finding there is no highway on the easterly side of the canal.

The employees of the defendants and of the other plants in going to and from work used either one of these footbridges across the canal and paths across the railroad tracks or crossed the tracks and canal by the Warehouse Point highway, as might be most convenient.

The railroad tracks, the land on the east side of the railroad tracks, and the two footbridges were private property. The defendants gave no instructions to the deceased or any of its employees as to how they were to go to and from their plant. The most convenient means for employees in the situation of the decedent of reaching the defendants was by way of the footbridge of the American Writing Paper Company, which was located nearly opposite Grove street, upon which he lived. Presumably he customarily used it.

The method of aproaching the defendants' plant by the Warehouse Point highway was an inconvenient and little used method, and one that, from the finding, apparently involved passing over private property in going from the Warehouse Point road northerly to the defendants' plant.

On Saturday, November 12th, the decedent, when returning to work at the defendants' plant, after having dinner at his home, while crossing the tracks just before reaching the footbridge of the American Writing Paper Company, was struck by a north-bound train and instantly killed.

Jacob Berman, of Hartford, for appellant.

Ralph O. Wells, of Hartford, for appellee.

CURTIS, J. (after stating the facts as above). The question in controversy in this case is whether the injury to the employee arose within the course of his employment or out of his employment. The two neighboring footbridges over the canal maintained by neighboring plants were used indiscriminately by employees of the nearby plants.

The fact that the defendants and an adjoining manufacturing concern owned and controlled one of the footbridges crossing the canal, from which a pathway led over the railroad tracks to Main street, and which bridge apparently had no other use than as a way of approaching or leaving the plants to and from Main street, practically makes the inference necessary that this footbridge and the pathway for it over the railroad tracks was a method of approach for employees to the defendants' plant situated as the decedent was, contemplated in their employment by the defendants.

The indiscriminate use of both footbridges by employees of neighboring plants as the method of approach for employees in the situation of the decedent, the acquiescence of the employer in such use, in connection with the facts found, leads irresistibly to the inference that the method of approaching the defendants' plant which this employee customarily used was a method of approach which the defendants contemplated that employees whose homes were situated as this employee's home was situated would ordinarily use in going to and from the Horton plant.

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The defendants' employment of the decedent therefore contemplated that he would approach and leave the plant by passing to and from the highway over private property, including either of the footbridges and the railroad tracks parallel with Main street.

Under these circumstances this employee was within the scope of his employment when he was passing to or from his work at the plant over the private property lying between Main street and the plant; in other words, the use of this method of approach to the plant by this employee was an incidental term of his contract of employment annexed to it by the consent of his employers. Merlino v. Connecticut Quarries Co., 93 Conn. 57, 104 Atl. 396.

When this employee, under the facts found, entered upon the private property lying between Main street and the defendants' plant, he came within the zone of his employment, and all dangers and perils incident to the use of this method of approach were perils incident to and arising out of his employment.

It does not render the dangers of this contemplated method of approach any less an incident of the decedent's employment that there existed a method of approach by way of the Warehouse Point highway which would permit him to cross the railroad tracks on a highway. This method of approach for persons in the situation of the decedent was highly inconvenient, and it was not contemplated by the defendants in his employment that he should ordinarily use it.

Apparently the approach to this plant by way of the Warehouse Point road involved a much longer passage over private property than the method of approach followed by the decedent. If our interpretatoin of the finding is correct, there was no way to reach the Horton plant that did not involve passing over private property.

In Fumiciello's Case, 219 Mass. 488, 107 N. E. 349, crossing the railway tracks was not a method of approach to the employer's plant which the employer contemplated that all employees living in certain localities should use, and in that particular is distinguished from this case. Furthermore it does not appear in that case that the railway tracks were adjacent to the plant directly or as one of several strips of private property lying between the plant and a highway.

In the case of In re Sundine, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318, the claimant was injured while upon stairs over which her employer had no right of control, but the use of which by her was contemplated in her employment. The fact that she was a licensee or trespasser on another's property did not bar the claimant's recovery of compensation. The fact that her use of the stairway was contemplaed by the employer was apparently the essential fact which made such use an incident of her employment. The fact that the stairway was the only method of approach conclusively established the fact that the use was contemplated by the employer.

The fact that the contemplated way of approach in the present case may have passed over several strips of land owned by several different proprietors would not change the legal effect of the situation. The private property passed over was, as a whole, adjacent to the plant.

If the stairway in the Sundine Case had passed through several floors of the building, each floor owned by a different proprietor, would the employer in that case only have been held liable for an injury on the stairway occurring on the floor first entered by the employee? The answer is obvious.

We hold that the decedent at the time of his injury was using a way of approach over private property from a highway to the defendants' plant, which way of approach the defendants in their employment of the decedent contemplated that he should use, and that the decedent

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in such use of the way was, after he left the highway, in the course of his employment, and that the injury arose out of a danger incident to his employment. Honnoldd on Workmen's Compensation, p. 368; In re O'Toole, 229 Mass. 165, 118 N. E. 303; Kenney's Case, 232 Mass. 532, 122 N. E. 739; Starr Piano Co. v. Industrial Accident Commission (Cal.) 184 Pac. 860; Papineau v. Industrial Accident Commission (Cal. App.) 187 Pac. 108; Butterworth's Workmen's Compensation, p. 459; Merlino v. Connecticut Quarries Co., 93 Conn. 57, 104, Atl.. 396; Carter v. Rowe, 92 Conn. 82, 101 Atl. 491; Judicial Interpretation of Workmen's Compensation Cases, by Charters, p. 233.

There is error, the judgment is reversed, and the superior court directed to enter its judgment sustaining the appeal from the commissioner, vacating his award, and directing him to make an award in favor of the claimant for such amount as the facts found may warrant.

The other judges concurred.

CHICAGO-SANDOVAL COAL CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13371.)

(Supreme Court of Illinois. Oct. 23, 1920.)

128 Northeastern Reporter, 567.)

1. MASTER AND SERVANT—REVIEWING COURT CONCLUDED BY FINDINGS REQUIRED BY COMPENSATION ACT.

Where there is evidence in the record to sustain the commission's finding of a fact essential to an award under the Workmen's Compensation Act the finding is conclusive on review by the Supreme Court, since the court is not allowed to weigh the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

2 MASTER AND SERVANT — COMPENSATION CLAIMANT MUST SHOW EMPLOYER'S KNOWLEDGE OF NECESSITY FOR MEDICAL SERVICES.

Since Workmen's Compensation Act, § 8, par. (a), requiring the employer to provide necessary medical services, permits the employee to secure such services at his own expense, the applicant should show a knowledge by the employer of the necessity for such services, or of facts from which such knowledge might be presumed, or should show a request by applicant for such services.

(For other cases, see Master and Servant, Dec. Dig. § 393½.)

3. MASTER AND SERVANT—EVIDENCE HELD TO SHOW REQUEST FOR MEDICAL SERVICES PROVIDED FOR BY COMPENSATION ACT.

Evidence that an injured employee told the superintendent he wanted to go to a hospital, and that superintendent told him he could go at his own expense, *held* sufficient to sustain the Industrial Commission's finding that the employee requested medical and hospital services provided for by Workmen's Compensation Act, § 8.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

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4. MASTER AND SERVANT—EMPLOYER ESTOPPED TO DENY KNOWLEDGE OF NECESSITY FOR MEDICAL SERVICES.

An employer, who refused to pay for medical and hospital services when his injured employee requested such services, cannot insist that it did not know of the necessity therefor.

(For other cases, see Master and Servant, Dec. Dig. § 393½.)

5. MASTER AND SERVANT—MEDICAL SERVICES NOT LIMITED TO PERIOD IMMEDIATELY FOLLOWING INJURY.

Under Workmen's Compensation Act, § 8, par. (a), requiring the employer to provide medical and hospital services for not more than eight weeks, the period of eight weeks may be any period in which the services are necessary because of injuries received in the employment, not necessarily the eight weeks immediately following the injury.

(For other cases, see Master and Servant, Dec. Dig. § 393½.)

Error to Circuit Court, Marion County; William B. Wright, Judge.

Proceedings under the Workmen's Compensation Act by Jack Vantogha against the Chicago-Sandoval Coal Company, to recover compensation for injuries. The award of the Industrial Commission was confirmed by the circuit court, and the employer brings error. Affirmed.

Frank F. Noleman and June C. Smith, of Centralia, and Andrew J. Dallstream, of Hooperston, for plaintiff in error.

A. W. Kerr, of Springfield, and Fred H. Kruger, of Belleville, for defendant in error.

STONE, J. Defendant in error, Jack Vantogha, received an injury on September 10, 1918, while employed by plaintiff in error as a loader or digger in its coal mine in Sandoval, Ill. The Industrial Commission awarded him compensation for the injury, and the circuit court of Marion county confirmed the award. The case has been brought here in writ of error.

The injury to Vantogha resulted from a strain while attempting to lift a coal car that had left the track in his room in the mine. He continued to work at his usual employment, however, until January, 1919, when it became necessary for him to go to the hospital and submit to an operation. There is no contest concerning the amount allowed for the injury or whether or not the injury arose out of and in the course of the employment. It is admitted that the parties to this proceeding are under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126–152i).

It is contended on the part of plaintiff in error: First, that no notice of the injury was given, as required by the act; and, second, that the Industrial Commission was not justified in making an award of $200 for medical and hospital services.

[1] There is evidence in the record that the defendant in error reported his injury to the mine boss and mine superintendent on October 4, and under the rule, many times stated, that this court is not allowed to weigh the evidence, that question is concluded by the finding of the commission that notice of the injury was given. Plaintiff in error's first objection, therefore, cannot obtain.

The evidence in the record shows that defendant in error was examined by a physician on January 26, 1919, and was thereafter taken to the hospital, and an operation was performed January 29, 1919. This was over four months after the injury. He was confined to the hospital for about two months. There is no evidence in the record of medical or

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hospital services having been rendered, offered, or requested prior to that time. Plaintiff in error contends that there was no request for medical services, but such were obtained by defendant in error, and were of his own choosing, and that there is no liability on its part therefor.

[2] Paragraph (a) of section 8 of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, § 133) provides concerning surgical and hospital aid as follows:

"The employer shall provide necessary first aid, medical, surgical and hospital services; also medical, surgical and hospital services for a period not longer than eight weeks, not to exceed, however, the amount of $200.00. The employee may elect to secure his own physician, surgeon or hospital services at his own expense."

While the employer is required to provide necessary medical, surgical, and hospital aid for a period not longer than eight weeks, yet since the employee may elect to secure his own physician, surgeon, or hospital services at his own expense, and since it cannot be presumed, in the absence of proof, that the employer knew of the necessity for such services or treatment, the applicant should show knowledge on the part of the employer of facts from which he might reasonably be presumed to know or believe that such services were necessary, or the applicant should show a request therefor on his part.

[3] The record shows that on January 16, 1919, the defendant in error notified the mine superintendent, Lewis, that he was going to the hospital. He states in his evidence that he went to see Lewis because he had just found out that there was a compensation law; that he went to see if he could get compensation, and he did not know before that he was entitled to it. He also testified that the mine superintendent told him that if he wanted to go to a hospital to go, but that the company would not pay for it. There was no testimony offered on this point on the part of the plaintiff in error. The testimony of the defendant in error was given through an interpreter, and it is a matter of general knowledge that such testimony is not always clearly and distinctly given. We are of the opinion, however, that the commission was justified in finding that the defendant in error requested medical and hosital services.

[4] By its refusal to pay hospital expenses plaintiff in error is not in a position to insist, on this record, that it did not have knowledge of the necessity for such services, or that it did not have a request therefor from the defendant in error.

[5] But it is contended by plaintiff in error that it is not liable for these services, for the reason that none were rendered or requested within eight weeks from the date of the injury. It is evident from the provisions of paragraph (a) of section 8, requiring that the employer provide necessary first aid, medical, surgical, and hospital services, and in addition thereto medical, surgical, and hospital services for a period not longer than eight weeks, that the Legislature did not intend that the eight weeks should necessarily be confined to the time immediately following the injury. Nor could such construction be reasonably put upon it, as it frequently occurs, as in this case, that the results of the injury do not develop to such an extent as to require medical, surgical, or hospital services for a considerable period of time after an injury is received, and to hold that such services are to be supplied only within the first eight weeks following the injury would, in many instances, limit such services to but a part of eight weeks, and in other cases prevent recovery for such services altogether. It is evident that the Legislature intended that the medical, surgical and hospital services for which the employer is liable must be necessitated by the injury, but that such liability is not limited to the eight weeks immediately following the injury, where the necessity for such services does not arise immediately following the injury.

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The Industrial Commission did not err in awarding the sum of $200 for medical, surgical, and hospital services. The judgment of the circuit court is therefore affirmed.

Judgment affirmed.

CITY OF CHICAGO v. INDUSTRIAL COMMISSION ET AL.
(No. 13379.)

(Supreme Court of Illinois. Oct. 23, 1920.)

128 Northeastern Reporter, 524.

MASTER AND SERVANT — EVIDENCE INSUFFICIENT TO SHOW EMPLOYMENT BY CITY SUBJECT TO COMPENSATION ACT.

In a proceeding against a city under the Workmen's Compensation Act, to recover compensation for the death of claimant's husband, caused by a fall on a sidewalk, evidence *held* not sufficient to support a finding that decedent was in the employ of the city at the time of the accident.

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings by Mary Jane E. Barbour, as administratrix of the estate of William H. Barbour, deceased, against the City of Chicago, for compensation under the Workmen's Compensation Act. An award of compensation was confirmed on review by the Industrial Commission, and again on a writ of certiorari from the circuit court, and the City brings error. Reversed.

Samuel A. Ettelson, Corp. Counsel, and William H. Devenish, City Atty., both of Chicago (Robert H. Farrell and Harry W. Starr, both of Chicago, of counsel), for plaintiff in error.

CARTWRIGHT, C. J. An arbitrator made an award of $3,500, payable in monthly installments, to Mary Jane E. Barbour, administratrix of the estate of her husband, William H. Barbour, as compensation for his death. The award was confirmed on a review by the Industrial Commission, and again on a writ of certiorari from the circuit court of Cook county.

On January 11, 1917, at about 7 o'clock in the evening, while going to his home, and about half a block therefrom, William H. Barbour slipped and fell on account of the slippery condition of the sidewalk. He was assisted to his home, and was afterward taken to hospital, where he remained in a stupid and semiconscious condition, from which he was aroused with difficulty, and he died on February 22, 1917. There was a postmortem, which showed a sloughing ulcer of the stomach, and the verdict of the coroner's jury, which was admitted in evidence by agreement, found that he came to his death from general infection, due to the sloughing ulcer of the stomach following injuries. The primary ulcer showed evidence of being chronic, but there were expert medical opinions that the death may have been caused by the fall, or that it was hastened by the injury because of probable damage to the brain, and it was characterized as a brain case.

It was agreed that the city was an employer engaged in the occupations enumerated in the Workmen's Compensation Act (Laws 1913, p. 335), and had not rejected its provisions, and that Barbour had not re-

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jected such provisions. It was then necessary for the applicant to prove, not only that the fall on the sidewalk caused the death of her husband, but also that he was in the employ of the city, and that the injury arose out of and in the course of the employment. Assuming, but not deciding, that there was evidence sufficient to justify a finding that the fall on the sidewalk either hastened or caused the death of Barbour, there was no competent evidence that he was in the employ of the city at that time. Barbour had been employed by the city in 1916 as one of the street inspectors, at $125 a month, but street inspectors were not employed during the winter, when construction work was not being done. That class of work was closed down early in December and was not resumed until the following March or April. In the winter street inspectors were not employed by the city, and received no pay. The employment of Barbour ended on December 7, 1917, when his name was taken from the civil service roll of employees by the city, and he was not thereafter employed.

The finding of the arbitrator, Industrial Commission, and court could not have rested upon anything but conjecture or surmise, based on no competent evidence, but only on something that Barbour or some one else said, indicating that he might have gone to look at some work at the request of an alderman, who had no authority to employ him, and was returning to his home, but if he did go to look at some piece of work and his act was authorized, the employment was only casual, and not within any provisions of the Compensation Act. Aurora Brewing Co. v. Industrial Board, 277 Ill. 142, 115 N. E. 207; McLaughlin v. Industrial Board, 281 Ill. 100, 117 N. E. 819; Chicago Great Western Railroad Co. v. Industrial Com., 284 Ill. 573, 120 N. E. 508. If there had been any legitimate evidence of such casual employment, the fall on the slippery sidewalk did not occur during the employment, but happened when Barbour was going to his home.

The award not being based upon any competent evidence bringing the injury within any provision of the Compensation Act, the judgment of the circuit court is reversed and the award set aside.

Judgment reversed.

LOMBARD COLLEGE v. INDUSTRIAL COMMISSION ET AL.. (No. 13336.)

(Supreme Court of Illinois. Oct. 23, 1920.)

128 Northeastern Reporter, 553.

MASTER AND SERVANT — COLLEGE EMPLOYING INSOLVENT UNINSURED CONTRACTOR HELD NOT LIABLE AS "EMPLOYER" FOR COMPENSATION AWARDED TO HIS EMPLOYEE.

Where a college, an eleemosynary institution employed a licensed plumber to repair a gas leak, and his workman was injured by an explosion on the premises, an award of compensation against the plumber, who was insolvent and did not carry insurance as required by Compensation Act 1913, § 31, was not enforceable against the college as "employer" within the provision imposing such liability on corporations con-

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tracting for work enumerated as extrahazardous in section 3 (b), which applies to those engaged in the business of building, maintaining, repairing, or demolishing structures.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series Employer.)

Error to Circuit Court, Knox County; George W. Thompson, Judge.

Proceeding by Gillis Hvarfven under the Workmen's Compensation Act to obtain compensation for personal injury, opposed by Lombard College and its contractor, James F. Dolan, the employer. An award by the Industrial Commission was confirmed by the circuit court, and Lombard College brings error. Reversed, and award set aside.

Williams, Lawrence, Green & Gale, of Galesburg, for plaintiff in error.

Barnes, Magoon & Black, of Lacon, for defendants in error.

THOMPSON, J. This writ of error is prosecuted to review a judgment of the circuit court of Knox county confirming an award of the Industrial Commission awarding compensation to Gillis Hvarfven for loss of the sight of both eyes, and holding plaintiff in error liable under section 31 of the Compensation Act of 1913 (Laws 1913, p. 335).

Plaintiff in error is an eleemosynary institution located at Galesburg, Ill., and is engaged in the business of furnishing instruction to such students as enroll in its classes. It employs a president as its chief executive officer, and in addition to the salary paid him for his services it furnishes him the use of a residence which belongs to the college. October 3, 1913, James F. Dolan, a licensed plumber in Galesburg, was employed to repair a gas leak in the president's house. He brought with him an experienced plumber, Gillis Hvarfven. While examining the ceiling of one of the rooms in an effort to locate the leak Dolan set up a ladder and told Hvarfven to steady it. Dolan struck a match in trying to find the leak, and located the leak with the usual result of an explosion. A quantity of plaster fell into Hvarfven's eyes, as a result of which he finally became blind. Compensation was awarded, and because Dolan is insolvent and did not carry insurance, as required by section 31 of the Compensation Act of 1913, it is conceded by defendant in error that Lombard College should pay the award.

Section 31 provides that any corporation who contracts with another to have done for it any work enumerated as extrahazardous in paragraph (b) of section 3, requiring employment of employees in, on, or about the premises where he contracts to do such work, and does not require of the person undertaking to do such work that such person shall insure his liability to pay compensation provided in the act to his employees, such corporation shall be included in the term "employer." and with the immediate employer shall be jointly and severally liable to pay the compensation provided for in the act, and be subject to all the provisions of the act. Laws 1913, p. 335. In so far as it applies to the facts in this case, paragraph (b) of section 3 provides that the provisions of the act shall apply to an employer engaged in the occupation, enterprise, or business of building, maintaining, repairing or demolishing a structure. Laws of 1913, p. 339. The language of section 31 is broad, and, as we held in American Steel Foundries v. Industrial Board, 284 Ill. 99, 119 N. E. 902, it includes any person, firm, or corporation for whom work covered by the Compensation Act is to be done. In construing this section, however, the whole act should be considered for the purpose of determining

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what the Legislature meant by the language used. Certainly the Legislature did not intend to include any person, firm, or corporation that was not covered by the act and operating under it. Plaintiff in error had not elected to come under the act, and so is not included in the terms of section 31 unless it is brought under the act by its terms. Plaintiff in error was not engaged in the occupation, enterprise, or business of building, maintaining, repairing, or demolishing structures (Uphoff v. Industral Board, 271 Ill. 312 111 N. E. 128, L. R. A. 1916E, 329, Ann. Cas. 1917D, 1; Johnson v. Choate, 284 Ill. 214, 119 N. E. 972; Alabach v. Industrial Com., 291 Ill. 338, 126 N. E. 163), and is therefore not within the terms of section 31.

The judgment of the circuit court is reversed, and the award set aside.

Judgment reversed.

CENTRALIA COAL CO. v. INDUSTRIAL COMMISSION ET AL.
(No. 13372.)

(Surpeme Court of Illinois. Oct. 23, 1920.)

128 Northeastern Reporter, 554.

MASTER AND SERVANT—CLERICAL ERROR IN COMPENSATION AWARD CAN BE CORRECTED ON REVIEW.

On review of a judgment confirming an award under the Compensation Act for a loss of the use of claimant's right leg, where all the evidence in the record shows, and the findings state, that the injury was to the left leg, the apparent clerical error in inserting the word "right" in the award will be corrected, by substituting the word "left," and the judgment affirmed, instead of remanding the cause for correction of the error.

(For other cases, see Master and Servant, Dec. Dig. § 418[7].)

Error to Circuit Court, Marion County; William B. Wright, Judge.

Proceeding under the Workmen's Compensation Act (Laws 1913, p. 335), by Art Coffey, employee, opposed by the Centralia Coal Company, employer. Judgment of the circuit court, confirming an award of the Industrial Commission, and the employer brings error. Modified and affirmed.

Frank F. Noleman and June C. Smith, both of Centralia, and Andrew J. Dallstream, of Hoopeston, for plaintiff in error.

A. W. Kerr, of Springfield, and Fred H. Kruger, of Belleville, for defendants in error.

THOMPSON, J. This writ of error is prosecuted to review a judgment of the circuit court of Marion county, confirming an award of the Industrial Commission in favor of Art Coffey for the loss of 40 per cent. of the use of his right leg. It is argued that there is no competent evidence in the record upon which to base such an award.

June 19, 1918, defendant in error was caught under a fall of rock from the ceiling of the mine of plaintiff in error and suffered a serious injury to his left leg, hip, and back. There is abundant evidence in the record to sustain an award for a 40 per cent. permanent loss of the use of his left leg. All the evidence in the record shows that the injury was to

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the left leg. The finding of the arbitrator was based on an injury to the left leg, and the ninth paragraph of the decision of the commission was:

"That as a result of said accident the applicant has sustained 40 per cent. permanent loss of the use of his left leg."

It is clear that the insertion of the word "right" before the word "leg" in the final order of the commission was a clerical error. It does not appear that this clerical error was called to the attention of the circuit court. If it had been, it could have been corrected there.

We see no reason for delaying the final judgment in this case by remanding the cause for correction of this clerical error. The award will therefore be modified, by striking out the word "right," and inserting the word "left," before the word "leg," in the final order of the commission, and, as modified, the judgment will be affirmed.

Judgment modified and affirmed.

MORRIS & CO. v. INDUSTRIAL COMMISSION ET AL. (No. 12859.)

(Supreme Court of Illinois. Oct. 23, 1920. Rehearing Denied Dec. 8, 1920.)

128 Northeastern Reporter, 727.

1. MASTER AND SERVANT — INDUSTRIAL COMMISSION'S FINDING OF FACT CONCLUSIVE.

The Supreme Court cannot review the correctness of the decision of the Industrial Commission and the judgment of circuit court on the question of compensation claimant's intoxication, as to which the testimony is conflicting.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

2. MASTER AND SERVANT—COMPENSATION CLAIMANT HAS BURDEN TO SHOW INJURY ARISING OUT OF EMPLOYMENT.

Under the Workmen's Compensation Act the burden is on a claimant to show that injury arose out of and in the course of the employment, and the finding cannot rest on conjecture or possibility.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

3. MASTER AND SERVANT — COMPENSATION CLAIMANT'S INJURY MUST ARISE OUT OF AND IN COURSE OF EMPLOYMENT.

Under the Workmen's Compensation Act, the injury must not only arise in the course of the employment, but also arise out of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

4. MASTER AND SERVANT—FALL OF DRIVER FROM TRUCK DRIVEN FOR HIM BY ANOTHER HELD NOT ACCIDENT "ARISING OUT OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Under the Workmen's Compensation Act the fall of a driver of packing house truck from the truck, whereby he was killed at a time when he had requested another to drive the truck for him on his way home after work, did not arise out of the employment; the temporary driver not being negligent.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

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5. MASTER AND SERVANT — COMPENSATION ACT CONSTRUED LIBERALLY.

The Workmen's Compensation Act must be construed liberally, but court cannot create a liability where the law creates none.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under Workmen's Compensation Act by Agnes Byers for death of her husband, the employee, opposed by Morris & Co., the employer. From an award of the Industrial Commission the employer, on certificate, brings error. Reversed.

M. W. Borders and Norman G. Collins, both of Chicago, for plaintiff in error.

Frank B. Murray, of Chicago (Edmund M. Sinnott, of counsel), for defendant in error.

FARMER, J. The circuit court of Cook county confirmed an award made by the Industrial Commission in favor of Agnes Byers, widow of Frank Byers, for the death of her husband, certified the case was one proper to be reviewed by the Supreme Court, and the record is brought here for review by writ of error.

Frank Byers was regularly employed by the plaintiff in error, who was engaged in the packing house business and conducted a branch market at 1535 South state street, Chicago. He was employed to drive and operate a motortruck and deliver meats from the branch market to customers, collect the money from the customers when cash was paid, and turn the money in to the bookkeeper at the branch market. It appears that he also returned to the market meats not disposed of. The day's work began by the truck driver going to the barn or garage of plaintiff in error at 5:30 a. m., getting the truck, driving to the branch market, and securing a load for the day's delivery. This work would usually be completed and the driver of the truck would return to the branch market in the neighborhood of 2:30 p. m. ,turn over the money received and the undisposed of meats, and after that was done drive the truck back to the barn at Ashland avenue and Forty-Fourth street, which completed the day's work. On September 23, 1916, Frank Byers took a load of meats from the branch market for delivery to customers, and returned to the market between 2:30 and 3 o'clock p. m. After turning over the money collected by him and unloading the meats undisposed of, he left the branch market, accompanied by Fred Schaeffer, who was employed by plaintiff in error at the branch market as shipping clerk. The truck was driven south to Thirty-Fifth street, and then turned west on that street, which was in the route of the return to the barn, and while driving on said street Byers fell from the seat to the pavement, the left front wheel passed over his body, and he was so severely injured that he died in a short time.

It is the contention of the plaintiff in error that Frank Byers was drunk when he returned to settle up with the branch market; that he was so drunk he requested Schaeffer to make or help make his report and settlement, which he did, and after that was done he asked Schaeffer to take him home and return the truck to the garage; that Schaeffer accompanied him and drove the truck, and that while driving slowly along a paved street Byers fell from the seat as a result of his intoxication, and received the injuries from which he died. It is contended the injury which caused his death did not arise out of his employment (1) because his fall from the truck was the result of his being intoxicated at the time; and (2) that he was not at the time of the accident engaged in the performance of the duties of his employment.

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[1] Upon the question of Byers' intoxication and his fall resulting from that condition the testimony was conflicting. The testimony of plaintiff in error tended to show he was so intoxicated that he was unable to drive his truck, and requested Schaeffer, who was shipping clerk for plaintiff in error, to drive him home and take the truck to the garage, and that while Schaeffer was driving the truck Byers fell from his seat by the side of Schaeffer. The testimony of the claimant was directly contradictory of the testimony of plaintiff in error as to Byers being intoxicated, and tended to show he was sober when he left the branch market with Schaeffer. Under that state of the testimony we cannot weigh the evidence and review the correctness of the decision of the Industrial Commission and the judgment of the circuit court on the question of Byers' intoxication. Lefens v. Industrial Com., 286 Ill. 32, 121 N. E. 182.

The uncontradicted testimony shows Byers was not driving the truck at the time of the accident, but it was being driven by Schaeffer. Byers' employment required him to drive the truck to his employer's garage after completing his day's work. This duty he was not performing when injured, but it was being performed by Schaeffer. Byers was riding with Schaeffer and going to his home, which was on the route to the garage. This was testified to by Schaeffer, and was uncontradicted. Defendant in error insists that Schaeffer was unworthy of belief, and that the Industrial Commission was warranted in disbelieving his testimony that he, and not Byers was driving the truck. Selenszki, another truck driver for the branch market, testified his and Byers' trucks both left the branch market at the end of the day's work at the same time, and both were driven to a restaurant around the corner, where the parties stopped for lunch Schaeffer drove Byers' truck, Byers sitting by his side. Riley who saw the accident, testified the truck turned out and passed a wagon in front of it, and then swung in on the west-bound street car track. Witness was in a wagon drawn by horses, and the truck was but a few feet behind it, when witness saw Byers fall over the front wheel head first to the street. The truck stopped at once, only the front wheel passing over his body. Byers was sitting on the left or south side of the truck. There was no jolt or jar of the truck at the time Byers fell. This testimony corroborates the testimony of Schaeffer that Byers was not driving the truck. It must be accepted as established by undisputed proof that Byers was not driving his truck at the time he received the injury from which he died. That being so, did the injury arise out of his employment?

[2-4] The burden is on the claimant to show the injury arose out of and in the course of the employment, and the finding cannot rest on conjecture or possibility. Albaugh-Dover Co. v. Industrial Board, 278 Ill. 179, 115 N. E. 834; Dietzen Co. v. Industrial Board, 279 Ill.11, 116 N. E. 684, Ann. Cas. 1918B, 764. It is not sufficient that the injruy arose in the course of the employment, but it must also have arisen out of the employment. This accident occurred in the course of the employment, and while the truck was being driven to plaintiff in error's garage, which was a duty of Byers' employment. He was not driving the truck, which was his duty under his employment, but was sitting beside another man, who was performing that duty. It is true the truck was traveling the route it would have traveled had Byers been driving, but he was not driving it, as the duties of his employment required. The decision of the question under the peculiar and unusual state of facts is not entirely free from difficulty, but as the proof shows Byers was not at the time of the injury engaged in the performance of the duties of his employment it cannot be said that the accident arose out of the employment. In the Dietzen Co. Case, supra, it was said if an

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employee chooses to step outside the sphere of his employment and do something not expected or required of him he does so at his own risk, and is not under the protection of the act. Byers had stepped outside the sphere of his employment by permitting another to perform his duties. There is no proof that the ignorance or negligence of Schaeffer in driving the truck caused the accident but he was at the time doing the work Byers was employed to do, and Byers was not engaged in the performance of any duty of his employment. It is the law that in order to make the employer liable to an employee for an accidental injury it must arise out of the employment. How, then, can it be said Byers' injury arose out of his employment when the undisputed evidence is that he was not in any way engaged in performing any duty of or connected with his employment, but his duties were being performed by another This court must be governed by the law, and can only enforcee liability under its terms and provisions.

[5] We have, in accordance with the objects and intent of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126, 152i), construed it liberally in favor of the employee, but we cannot create a liability where the law creates none, and in no case have we ever held, nor would we be authorizeed to hold, a liability for an accidental injury to an employee which did not arise out of his employment.

The award, and the judgment of the circuit court affirming it, are reversed.

Judgment reversed.

INDIAN CREEK COAL & MINING CO. v. KUTTER et al.
(No. 10865.)

(Appellate Court of Indiana, Division No. 1. Nov. 16, 1920.)

128 Northeastern Reporter, 763.

2. MASTER AND SERVANT—AMOUNT OF COMPENSATION TO PARTIAL DEPENDENTS; "AMOUNT CONTRIBUTED WEEKLY."

The words "average amount contributed weekly," as used in Workmen's Compensation Act, § 37, as amended by Acts 1919, c. 57, declaring that the weekly compensation to partial dependents shall be in the same proportion to the weekly compensation of persons wholly dependent as the average amount contributed weekly bears to the "average weekly wages," defined in section 76, are used in their ordinary, and not a technical, sense, and mean the amount actual, so that, where deceased employee, whose average weekly wage was more than $24, contributed all his earnings during the year, about $800, to his parents, his partial dependents up to the time of injury, the award to them should have been measured by the average amount actualy contributed, ascertainable from his contribution, and not by a percentage of the average weekly wage.

(For other cases, see Master and Servant, Dec. Dig. § 386[1].)

Appeal from State Industrial Board.

Claim by Louis Kutter and another against the Indian Creek Coal & Mining Company, employer, for compensation under the Workmen's Compensation Act for the death of Charles Kutter, employee. From an award of the Industrial Board for claimants, the employer appeals. Reversed and remanded to board for further proceeding.

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Chas. E. Henderson, of Indianapolis, for appellant.
John A. Riddle, of Vincennes, for appellees.

ENLOE, P. J. On, and for a year prior to, the 16th day of August, 1919, one Charles Kutter was an employee of appellant, working in its mine near Vincennes, as a "trip rider." On that day he received an injury arising out of and in the course of his employment, which resulted in his death on the same day. He was, at the time of his death, 17 years of age, and resided with his father and mother, the appellees herein, in Vincennes. The appellees claim compensation as partial dependents. The deceased received wages at the rate of $5 per day when and while he worked for appellant, all of which he turned over to his mother, and which was used in the support of the said family.

There was and is no dispute as to the essential facts of this case. The cause was first heard by one member of said board, and later, upon petition, a review was had before the full board, which made a finding that the average weekly wages of said deceased was in excess of $24; that the said Charles Kutter, at the time of his injury and death, was earning $36.51 per week, and had been earning said weekly wage for several weeks prior to his injury and death; that at the time of his injury and death the said Charles Kutter was contributing to the support of his father and mother the whole of his earnings and his entire weekly wages; that said earnings were required, etc.

There was an award of compensation at the rate of $13.20 per week for 300 weeks. To this award the appellant excepted, and now prosecutes this appeal.

[1, 2] Was this award contrary to law? The answer to this question depends upon the construction to be given to that part of section 37 of the Workmen's Compensation Act (Laws 1915, c. 106, as amended by Laws 1919, c. 57), relating to compensation to be awarded to dependents, partially dependent. That part of said section which is material to this question now under consideration reads as follows (Acts 1919, pp. 164, 165).

"If the employee leaves dependents only partially dependent upon his earnings for support at the time of his injury, the weekly compensation to those so dependent shall be in the same proportion to the weekly compensation of persons wholly dependent as the average amount contributed weekly by the deceased to such partial dependent bears to his average weekly wages at the time of the injury."

The statute here gives us the rule for determining the amount of compensation to be awarded to such dependents. Stated in the form of a problem in proportion we have:

"Compensation to be awarded partial dependents is to compensation to be awarded wholly dependents as average amount contributed to partial dependents is to average weekly wage."

The Industrial Board found that the average weekly wage was in excess of $24, thus fixing the fourth term of the above proportion. The law fixes the amount of the award to the "wholly dependent" at 55 per cent. of this amount, thus giving us $13.20 as the second term in the above problem. But before the said problem can be solved it is necessary that another term in said proportion be known—the third—before we can determine the amount of compensation to be awarded. As the board made an award of $13.20 per week, we know, as a simple matter of arithmetic, that they fixed the third term in said proportion at $24, and stated the proposition thus:

$$X : \$13.20 :: \$24.00 : \$24.00$$

This they presumably did on the basis that, as the average weekly wage, as a basis for fixing the award, was $24, and as the deceased contributed all his wages to appellees, he therefore contributed at least $24

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per week to his dependents. If the term "weekly wage" and "average amount contributed weekly" by the deceased are both to be measured and fixed by the same standard, then a correct result was reached.

In section 76 of said act, supra, the term "average weekly wage" is defined. Its meaning is technical. For practical purposes, it means the daily wage of the employee multiplied by 6, where the employee has lost seven or more calendar days during a year. But, because the technical average weekly wage is in execess of $24, it does not necessarily follow, though all earnings may have been contributed to the dependents, that such contribution was actually in excesss of $24 per week. In re Carroll, 65 Ind. App. 146, 116 N. E. 844, the court said:

"It will be observed that, in determining the amount to be paid to persons partially dependent, three elements are to be considered: First, the annual earnings of the deceased at the time of his injury; second, the amount that would be paid to a person wholly dependent under the same circumstances; third, the amount contributed by the deceased employee to such partial dependent. The inquiry respecting the third element is not limited to the time of the injury. The section reads 'contribute,' rather than 'being contributed.' It is our judgment that, in determining the third element, the entire period during which or within which contributions have been made may be considered."

This decision was made in 1917, and although the Legislature in 1919 amended said act, it left this portion of said section unchanged, thereby confirming the construction theretofore placed thereon, as above set forth. It is our opinion that the words "average amount contributed weekly," as used in the said section 37, were used in their ordinary, and not in a technical, sense; that the "amount contributed weekly," as used therein, means the amount actual, rather than technical.

With this construction placed upon said section, it became necessary for said board in this case to determine the average amount actually contributed weekly by said decedent to his said dependents. This is the necessary third term of said proportion, which must be known before the first term thereof can be rightly determined. The record before us shows, without contradiction, that, during the year previous to the time of his death, the deceased had earned, in the employment of appellant, the sum of $797.74, all of which he contributed to the support of appellees, as partial dependents, and we find no suggestion of any other earnings or contributions to said dependents. This furnished to the Industrial Board the data from which said third term could have been duly ascertained, from which they could have determined the average amount actually contributed. It therefore follows that the award of said Industrial Board is contrary to law.

The award of the Industrial Board is therefore reversed, and this cause is remanded to said board, with directions to set aside the said award in this case, and for further roceedings.

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INDIAN CREEK COAL & MINING CO. v. WEHR ET AL.
(No. 10689.)

(Appellate Court of Indiana, Division No. 2. Nov. 17, 1920.
128 Northeastern Reporter, 765.

1. MASTER AND SERVANT—"EMPLOYMENT," WITHIN COMPENSATION ACT, NOT LIMITED TO EXACT TIME OF WORK.

Employment," within Workmen's Compensation Act, as regards injury arising out of and in the course of the employment, is not limited to the exact time when the employee reaches his work place or the moment when he ceases work, but includes a reasonable time before and after, length of which depends on the circumstances of each case, and is usually a question of fact.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Employment.)

2. MASTER AND SERVANT—FINDING OF DEATH ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT WARRANTED.

Evidence *held* to warrant finding of Industrial Board that death of employee from train on premises of, and hired by, employer, to take employees to and from coal mine, the place of work, to city where they lived, arose out of and in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from State Industrial Board.
On petition for rehearing. Denied.
For former opinion, see 127 N. E. 202.

Chas. E. Henderson and Jas. L. Murray, both of Indianapolis, for appellant.

McMahan, C. J. Our statements in the principal opinion, wherein we said appellant employed about 400 men in and around its mine, all of whom lived in Vincennes, and that Mr. Wehr continued his work in the office until it was about time for the train to start, are not strictly correct. We should have said that appellant employed in and around its mine about 400 men, who lived in Vincennes, and that according to the statement of the appellant in its brief these were practically all of the men who were employed by appellant at this mine. While there may be no positive evidence that Mr. Wehr continued at his work, it is clear that he and his assistant remained in the office until the train was ready to leave, when they ran out to catch it. Some of his work was performed in the office. There is no direct evidence as to when he quit, other than the statement of appellant's superintendent that his quitting time was 3 o'clock and that he had quit work when he left the office. To be more nearly accurate we should have said hat when he was injured he was leaving the office where he had been at work, but was yet on the premises of the appellant.

The appellant, however, contends that at the time of his injury he was not on the premises of appellant, but was on the right of way of the railroad company. There is no evidence that the railroad company owned

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a right of way. The legitimate inference to be drawn from the evidence is that the spur track, where Mr. Wehr was killed, was laid on the premises of the appellant. The evidence is that the mine is about 3 miles south and east of the main line of the Indianapolis & Vincennes Railroad; that, when the mine was opened, a spur track was laid from the main line to appellant's mine, for the purpose of getting coal from the mine; that the spur track was used as a siding for cars and for the miners' train, which ran from Vincennes to a point 10 or 12 feet from the mine, and that appellant's property extended about 1,000 feet north of the mine.

The evidence is not positive as to who owned this spur track. The president of the appellant testified that it was built and owned by the railroad company. Mr. Donie, the superintendent, said he did not know who owned it. Prior to the war the railroad kept it in repair, but, when the government took possession of the railroads, the War Department issued instructions that appellant should make the repairs to this track, if it wanted the track maintained. Following this instruction, the superintendent says, appellant made the repairs, while the appellant's president says it refused to make them.

In 1912 the appellant entered into an agreement with the railroad company for the operation of the miners' train, as stated in the principal opinion. The train was operated under that agreement until after the decision in the Stevens Case, 114 N. E. 1001. After that decision there were one or two meetings between officials of appellant and the railroad company relative to the operation of the train, and while appellant's superintendent testified that this contract had been abrogated, no new contract was ever made between the appellant and the railroad. The railroad company continued to run the train the same as it had been doing before the decision in the Stevens Case, and appellant continued to pay $500 a month for the use of this train, and to deduct a sufficient amount from the pay of the miners riding on it to recoup itself for the money it paid to the railroad company, the same as it had theretofore been doing. The evidence conclusively shows without any contradiction, that there was no change as to the method of paying for the train or in the amount of money which appellant, through its system of bookkeeping, retained out of what it was pleased to term the monthly wage of its employees. The fact remains that it was necessary for appellant to have the train, and that it paid the railroad company $500 a month for its use.

The amount retained out of the so-called monthly wage of each man was not the same each month. Some months $1.50 was deducted, although $1.25 seems to have been the amount usually deducted, as that was generally sufficient to raise the $500. Indeed ,it appears that, at the end of one month, the appellant, after paying the railroad company the $500, had some money on hand which it had collected from the employees, and which it did not then pay to the railroad, and the next month it deducted only $1 from the pay of each man, as that was sufficient, with the money on hand, to make up the $500. It is certainly a fair inference from the evidence that the railroad, through some kind of an agreement with appellant, expected to and did receive from appellant $500 a month for the use of this train, and that the railroad was not interested in and did not pretend to fix the amount that should be levied upon the miners by appellant in recoupment.

Practically all the men employed by appellant in this mine lived in Vincennes. The evidence does not disclose whether there were any houses near the mine where any of these men could live, but as testified to by appellant's superintendent the men lived in the city, and it was necessary to get them out to the mine; that appellant would have difficulty in getting men, if it did not provide a way to get to the mine; that it was

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customary, where mines were so located, that they arrange for a train: that it was necessary for appellant to have a train to get the men If the miners had to pay the regular fare. appellant could not get them out to the mine; and if they did not run the train, the men could not get to the mine, and the mine could not operate.

[1] One of the most difficult problems met with the enforcement of the Workman's Compensation Act (Acts 1915. c 106) is the determination of the question whether an injury, arose out of and in the course of the employment. The employment is not limited to the exact moment when the workman reaches the place where he is to begin his work, or to the moment when he ceases that work. It necessarily includes a reasonable amount of time and space before and after ceasing actual employment, having in mind all the circumstances connected with the accident. Whether an employee, in going to or returning from the place of his employment, is in the line of his employment is governed and controlled by the particular circumstances and facts of each case. There must however, be a line beyond which the liability of the employer cannot continue. Where that line is to be drawn usually a question of fact. Wabash R. Co. v. Industrial Comm., 294 Ill. 119, 128 N. E. 290. To the same effect is Smith v. South, etc., Colliery Co., 88 L. T. 5, 5 W. C. C. 14, where the Court said;

"It is a question of fact up to what point of time the employment can be said to continue after the workman has ceased working. While the workman is leaving the place where he is employed, I think that for the purpose of this act his employment would still continue. But, though his employment may continue for an interval after he has actually ceased working, yet there must come a time when he can no longer be said to be engaged in his employment in such a way that an accident happening to him can be said to have arisen out of and in the course of his employment. There must be a line beyond which the liability of the employer cannot continue, and the question where that line is to be drawn in each case is question of fact."

The usual rule appears to be that a man's employment does not begin until he reaches the place of his work or the scene of his duty, and does not continue after he has left the premises of his employer. Bradbury on Workmen's Comp. (3d Ed.) 468. Courts have been liberal in so interpreting Workmen's Compensation statutes as to bring many cases within the statute, where the acts of the employees seemed to be outside of the strict and ordinary lines of duty. As where an employee was injured while eating his dinner upon the premises in accordance with the permission of the employer or general custon (Mann v. Clastonbury Knitting Co., 90 Conn. 116, 90 Atl. 368, L. R. A. 1916D, 86); to a workman on a telegraph line, who during a storm had taken refuge under a freight car and had gone to sleep (Moore v. Lehigh Valley R. Co., 217 N. Y. 627, 111 N. E. 1092); to an employee who was injured while returning from a cabin on the premises of a railroad company, to which the employees were permitted to go to eat their meals (Earnshaw v. Lancaster R. Co., 5 W. C. C. 28); to a lighterman who, while waiting for the tide to ebb, went from his barge to a small boat a short distance therefrom to rest (May v. Isom, 7 B. W. C. C. 148); to an employee who was injured by a falling wall while he was eating his dinner on the employer's premises (Blovelt v. Sawyer, 6 B. W. C. C. 16); to an employee who, in accordance with the general custom left the composing room where he worked to go upon the roof and got fresh air on a hot night (Matter of Von Ette. 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641); to an employee engaged in dumping cars, who on a cold night during an interval of leisure, for the purpose of warming himself, sat or lay down in a position where he was injured by moving car (N.

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W. Iron Co. v. Industrial Comm., 160 Wis. 633, 152 N. W. 416); to an employee who was injured while getting down from a moving wagon, where he rightfully belonged, to pick up his pipe (McLauchlan v. Anderson, 4 B. W. C. C. 376); to an employee who was injured while attempting to stop a runaway horse of his employers, and where his regular work was entirely unconnected with horses (Rees v. Thomas, 1 W. C. C. 9); to an employee who, in the line of his duty, reproved a fellow workman, and was struck by the latter in the eye (Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344); to an employee who left the strict line of his employment and attempted to rescue another workman, technically in the employ of an independent contractor, from a danger which threatened his life (Matter of Waters v. Taylor Co., 218 N. Y. 248, 112 N. E. 727, L. R. A. 1917A, 347); to a workman falling from a boat, which was his only method of getting to and from his work, and which was supplied by employer (Mole v. Wadworth, 6 B. W. C. C. 129); to a miner who, while waiting to get a train provided by the employer to convey miners to and from their mine, was pushed off the platform and killed (Cremins v. Guest, 1 B. W. C. C. 160; Walton v. Coal Co., 6 B. W. C. C. 592); to an employee whose contract of employment required the employer to pay the expenses of the employee's transportation to and from his home, and who was killed while riding from his place of work to a railroad station in an automobile furnished by the employer (Swanson v. Latham, 92 Conn. 87, 101 Atl. 492); to an employee injured while being driven to place of work in an automobile furished by employer pursuant to employment contract (Scalia v. American, etc., Tobacco Co., 93 Conn. 82, 105 Atl. 346), to a laborer on way home from work, who was drowned by breaking through the ice while crossing a pond in control of the employer (In re Stacy, 225 Mass. 174, 114 N. E. 206); to an employee injured while boarding a train owned and operated by a railroad company, where the employer had agreed to and did furnish free transportation to and from the place of work (Harrison v. Central Construction Co., 135 Md. 170, 108 Atl. 874); to an employee, where the employer, on demand of employees for free transportation from railroad station to a place in country where they were building a house, hired a truck to carry employees to and from work, and employee was injured while in such truck on way to station (Littler v. Fuller Co., 223 N. Y. 369, 119 N. E. 554); to a miner who, after leaving his lamp, started home and while crossing a frosty and slippery railroad track, forming part of coal siding, slipped and fell (Wales v. Lambton, etc., 10 B. W. C. C. 527).

In Dominguez v. Pendoia (Cal. App.) 188 Pac. 1025, where the employee was killed by being thrown from an automobile furnished by the employer to transport the employees to the place of work, the court, in holding that injury and death arose out of and in the course of the employment, said:

"Where transportation is furnished by an employer, as an incident to the employment, to convey an employee to and from the place of employment, an injury suffered by the employee going or coming in the vehicle so furnished by the employer, and under the control of the employer, arises out of and is in the course of the employment within the meaning of the Compensation Act"—citing In re Donovan, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778; Littler v. Fuller Co., 223 N. Y. 369, 119 N. E. 554; Judson Mfg. Co. v. Industrial Acc. Com. (Cal.) 184 Pac. 1; Starr Piano Co. v. Industrial Acc. Com. (Cal.) 184 Pac. 860; Bradbury on Workmen's Comp. (3d Ed.) pp. 480–484.

[2] We are well within the authorities in holding that the evidence is sufficient to support the finding of the Industrial Board that the death of Mr. Wehr arose out of and in the course of his employment. Kilduff v. Boston R. Co., 195 Mass. 307, 81 N. E. 191; Feneff v. Boston R. Co.,

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196 Mass. 575, 82 N. E. 705; Kowalek v. New York R. Co., 190 App. Div. 160, 179 N. Y. Supp. 637; Donlon v. Kips, etc., Co., 189 App. Div. 415, 179 N. Y. Supp. 93; Keaney's Case, 232 Mass. 532, 122 N. E. 739; Stacy's Case. 225 Mass. 174, 114 N. E. 206; Moran's Case, 234 Mass. 566, 125 N. E. 591; Sanderson's Case, 224 Mass. 558, 113 N. E. 355; Chicago R. Co. v. Industrial Com., 288 Ill. 126, 123 N. E. 278; Manchester St. Ry. Co. v. Barnett (C. C. A.) 265 Fed. 557; Gane v. Norton Hill Colliery Co., 2 B. W. C. C. 42, 100 L. T. 979; Hoskin v. Lancaster. 26 T. L. R. 612. 3 B. W. C. C. 476; Smith v. South Normanton Colliery Co., 88 L. T. 5. 5 W. C. C. 14; Sharp v. Johnson & Co., 115 L. T. Journ. 89, 7 W. C. C. 28; Marsh v. Pope, 117 L. T. 456, 33 T. L. R. 523. 10 B. W. C. C. 566. Wales v. Lambton, etc., 117 L. T. 454, 33 T. L. R. 504, 10 B. W. C. C. 527; Whittall v. Stavele Iron & Coal Co., 117 L. T. 130, 10 B. W. C. C. 298; Stewart v. Longhurst, 116 L. T. 763, 33 T. L. R. 285, 10 B. W. C. C. 266; Great Lakes, etc.. Co. v. Totzke, 121 N. E. 675; In re Loper, 64 Ind. App. 571, 116 N. E. 324; Holland-St. Louis Sugar Co. v. Shraluka, 64 Ind. App. 545, 116 N. E. 330, and authorities hereinbefore cited.

Petition for rehearing denied.

GARTON ET AL. v. KLEINKNIGHT. (No. 10877.)

(Appellate Court of Indiana. Division No. 2. Nov. 26, 1920.)

128 Northeastern Reporter, 770.

1. MASTER AND SERVANT — EMPLOYER'S KNOWLEDGE OF INJURY HELD SUBSTITUTE FOR NOTICE REQUIRED BY COMPENSATION LAW.

Under Workmen's Compensation Act, §§ 22, 23, requiring written notice of the injury, but providing that defects shall not bar compensation unless the employer was prejudiced, where employers had actual knowledge of an injury to an employee's eye and incapacity therefrom. and that her vision had been reduced to 20 per cent. of the normal vision, but failed to provide physicians or hospital service, such knowledge constituted a substitute for the written notice.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

2. MASTER AND SERVANT—MAKING COMPENSATION PAYABLE FROM DAY OF INJURY HARMLESS ERROR.

That an award for injuries to an employee's eye, of which written notice was not given, but of which the employer had actual knowledge, was made payable from the day of the injury, was harmless error.

(For other cases, see Master and Servant, Dec. Dig. § 417[8].)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Law by Esther Kleinknight for compensation for injuries, opposed by Hilda Garton and another, employers. Compensation was awarded and the employers appeal. Affirmed.

Abram Simmons and Charles Dailey. both of Bluffton, and Saml. D. Miller, Frank C. Dailey, Wm. H. Thompson, Sidney S. Miller, and Albert L. Rabb, all of Indianapolis, for appellants.

Charles E. Sturgis and Robert W. Stine, both of Bluffton, for appellee.

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McMahan, C. J. Claim by appellee against the appellants for compensation. The facts as found by the full Industrial Board on final hearing are as follows:

On May 18, 1918, appellants as partners were engaged in the grocery business. On and prior to said date appellee was employed by them as a clerk at a weekly wage not exceeding $10. On said date, while appellee was removing a top from an egg crate, a nail flew out and struck her in the right eye. This resulted in the permanent loss of vision of the injured eye. Appellant had actual knowledge of such injury within three days after the accident. Appellee was absent from her work for two weeks immediately after the accident on account of said injury, during which time she was unable to perform her duties as such employee. Appellants at that time had personal knowledge that appellee was not able to perform her duties. At the end of two weeks appellee returned to her duties, and informed appellants that as a result of her injury she had lost 20 per cent. of her vision. The impairment progressed so that shortly thereafter, as a direct result of the injury, the entire vision of said eye was permanently destroyed. Appellee did not, prior to the filing of her application for compensation herein, serve written notice upon appellants, advising them that the injury to her eye had resulted in the permanent loss of the entire vision thereof. Appellants paid appellee $12 in compensation, but did not provide her with an attending physician for the treatment of her injury. Appellee provided her own physician and surgical supplies, at a cost of $22.96. Appellee was awarded 100 weeks' compensation at the rate of $5.50 per week, beginning May 18, 1918, appellants being given credit for the $12. An award of $22.96 was also made on account medical expense incurred.

The errors assigned are that the award was not sustained by sufficient evidence. and was contrary to law. The evidence shows that appellee, while working in appellant's store, was injured during their absence. The accident occurred about 10 a. m. on Saturday. Appellee worked until noon and went home. Appellants learned of the accident the following evening. On the followig Monday appellee telephoned to the store and informed them that she would not be at the store that day. She went to see a physician two days after the accident, at which time the vision of the injured eye was only 20 per cent. normal. The following Wednesday, she went to another physician, and in the evening after returing from this physician she had a conversation with one of the appellants. Appellee testified that she was blind in the injured eye at that time, and that she at that time told one of the appellants of the condition of her eye, and that she would not be able to work for a while. A physician who examined her in May, 1920, testified that she retained but one-fourth of 1 per cent. vision in the injured eye; that this condition had obtained a long time, having advanced rapidly after the injury.

The award of the Industrial Board was based on total blindness of the injured eye. Appellants contend that the award is contrary to law, and not supported by sufficient evidence, for the reason that no notice was given before the filing of this action that appellee had become blind as a result of the accident. Appellants do not deny knowledge of the accident, and that they had knowledge of the nature and cause of the injury the fourth day after the accident, but contend that it is incumbent upon a claimant to notify the employer of an injury which has occurred in the course of employment, and in such notice to state "the exact nature of the injury, so that the employer may have an opportunity to take proper steps in regard to the injured employee." They further contend that appellee was not wholly blind at the time when they learned of the injury;

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that they could not know such a condition would develop, unless notified of that fact by appellee, and that they were entitled to a further notice after appellee became totally blind in the injured eye.

Section 22 of the Workmen's Compensation Act (Acts 1915, page 392), provides that:

"Every injured employee or his representative shall immediately upon the occurrence of an injury or as soon thereafter as practicable, give or cause to be given to the employer written notice of the injury and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued, under the terms of this act, prior to the giving of such notice; unless it can be shown that the employer, his agent or representative had knowledge of the injury or death, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person, or for equally good reason; but no compensation shall be payable unless such notice is given within thirty days after the occurrence of the injury or death, unless reasonable excuse is made to the satisfaction of the Industrial Board for not giving such notice."

Section 23, after enumerating what the notice shall state, provides that:

"No defect or inaccuracy in the notice shall be a bar to compensation unless the employer shall prove that his interest was prejudiced thereby, and then only to the extent of such prejudice."

The burden of proving prejudice is on the employer.

[1] There is no claim here that the disability has been increased by reason of any act on the part of appellee, or that appellant did not have an opportunity of furnishing medical attention. Appellants had timely knowledge of the accident, and that appellee had received an injury to her eye that incapacitated her, and that she had been taking medical treatment. The injury to the eye was patent. Had it been latent injury developing months after the accident a different question would be presented. Appellants received actual knowledge of the accident and injury to appellee the day of the accident. Two days later they knew that the injury was such that appellee could not return to her work, and on the fourth day after the accident appellee, after having been examined by two physicians, and when she had lost 80 per cent. of the vision of the injured eye, and, at a time when she says that she was blind in that eye, informed one of the appellants of such facts. It is clear that appellants had timely knowledge that appellee was injured. It has been held many times that knowledge on the part of the employer is a substitute for written notice required by section 22 of Workmen's Compensation Act. Appellants having actual knowledge that appellee met with an accident which resulted in an injury to her eye which prevented her from working for a period of two weeks and within a week after the injury and having knowledge that the vision of the injured eye had been reduced to 20 per cent. of its normal vision, cannot, after failure to provide the necessary physicians and hospital service, escape liability on the ground that no written notice was afterwards given them of the fact that appellee had become totally blind in the injured eye. Under the facts in this case such notice was not necessary.

[2] The fact that the award of the Industrial Board makes the compensation payable from the day of the injury was a harmless error.

Award affirmed, and under the statute is increased 5 per cent.

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JACKSON v. IOWA TELEPHONE CO. (No. 33660.)

(Supreme Court of Iowa. Nov. 26, 1920.)

179 Northwestern Reporter, 849.

1. MASTER AND SERVANT — INDUSTRIAL COMMISSIONER'S CONCLUSION SUSTAINED BY SOME EVIDENCE WILL NOT BE DISTURBED BY SUPREME COURT.

In view of Code Supp. 1913, § 2477m24, Industrial Commissioner's conclusion in workmen's compensation proceedings that employee's rheumatism was not caused by injury will not be disturbed by the Supreme Court reviewing the judgment of the district court, where there was some evidence to sustain it.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

2. MASTER AND SERVANT — FINDING THAT RHEUMATISM WAS NOT CAUSED BY INJURY HELD SUSTAINED BY EVIDENCE.

In proceedings under Workmen's Compensation Law, evidence *held* to warrant Industrial Commissioner's conclusion that rheumatism causing claimant's disability was not caused by injury.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from District Court, Polk County; Joseph Meyer. Judge.

Appellee began proceedings before the Iowa Industrial Commissioner, alleging that he was injured while in the employ of appellant, and asking compensation for a period of 40 weeks, at $10.00 per week, under the compensation law. The arbitration committee decided that appellee had received an injury resulting in 13½ weeks' disability, and that, this having been paid by the defendant, there was nothing due plaintiff. This finding was confirmed on review before the Industrial Commissioner. Appellee appealed to the district court, which reviewed the testimony certified to it, which had been taken before the committee, and which included additional testimony received by the commissioner. On the appeal, the dstrict court set aside the prior findings because the facts found do not support the finding. and that there was not sufficient competent evidence in the record to warrant the commissioner in making the order complained of, and found that the appellee had been incapacitated for a period of 28½ weeks, from which it deducted the 13½ weeks for which appellee had been paid, and entered judgment for 15 weeks' disability, $157.50. The $140.00 was paid by the defendant under a plan of compensation of its own, which it claims is more liberal to its employees than the compensation allowed by statute. This question was presented to the commissioner, who held against the appellant on that proposition and the company did not appeal therefrom. From the judgment of the district court, the defendant has appealed to this court. Reversed.

C. Woodbridge, of Des Moines, for appellant.
Nesbitt & Johnson, of Des Moines, for appellee.

PRESTON, J. The disputed question bofere the commissioner was as to how long plaintiff was disabled by reason of his injury. The injury seems not to have been serious in the first place. but appellee contends that the injury caused rheumatism, or that, because of a latent tendency to rheumatism, it was accelerated by the injury, and was the proximate

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cause of the disability, and that the disability was prolonged by reason thereof. Appellant's contention is that the injury was slight, and that recovery therefrom was complete within a short time, and that any disability thereafter was solely from rheumatism. Appellant further contends that the disability from the injury was even less than 13½ weeks, but that, since it had paid plaintiff an amount equal to the compensation for 13½ weeks, the commissioner simply allowed for that period. It seems to be conceded, or at least not disputed by appellee, that he has the burden of proof. Appellant says the evidence clearly preponderates in favor of the appellant. but that in any event, if there is a conflict in the testimony, the findings of the committee and commissioner are conclusive, and that the courts may not reverse even though they should be of opinion that the preponderance of the evidence was the other way. They cite Griffith v. Cole Bros., 183 Iowa, 415, 165 N. W. 577, L. R. A. 1918F, 923; Hanson v. Dickinson, 176 N. W. 823; Ninneman v. Ind. Com. of Wis., 176 N. W. 909. We think there is a conflict in the testimony, and that the facts found by the commissioner support his order, and that there is sufficient competent evidence to warrant his finding. This being so, it will be necessary to refer to the testimony, but we shall attempt to do so as briefly as may be. It should be said perhaps at the start that some of the evidence for appellant being particularly in that form. Appellee argues somewhat strenuously that affidavits are not admissible. We held otherwise in Reid v. Automatic Washer Co., 179 N. W. 323. That case was not reported at the time of the decision by the district court in this case. The district court may not have considered the affidavit of the defendant. It was received and considered by the commissioner.

Plaintiff says he was injured August 28, 1917; in coming down a telephone pole, slipped on a step, and fell about 7½ feet; foot struck on some brickbats; the accident happened at 4:30 in the afternoon, and when he went home that night the foot was swollen; he thought he had sprained it; thought there was no injury to the bottom of the foot; it was swollen, and the ankle also; put on liniment; did no work that day, was not able to get around before December 15th; was totally incapacitated until March 15, 1918; at the time of the hearing, was employed at the Wells Transfer at the Union Depot; was then able to perform most kinds of labor; says he had not had rheumatism since the year 1904 or 1905 until after this injury.

Dr. Willett testifies:

"I attended Mr. Jackson during the year of 1917. When I first called he was suffering a great deal of pain. He had a swollen ankle which was red and inflamed. I do not remember observing the ball of his foot. I treated him for his foot several days. I don't think it was quite as long as until October. It was the latter part of September or the first of October that he developed rheumatism. I treated him for rheumatism until the middle of December. This rheumatism was located in the knee, shoulder, and two or three different joints. The foot was affected with it too. He was still having some rheumatism when I quit calling on him, but he was practically cured of rheumatism at that time. I saw him in my office in February or March. He did not have any rheumatism at that time. There was some tenderness then in the bottom of the foot. There was no swelling. I found no fracture in the foot or ankle. I ceased to treat Jackson for anything about the middle of December. I told him he was still suffering slightly. He was suffering at that time from rheumatism, and still had some trouble with the ankle and bottom of the foot. I cannot establish whether it was due to the injury or due to the rheumatism."

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The evidence of Dr. Willett varies somewhat from a report made by him of an examination he made September 29. 1917, wherein the diagnosis was given as rheumatism; condition improved; prognosis good, and that plaintiff would probably be able to return to work in about ten days; treated patient mostly for acute rheumatism. Additional testimony was taken before the commissioner on October 28th, Dr. Hutchinson testifying that, if rheumatism is latent in the system, an injury would have a tendency to bring on rheumatic conditions; recalls one case in his own experience where a man fell 16 feet, and the bones of his foot were crushed almost to a pulp, where a rheumatic condition resulted; if the injury involved only the soft tissues, and not the bones, would say it would not be sufficient to cause rheumatism; would expect to find rheumatism in the neighborhood of the injury; if the injury was nonconseqential, would assume that the rheumatism was chronic; never saw plaintiff until the day he testified, and says he would not pretend to know or be able to tell what the extent of the injury was, or whether his rheumatism came on from the injury or simply that he has the rheumatism. Another witness testifies he saw plaintiff on Christmas Day, 1917. and helped carry plaintiff in an automobile, and says that it was apparent he could not use this one limb at that time.

Plaintiff offered the affidavit of Dr. Carson who treated plaintiff for rheumatism in the winter of 1904; has not known of his having rheumatic trouble since that date, until 1917. In his opinion, if rheumatism was latent in plaintiff's system, the weakening of his physicial condition, which resulted from the injury, would have a tendency to develop the latent disease and make him subject to a rheumatic attack. It will be noticed that the witness does not give his opinion that the injury did develop the latent disease, but only that it would have such tendency.

The defendant offered in evidence, over plaintiff's objection, which was received in evidence, a report of Dr. Luginbull, of an examination made November 16. 1917, in which the diagnosis was given as chronic arthritis; prognosis poor; and that there was no fracture anywhere, nor any evidence of an old fracture. We understand this report was made on appointment by the commissioner under section 2477m30, Code Supp.; but this is not entirely clear. A witness testifies for defendant that while plaintiff was working under him, during the year previous to the injury in question, plaintiff was disabled, or laid up three or four times, and that plaintiff always told him that the reason was rheumatism. He appeared to be lame, and could not climb poles, at least he said he could not; plaintiff laid off and did not work for a time, and told witness that he was troubled with rheumatism. This evidence is denied by the plaintiff in rebuttal. Defendant offered in evidence the affidavit of Dr. Fay, who says:

"I first examined O. C. Jackson on October 3, 1917. At that time Jackson stated that he had his right foot injured on August 28, 1917. in falling from a telephone pole, which he was climbing; that he fell a distance of six or seven feet to the ground, striking his foot on a brick. At the time of said examination he was complaining of pain in the region of the first, second, and third metatarsal bones of the right foot and claimed to be unable to walk on account of the pain. Examination failed to disclose any evidence of injury, and it was my opinion that Jackson's injury had been slight, recovery being complete within a short period, and that at the time of said examination his disability was entirely due to an acute rheumatism. An X-ray was taken to determine definitely as to presence of a fracture. This X-ray was made on November 15, 1917, and there was then no fractures, nor evidence of an old fracture.

"On February 19, 1918. I again examined Mr. Jackson. At that time, there was no swelling and no deformity of the foot and he walked without

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a limp. There was absolutely no evidence that the pain of which he then complained was in any manner or degree the result of his injury of the previous August.

"There was not at any time after I saw Mr. Jackson on October 3, 1917, any physical evidence to connect it and the disability of which he complained with the accident of August 28, 1917.

"It is my opinion that the rheumatism from which Mr. Jackson has suffered was in no manner or degree caused or contributed to by the alleged injury of August 28, 1917.

"Rheumatism is now universally recognized as a disease of bacterial origin, the exciting organisms invading the joints from a focus in some other part of the body, e. g., the tonsils, abscessed teeth, infection in the genito-urinary tract, etc. Rheumatism is never the direct result of an injury, nor does injury determine an inflammatory condition where rheumatism is latent in the system. This is evidenced by the fact that manipulation plays an important part in the treatment of old rreumatic joints. In an acute rheumatic process, the condition of a given joint might be unfavorably influenced by a traumatism."

We have given in a general way the substance of the testimony. The evidence as to whether plaintiff's disability, up to the time he claims for, was due to the injury, or whether it was wholly from rheumatism, depends upon the evidence of the medical witnesses and their opinions. As to this, there is a conflict. And there is some conflict in plaintiff's own evidence as to the length of the disability. Dr. Willett says there was rheumatism in February, and he says further he could not tell whether the trouble was due to the injury or to rheumatism. Dr. Carson says the same. Dr. Fay's evidence is positive that it was due wholly to rheumatism. If we considered the evidence of plaintiff alone, it would justify the commissioner in finding that plaintiff was entitled to compensation for the longer time claimed by him. On the other hand, if the evidence of the defendant be considered alone, it would justify a finding by the commissioner that there was no disability from the injury for a longer period than 13½ weeks as the committee and the commissioner both did find. In making the award, two members of the committee found in favor of defendant, and one was in favor of the plaintiff. The commissioner agreed with the two members of the committee. The district court disagreed with the commissioner. We disagree with the district court. Clearly there is a conflict. We do not pretend to say which side is right. That is not our province.

[1, 2] We said in the Hanson case, supra, at page 24 of 176 N. W., that there was "some evidence sustaining the Industrial Commissioner's conclusion that the disease was lighted up or accelerated by the accidental slipping of the hammer from the chisel and striking complainant. * * * This being true, the courts may not intefere with such finding," citing the Griffith Case. Such is the situation here, except that the commissioner arrived at the opposite conclusion. The rule ought to be, and is, the same in either event. Any other rule would encourage litigants to bring the matter first before the arbitration committee, then to the Industrial Commissioner, then to the district court, then to the Supreme Court, for the determination of the credibility of the witnesses and the preponderance of the evidence, hoping that somewhere along the line a tribunal could be found that would differ, as the district court did, with the findings of the committee and commissioner, the tribunals established by law for the determination of such questions; so that instead of simplifying the procedure, and lessening litigation and expense, it would become more complicated and more expensive. The statute, section 2477m24, Code Supp., provides that the process and procedure under the act shall be as summary as reasonably may be.

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We reach the conclusion that the trial court erred in setting aside the finding of the Industrial Commissioner.

The judgment is reversed.

Weaver, C. J., and Evans and Salinger, JJ., concur.

BLACKBURN v. COFFEYVILLE VITRIFIED BRICK & TILE CO. (No. 23063.)

(Supreme Court of Kansas. Nov. 6, 1920.)

193 Pacific Reporter. 351.

(Syllabus by the Court.)

1. MASTER AND SERVANT—EVIDENCE HELD TO SHOW DISEASE RESULTING FROM INJURY ARISING OUT OF AND IN COURSE OF EMPLOYMENT WITHIN COMPENSATION ACT.

The evidence in a workman's compensation case is considered, and *held* sufficient to sustain a finding that a disease from which the appellee suffers was the result of an injury arising out of and in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—INJURY AGGRAVATING DISEASE JUSTIFIED AWARD UNDER COMPENSATION ACT.

Following Monson v. Battelle, 102 Kan. 208, 170 Pac. 801, and Gilliland v. Cement Co., 104 Kan. 771, 180 Pac. 793, it is *held* that if, by weakening resistance or otherwise, an accident so contributes to or influences the progress of an existing disease as to cause a disability, it is sufficient to justify an award under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

3. MASTER AND SERVANT — INCONSISTENCY IN FINDINGS IN WORKMEN'S COMPENSATION CASE EXPLAINABLE BY ERRONEOUS CHARGE NOT COMPLAINED OF.

In a workman's compensation case there was evidence to sustain a finding that the plaintiff's injury contributed to and aggravated the disease of multiple sclerosis from which it is conceded he suffered. The jury found that the plaintiff's injury had precipitated or contributed to the development of his present condition, and also that it was fully responsible for that condition. *Held,* that any inconsistency in these findings s explained by an error (not complained of by either party) in the giving of an instruction which charged that the plaintiff was not entitled to recover for an aggravation of a disease he may have had prior to receiving the injury, and further *held* that the error should be disregarded and the general findings and judgment upheld.

(For other cases, see Master and Servant, Dec. Dig. § 410½, New Vol. 7A Key-No. Series.)

4. MASTER AND SERVANT—PETITION IN WORKMEN'S COMPENSATION CASE HELD UNOBJECTIONABLE.

Ordinarily the issues in a compensation case are simple, and, except for certain facts which the statute makes essential, the pleadings are of little importance. Where the petition charges incapacity resulting from an

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accident, the employer may not unreasonably be expected to meet evidence showing that as a result of the accident a disease from which the plaintiff already suffered was aggravated, causing partial or total incapacity.

(For other cases. see Master and Servant, Dec. Dig. § 401.)

Appeal from District Court, Montgomery County.

Claim by Leroy Blackburn against the Coffeyville Vitrifield Brick & Tile Company under the Workmen's Compensation Act. Judgment for plaintiff, and defendant appeals. Affirmed.

Ziegler, Jackson & Etchen, of Coffeyville, for appellant.

Chas. D. Ise, of Coffeyville, for appellee.

PORTER, J. The principal question to be determined by defendant's appeal is whether in an action under the Workmen's Compensation Act (Laws 1911, c. 218, as amended by Laws 1913, c. 216) the judgment is sustained by evidence which established the fact that a disease from which the appellee suffers was caused by an injury arising out of and in the course of his employment.

[1] At the time of his injury plaintiff was a young man 19 years of age. His evidence tended to show that previous to the injury he was an able-bodied man who had been working as a common laborer for about two years at construction work pouring concrete, hauling pipe, and digging ditches. and that he had shown no indications of the disease from which he now suffers. While attempting to start a gas engine, his foot was caught in the crank case, lacerating his foot, and in attempting to release himself he fell backward into a box of trash and pieces of old iron. that he lay there in a faint from a half to three-quarters of an hour, and when he got up he could not stand on his left foot; that shortly after his injury he felt a severe pain in his neck and back; that he had fits of shaking and trembling, and lost the use of his limbs so that he walked with crutches. At the trial, which occurred about two years after his injury, it was conceded that he was suffering with multiple sclerosis, which, according to the medical testimony, is a hardening of many areas of the brain and spinal cord which have become infected by some organism or poison that causes a deadening of the cells. from which they never recover for the reason that they have no blood vessels to nourish them. It seems to be conceded that multiple sclerosis is due to a reaction of nerve centers to infection. When the nerve center hardens or becomes destroyed it fails to function; that is, to carry along the impulses from the brain. The authorities agree that there are various causes which produce the disease. Some state that acute infection may cause it or that it may come from measles. scarlet fever, smallpox, whooping cough, and other infections diseases. Heredity is given as one of the most frequent causes, and many of the authorities mention traumatic injuries, although some of the modern ones do not refer to that as a cause. The testimony of the physicians was based upon knowledge gained by consulting authorities, rather than from personal acquaintance with the disease. The principal conflict in the testimony of the physicians called by the plaintiff, and those who testified for the defendant arose over the question whether multiple sclerosis could develop from a traumatic injury immediately after such injury. One physician who testified for the defendant gave his opinion that plaintiff's injury was absolutely independent of and nothing to do with the disease. He thought that anything that would excite a patient who had the disease in the earlier stages would exaggerate the symptoms, but would not of itself cause the disease to become permanently worse. Another physician

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who testified for the defendant gave infection as the cause of multiple sclerosis, and, in his opinion, no injury would produce the disease; it was due to bacterial infection, and in multiple sclerosis it would take from three to fourteen years, in his judgment, before the symptoms were developed. He did not think it could occur in less than a couple of years. It was his opinion that the plaintiff "will not recover from the disease." On cross-examination he said it was possible that the injury to the plaintiff brought on the nervousness and jerking sooner than it would otherwise have developed.

Dr. Baird. a regular practicing physician, who had known the plaintiff's family five or six years, and had treated him for multiple sclerosis, was a witness for the plaintiff. He named acute infections, scarlet fever, measles, and other infectious disease as recognized causes of multiple sclerosis, and stated that the authorities he had consulted give traumatic injuries as one, but indicate that in 50 per cent. of the cases it was impossible to determine the cause, that heredity was a frequent cause, and that there had been instances where there had been as many as six or seven members of the same family suffering with the disease. To a hypothetical question asked for the purpose of getting his opinion upon whether the disease from which the plaintiff suffers could have been caused by his injury, he answered, "I would say that it was contributory." He explained his answer to mean that this disease might have been latent in the system prior to the injury. in which case "the injury may have been the last straw that caused the disease to blaze up at that time," but the witness could not say that it was absolutely the cause of it. for the reason that, if the disease were present in the system, it was only a question of time until it would assert itself.

In their findings the jury said that the plaintiff was totally incapacitated for work as a result of an injury received by him in the course of his employment, and that this total incapacity continued and will continue for life; that plaintiff was not afflicted with the disease of multiple sclerosis at or prior to the time of his injury. They also found that his injury did precipitate or contribute to the development of his present condition, and that it was "fully responsible" therefor. The amount of compensation awarded him was $4,513.11.

The principle contention is that there was no testimony to sustain the findings and judgment. It is insisted that the strongest testimony any witness gave was that the disease might have been caused by the injury or that the injury might have aggravated it. We have already quoted testimony of Dr. aird, who gave his opinion that the injury was contributory, although he would not say that it was absolutely the cause of it, and the admission of a physician called by the defendant that in his opinion it was possible that the injury brought on the nervousness and jerking sooner than it would otherwise have developed. In addition, Dr. Fite gave his opinion that the plaintiff's condition was due to an injury or shock which undoubtedly aggravated and may have been the absolute cause of the disease. We think there was sufficient evidence to sustain the finding.

[2] While there is no complaint by either side with respect to instructions, it appears that the court instructed the jury that plaintiff could not recover for an aggravation of any disease he may have had prior to receiving the injury. The instruction was erroneous but was favorable to the defendant. See Monson v. Battelle, 102 Kan. 208, 212, 170 Pac. 801. and the authorities cited in the opinion including the following.

"The courts very generally hold that, if an existing disease is aggravated by accident or injury, compensation must be paid for the re-

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sulting injury. Note L. R. A. 1917D, 105. See, also, Id. pp. 129, 130." It was ruled in the syllabus of the Battelle Case as follows:

"The evidence in an action under the compensation statute held to support a finding that the plaintiff was injured on the premises where he was employed, by having to wade through flood water which had overflowed the defendant's car works; an old wound on his foot being thereby infected, requiring an amputation." Paragraph 3.

In Gilliland v. Cement Co., 104 Kan. 771, 180 Pac. 793. it is said in the opinion:

"The defendant insists that the workman died of disease; that is, the injury did not arise out of the employment. The question was one of fact, and should have been submitted to the jury. It is not material that the workman's blood vessels were weakened by disease, or that he was predisposed to hemorrhage because, for example, he had breathed the dust of the sacking department for three years. The statute establishes no standard of health for workmen entitling them or there dependents to compensation, and if the added factor of physical exertion in the employment were required to effect the lesion, and did so, the injury arose out of the employment." Page 778 of 104 Kan., page 796 of 180 Pac.

To the same effect, see Peoria Terminal Co. v. Indus. board, 297 Ill. 352, 116 N. E. 651, where it was said in the opinion:

"Even where a workman dies from a prexisting disease, if the disease is aggravated or accelerated under certain circumstances which can said to be accidental, his death results from injury by accident." (Page 356 to 279 Ill., at page 652 of 116 N. E.)

Also see Hartz v. Hartford Faience Co., 90 Conn. 539, 97 Atl. 1020; where it was held that:

"Whatever predisposing physical condition may exist, if the employment is the immediate occasion of the injury, it arises out of the employment because it devlops within it." Page 543 of 90 Conn., page 1022 of 97 Atl.

It has been held that "if, by weakening resistance or otherwise, an accident so influences the progress of an existing disease as to cause death or disability," it is sufficient to justify an award under the Workmen's Compensation Act. Mailman's Case, 118 Me, 172, 106 Atl. 606.

In Madden's Case, 222Mass. 487, 111 N. E. 379, L. R. A. 1916D, 1.000, a workman "with an already impaired heart suffered further injury therein through the muscular exertion" required by her work, and it was held that she could recover compensation not only for that part of the injury resulting directly from the work, but for that following directly from the previous defective condition of her heart.

Some cases are cited to the contrary in the defendant's brief. Others cited go no further than to hold that a disease which arises in the course of employment, with nothing more, is not within the act; that is, it must result from an injury; there must be an accident arising out of and in the course of the employment. It is true that under our compensation law a workman may not recover compensation for an incapacity resulting merely from a disease, although the disease developed in and was caused by the nature and conditions of his employment. It is only where he has sustained some accidental injury, arising out of and in the course of his employment, which aggravates a disease and thereby causes incapacity, that he may recover compensation. This distinction is recognized in the cases cited supra an in some of those cited in defendant's brief.

[3, 4] It is probable that the erroneous instruction led to what seems an inconsistency in the findings. The jury had heard the con-

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flicting opinions of the expert witnesses with respect to the possibility of this disease developing immediately after such an injury; they were instructed that the plaintiff could not recover for an aggravation of a disease he may have had prior to receiving his injury. In attempting to steer between the two theories they gave an affirmative answer to the question whether plaintiff's injury did "precipitate or contribute" to the development of his present condition. To another question, "To what extent did such injury contribute to the development of the plaintiff's condition?" they answered, "Fully responsible." The record is silent upon the matter, but presumably instruction No. 5, to the effect that plaintiff could not recover for an aggravation of a disease he may have had prior to his injury. was given at the request of the defendant. As we have seen, it was wrong, and moreover, prejudical to plaintiff's case. It can hardly be said, in view of all the circumstances, that there is any substantial inconsistency in the findings, such, at least, as would warrant the ordering of another trial. The facts seem to have been quite fully developed. The character of plaintiff's disease is conceded. The extent of his incapacity is not controverted, although the defendant, upon a mistaken theory, claims that it should not be held liable for compensation for total incapacity. The conflict in the evidence over the question whether the injury aggravated a latent disease of the plaintiff has been resolved against the defendant; and the finding that the injury was "fully responsible" for plaintiff's present condition may be regarded as a correct statement of a legal principle properly applied in compensation cases, rather than a statement of fact to be established by evidence.

We find nothing substantial in the complaint that defendant was prejudiced because the petition charged generally that the incapacity resulted from the injury and because the petition made no claim that the injury aggravated a pre-existing disease. In the ordinary compensation cases the issues are intended to be simple, and except for certain facts which the statute makes essential, the pleadings are of little importance. Where the petition charges incapacity resulting from an accident, the employer may not unreasonably be expected to meet evidence showing that as a result of the accident a disease from which the plaintiff already suffered was aggravated, cusing partial or total incapacity for work. Probably at the time the petition in this case was drawn neither the plaintiff nor his attorneys knew of such a disease as multiple sclerosis. We discover no error in the record, and the judgment is affirmed.
All the Justices concurring.

FOX v. UNITED CHEMICAL & ORGANIC PRODUCTS CO
(No. 23211.)

(Supreme Court of Louisiana. June 30, 1920. Rehearing Denied Oct. 14, 1920.)

86 Southern Reporter, 311.

(Syllabus by the Court.)

MASTER AND SERVANT—COMPENSATION ALLOWABLE ALTHOUGH EXTENT OF AGGRAVATION OF INJURY BY DISEASE IS NOT PROVED.

Where. in an action by an employee under the Burke-Roberts Employers' Liability Act (Act No. 20 of 1914), as amended by Act No. 243 of 1916, for damages for personal injuries, the evidence shows that the

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injuries complained of were the immediate proximate results of an accident which occurred in the course of plaintiff's employment, and fails to show the extent to which, if at all, the consequent physical disability of the plaintiff was aggravated by a disease with which he was thereafter found to be afflicted, or to what extent, if at all, the disease was accelerated or brought into activity by the accident, the plaintiff is properly allowed to recover in accordance with the provisions of the statute, and without regard to any hypothetical. but not proved, effects of the disease.

(For other cases, see Master and Servants, Dec. Dig. § 375 [2].)

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge Acting for T. C. W. Ellis.

Proceedings by William Fox against the United Chemical & Organic Products Company under the Employers' Liability Act, Judgment for plaintiff, and defendant appeals. Affirmed.

Edward Rightor and E. V. Parham, both of New Orleans, for appellant.

Edgar M. Cahan and Wm. F. Conkerton, both of New Orleans, for appellee.

MONROE, C. J. This is an appeal from a judgment condemning defendant to pay plaintiff $2,640 in 400 weekly payments of $6.60 each, commencing December 31, 1917 (less a credit of $61), together with the cost of the suit. The suit was brought under the "Burke-Roberts Employers' Liability Act," as amended, and judgment is based upon an allowance of 50 per cent. of the weekly wages of the plaintiff for 400 weeks, as provided by section 8 (e) of that act, as re-enacted by Act 243 of 1916, p. 515. The $61 for which credit is given was paid prior to the suit; and by way of answer to the demand for a continuation of the payments, defendant denied successively. but generally, the allegations contained in the various articles of the petition. It hereafter developed that its real defense is based upon its contention that plaintiff had recovered, when the suit was instituted, from the effects of the injury resulting from an accident which happened to him in the course of his employment, and since then, and now, is suffering from a chronic disease by which he was afflicted, and for which he was treated prior to the accident. The judge a quo accepted as a controlling precedent the judgment rendered by this court in the case of Behan v. John B. Honor Co., Ltd., 143 La. 348, 78 South. 589, L. R. A. 1918F, 862. In the instant case it is shown that plaintiff had been employed by defendant for perhaps eight or ten months as a laborer. and that during that time he had never lost a day or an hour; that upon the occasion of the accident he was carrying upon his shoulder a sack containing bones and hoofs of horses, and that in passing near a pit on his way through a passage, he was overbalanced by his load and fell into the pit; that there was in the pit a revolving pulley carrying a belt upon the outer surface of which at intervals of say, 18 inches there were pieces of wood, described as "paddles"; that, when plaintiff fell face down upon the bottom of the pit, he was struck by those paddles on his leg, his back, and other parts of his person in quick succession during a period of three or four minutes until, by reason of some obstruction accasioned by the entanglement of the sack that he had been carrying with the pulley, he was afforded an opportunity to escape. He was taken after a few days to the Charity Hospital, and later, at the instance of the physician who represents the indemnity company, real defendant in this case, to

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another hospital, both before and after which he was attended by another physicians who as we understand, was selected by him. Those physicians differ rather widely in their opinions as to plaintiff's exact condition and the causes that brought it about. The physicians employed by plaintiff, who saw and attended him first, found that he had been badly hammered and bruised, as can well be imagined from the uncontradicted description that he gives of the accident. The other, who saw him somewhat later, found no evidence of traumatic injury, and, having caused proper tests to be applied, ascertained that he was afflicted with a certain disease, in an active and virulent form, and that diagnosis was corrobated by the testimony of a third physician who examined the patient during the progress of the trial (about 4½ months after the accident), and who found him weak, anæmic, and shrunken, but, so far as he observed, showing no signs of traumatic injury. The physicians, however, agree that an experience such as plaintiff had in the pit, or in fact any severe physical shock, might develop or accelerate and aggravate the disease, which may have been otherwise latent or dormant, from which they found him to be suffering. They fully admit that there are many persons of many classes in this community and others who are affected with that disease, and who, in ignorance of their misfortune, discharge the functions of their various positions in the business and social life of which they form part with entire efficency, and, whilst the witnesses prophesy that such persons must sooner or later break down, they are unable to fix the time in any given case when the break must occur, or to deny that it may be accelerated by injuries such as those sustained by plaintiff. Plaintiff testifies without contradiction that prior to the acident here in queston he had enjoyed good health all of his life (of, say, 50 years), save that in 1913 he became for eight days an inmate of the Charity Hospital, where he was treated for rhematism, and on one other later accasion suffered with sores upon his face and in his mouth, the origin of which he attributes to poisoning from mosquito bites, received while working in the swamps, and, concerning which he says that the physicians in the hospital said that they were unable to say whether it was the disease to which we have referred or cancer; the fact being that the particular sores of which he then complained were healed, and he went on with his work as he had done before, and at the time of the accident so far as he knew was in good health.

In the case of Behan v. John B. Honor Co. supra, it was held that (quoting from the syllabus, which accords with the text):

"The fact that an employee injured in performing service arising out of and incidental to his employment in the course of his employer's occupation was already afflicted with a dormant disease that might some day have produced physical disability is no reason why the employee should not be allowed compensation, under the employers' liability statute, for the injury which, added to the disease, superinduced physical disability."

In the text of the opinion it is said:

"The proof goes no further in support of the defense of this suit than to show that the plaintiff might, and perhaps would, at some time, have become disabled by the disease that was lurking in his system, even if the accident complained of had not happened. * * * * * The evidence leaves no doubt that the plaintiff's physical disability resulting from the accident is worse than it would be if he had not been diseased at the time of the accident. But the accident was none the less the proximate cause of the present disability."

And so it may be said here. For years before and up to the moment of the accident, with the exception of a few days in 1913 and a few days at a later period, plaintiff had been able to continue the hard

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manual labor in which he had been engaged all of his life. Since the accident he has been able to do no work at all. The physician who was first called (after he left the Charity Hospital) says in his testimony:

"I found him suffering from an injury from [to] his feet and entire body. the chest and back and legs. * * * I found the right leg very much swollen, and, might say, it seemed there had been a pus formation on the inner side of the right leg, and there had been an incision, * * * and they had made an incision at the hospital, I presume * * * Q. What was the size of the leg? A. Possibly one-third larger than its normal size. Q. What was his general condition? A. He was very weak and very nervous, and the injury seemed to have weakened him very much, and I found certain things the matter with his back and chest, which was tenderness and a slight swelling of the back and chest. * * * Q. From your medical experience and attention, do you think he will be able to go to work soon, or ever be able to go to work? A. No, sir; I don't think so."

Upon the whole, the evidence satisfies us, as it seems to have satisfied the trial judge, that the accident was the proximate cause of the disability which immediately followed, and which continued up to the time of trial, with a prospect of a further and indefinite continuance, and we are unable to determine to what extent, if at all, it was aggravated by the disease, and, if so, to what extent the disease was accelerated or brought into activity by the accident; the testimony, in our opinion, throwing little or no light upon that subject.

The judgment appealed from is therefore Affirmed.

THIBEAULT'S CASE.

(Supreme Judical Court of Maine. October 25, 1920.)

111 Atlantic Reporter 491

1. MASTER AND SERVANT—COMPENSATION ALLOWABLE UNDER COMPENSATION ACT BASED ON AVERAGE EARNINGS.

An injured workman's loss of capacity to earn is measured by his average weekly earnings, computed by one of the three methods described in Workmen's Compensation Act § 1, par. 9, subpars. (a), (b), and (c), which should be applied in the order stated to the facts in the particular case.

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

2. MASTER AND SERVANT—COMPENSATION DECREE REVIEWABLE FOR ERRONEOUS COMPUTATION OF AVERAGE WEEKLY WAGES.

If the chairman of the Industrial Accident Commission applies a wrong rule of law in computing the average weekly wages of a claimant under the Workmen's Compensation Act, or finds any essential fact without proper evidence, the award can be attacked on appeal from the decree.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

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3. MASTER AND SERVANT—METHOD OF COMPUTING AVERAGE WEEKLY WAGES OF COMPENSATION CLAIMANT, WHO HAS WORKED LESS THAN YEAR.

Workmen's Compensation Act. § 1, par 9, subpars. (a), (b), and (c), describing three methods of computing the average weekly wage of an injured employee, does not permit the use of claimant's wage schedule for six months, under subparagraph (a), nor does it permit the use of a fellow employee's wage schedule for six months under subparagraph (b), the methods applicable when the working period is substantially one year; and it is contrary to the law to base a finding of claimant's average weekly wage solely on the wage schedule of a fellow employee for six months.

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

4. MASTER AND SERVANT—FELLOW EMPLOYE'S WAGE SCHEDULE AVAILABLE FOR FINDING AVERAGE WEEKLY WAGES OF CLAIMANT UNDER COMPENSATION ACT.

Where claimant, a weaver, had only been so employed for six months when he was injured, the wage schedule of a fellow employee, a woman, who had worked more than a year, was available as a proper standard for computing his average weekly wages under Workmen's Compensation Act,t § 1, par. 9 subpar. (b), allowing recourse to the average weekly wages of an employee of the same class "working substantially the whole of the preceding year"; it appearing that the woman, like claimant, was paid by the piece and at the same rate, that they worked the same number of hours per week, and that both were capable of doing the same amount of work, and were subject to the same contingencies of short work, discontinuances, or suspensions of work occasioned by causes incident and common to the employment, and not from causes peculiar to the employee.

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

5. MASTER AND SERVANT—FULL WAGE SCHEDULE OF CAIMANT UNDER COMPENSATION ACT SHOULD BE PRESENTED.

In all cases, where the method of computing compensation under Workmen's Compensation Act, § 1, par 9, subpars. (b), (c), may be restored to the full wage schedule of the injured employee for the whole period of his employment should be presented, and where a wage schedule of a fellow employee is relied on, wage schedules of more than one such fellow employee should be produced, if available.

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

Appeal from Supreme Judicial Court, Androscoggin County, in Equity.

Proceeding by Emile Thibeault under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the Bates Manufacturing Company, the employer. From a decree for the claimant the employer appeals. Appeals sustained, and decree modified.

Argued before Spear, Hanson, Philbrook, Morrill, and Wilson, JJ.

Andrews & Nelson, of Augusta, and Eben F. Littlefield, or Portland, for respondents.

MORRILL, J. The amount of money involved in this case is small, but the decision is important, as determining the correct procedure in computing the "average weekly wages, earnings or salary" of an injured employee, under the Workmen's Compensation Act of 1919 (Pub. Laws 1919, c. 238).

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[1.] The payment to an injured workman is intended to compensate him for his loss of capacity to earn, which is measured by the amount earned by him before the injury; in the varying conditions of work, a period of employment must be taken sufficiently long to obtain a fair average of his earnings as a basis of computation—not his earnings at the time of the injury or for a short period before, when they may be at an unusually low figure, thus operating unfairly to him, or at an unusually high figure, thus operating unfairly to the employer, but taken over a period long enough to show the variations in his earning power incident to the employment. This principle is at the foundation of the theory of compensation embodied in the Maine act.

By paragraph 9 of section 1 (P. L. 1919, c. 238), the methods of computing the "average weekly wages, earnings or salary" are stated: subparagraphs (a), (b), and (c) of that paragraph describe three methods of computation; these methods are not to be applied in the alternative as a matter of choice, but are to be applied in the order stated, to the facts as they exist in the particular case, upon the principle or resorting to the best evidence obtainable in determining the employee's average wage.

The first method, subparagraph (a), is to be applied, if the injured employee "has worked in the same employment, in which he was working at the time of the accident, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury," and affords the most satisfactory method of determining the employee's actual average wages, earnings, or salary.

The statute does not provide for computing the average weekly wage solely from the wages actually earned by the claimant, during a less period than "substantially the whole of the year immediately preceding his injury."

If the first method is not applicable to the facts of the particular case, recourse must next be had, under subparagraph (b), to the average daily wages, earnings, or salary of "an employee of the same class working substantially the whole of such immediately preceding year in the same or a similar employment, in the same or a neighborng place," as the next most available standard. The language of this subparagraph indicates at least two minor degrees of availability; the wages of a substituted employee working in the same employment are a more satisfactory standard than those of one working in a similar employment; and so the wages of one working in the same place are a more satisfactory standard than those of one working in a neighboring place.

If neither of the preceding methods can "reasonably and fairly be applied," the third method, subparagraph (c) is to be used.

In the instant case the claimant, at the time of his injury, was working as a weaver in the Bates Mill, and had then been working at that employment for about 6 months; previous to being so employed he worked at sweeping in the spinning room. It is therefore conceded that the first method of computation, subparagraph (a), cannot be applied.

The appellant contends that the second method, subparagraph (b), should have been applied, and that the findings of the chairman of the commission are not supported by proper evidence, and result in the finding of an "impossible wage" upon the evidence.

[2] If the chairman applied a wrong rule of law in computing the average weekly wages of the claimant, or found any essential fact in favor of the claimant without proper evidence, the decree can be attacked on this appeal. Mailman's Case, 118 Me. 172, 106 Atl. 606.

The chairman in his decision held:

"From the evidence introduced, the schedule of wages of the fellow employee offered by the insurance carrier did by no means fulfill the re-

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quirements of subsection (b) of paragraph 9 of section 1 of the act; therefore could not 'fairly and reasonably' be used as a basis of computation of compensation."

He then proceeded to find:

"That 'having regard to the previous wages, earnings or salary of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or a neighboring locality,' the sum of $27 reasonably represents 'the weekly earning capacity of the injured employee at the time of the accident in the employment in which he was engaged at such time.' "

He thereupon awards compensation at $15 per week, the maximum provided by the act. The procedure was manifestly under subparagraph (c).

[3] The chairman's finding of $27 per week, the respondents contend, is not supported by any legal evidence. This contention must be sustained. The chairman states that he had regard "to the previous wages, earnings, and salary of the injured employee." But the record does not show the amount of such earnings; the claimant was unable to testify thereto in detail, and no schedule of his wages during the period of his employment, or any part thereof, was produced. consequently it was impossible to have regard to such wages. The chairman also states that he had regard to the previous wages "of other employees of the same or most similar class." But the only evidence of wages of other employees was the schedule of wages of one Rebecca La Liberte, submitted by the insurance carrier as a basis of computation of compensation under subparagraph (b), which was rejected for that purpose, as not fulfilling the requirements of that subparagraph. That schedule shows an average weekly wage of $22.84 for the entire year, while an average of that schedule for the last 6 months, beginning with June, shows an average daily wage of $4.724, or an average weekly wage of $27.25 for a year of 300 days. The chairman's finding can be supported upon the evidence only by considering the wage schedule of this fellow employee for 6 months, being thus limited by the period of claimant's employment. The law does not permit the use of the claimant's actual wage schedule for 6 months, under subparagraph (a); nor does it permit the use of a fellow employee's wage schedule for 6 months, under subparagraph (b); in both cases the period for computing the average weekly wage must be substantially one year; we think that it is contrary to the law to base a finding of the average weekly wage of the claimant solely upon the wage schedule of a fellow employee for 6 months; to do so is to sanction the use of a wage schedule of a fellow employee for a shorter period than is permissible in determining the claimant's average weekly wage from a schedule of wages actually earned by him. It follows that the chairman's finding is not supported by legal evidence.

The record, however, contains sufficient evidence to enable the court to award compensation.

The claimant presented no evidence from which his actual wages can be determined; the employer presented the wage schedule of a fellow employee, supported by the testimony of claimant's overseer and the clerk in charge of compensation cases, and contended and now contends that compensation should be determined under subparagraph (b). The chairman overruled that contention, and rejected the schedule presented, by the ruling hereinbefore quoted.

[4] We think that the schedule of the fellow employee met the statutory requirements and could "reasonably and fairly be applied" in determining the claimant's "average weekly wages."

The weaver whose wage schedule was offered as a standard was a woman, one Rebecca La Liberte; she had worked in the same room where

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the claimant was employed for a year or more prior to the accident; she, like claimant, was paid by the piece, and at the same rate of wages; they worked the same number of hours for a day's work, 9¾ hours for 5 days in a week, and 5¼ hours on Saturday, or 54 hours per week; they were both capable of operating 6 looms when work ran full, and were subject to the same contingencies of short work incident to the operation of the mill at the time in question; the woman was of the same earning capacity as the claimant, as disclosed by the comparison of the pay rolls of both for 6 weeks prior to the injury, as made and testified to by the overseer. We think that they must be considered "of the same class."

The wage schedule submitted began with the last week in November, 1918, and ended with the week of November 22, 1919; the total time was 240 working days; during the first 6 months the weekly wage ranged between $7.99, and $18.13, with one week at $23.13; during the last 6 months the weekly wage ranged from $20.23 to $30.86, with 2 weeks at $17.91 and $10.07, respectively; this weekly wage varied with the supply of work necessary to keep the maximum of 6 looms running; for 2 weeks in January and 4 consecutive weeks in February and March the employee did not work.

The question is: Can this employee, whose wage schedule was submitted, be said to have worked "substantially the whole of such immediately preceding year"? The answer must depend upon whether the reduced time, and reduction in the number of looms operated, was occasioned by causes incident and common to the employment, or form causes peculiar to the employee. If the latter class of causes was operative, the wage schedule cannot be applied to determine the claimant's earning capacity.

"The object sought * * * is the ascertainment of the earning capacity of the workman, as shown by his constant employment in the past, in order that the remuneration after shall have relation to the remuneration before the injury." Hight v. Manufacturing Co., 116 Me. 81, 85, 100 Atl. 9, 10 (L. R. A. 1917E, 277).

Computation of the wages actually earned by the employee "during substantially the whole of the year immediately preceding the injury" being impossible, the next most reliable basis of computation is to be used, if available, viz. the wage schedule of a fellow employee of the same class "working substantially the whole of such immediately preceding year." It is clear that, if such substituted wage schedule is reduced in amount by causes incident and common to the employment, the injured employee could not have earned more than he whose schedule is substituted earned. The inquiry is: What were the claimant's average weekly wages, computed by the statutory method, having regard to the known and recognized incidents of the employment, including the element of discontinuance? If the work is discontinuous, that is an element which cannot be overlooked. Littler v. George A. Fuller Co., 223 N. Y. 369, 119 N. E. 554.

"The object of the act, broadly stated, is to compensate a workman for his loss of capacity to earn, which is to be measured by what he can earn in the employment in which he is, under the conditions prevailing therein, before and up to the time of the accident." Anslow v. Cannock Chase Colliery Co. [1909] A. C. 435.

The Legislature has seen fit to establish certain fixed methods for computing "average weekly wages." The result may be said to be an artificial average; but it is the standard established by the act. At the present point in the case we are concerned with the question whether Rebecca La Liberte was an employee "working substantially the whole of such immediately preceding year"; we think she must be so regarded. The relation of employer and employee was not interrupted; the mill

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regularly ran during the whole of the year, and the loss of time and reduction of wages resulted from the suspension of government work following the armistice and the change to the regular product of the mill, temporarily affecting all weavers alike. The testimony on this point is undisputed.

We are of the opinion that upon the evidence presented the average weekly wages should have been computed under subparagraph (b) of paragraph 9 of section 1, giving an average weekly wage of $22.84, and a weekly compensation of $13.71. The decree must be modified accordingly.

[5] In view of the somewhat meager evidence presented before the chairman, we take this occasion to say that, in all cases where compensation under subparagraph (b) or subparagraph (c) may be resorted to, a full wage schedule of the injured employee for the whole period of his employment should be presented; and where a wage schedule of a fellow employee is relied upon, wage schedules of more than one such fellow employee should be produced, if available. Comparison may then be made by the chairman in the presence of the parties and witnesses, and a better understanding of the incidents of the employmet be obtained.

Appeal sustained.

Decree modified, by substituting the sum of $13.71 in place of $15 as the weekly compensation awarded.

McMAHON'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. Nov. 26, 1920.)

128 Northeastern Reporter, 778.

MASTER AND SERVANT — COMPENSATION CLAIM FOR DEATH OF EMPLOYEE IN ELEVATOR SHAFT NOT ESTABLISHED.

It not being disclosed in what manner or from what cause the doors to an elevator shaft, in which the employee for whose death compensation is sought was killed, became open, there is no satisfactory explanation for the location of the elevator at the top of the shaft at the time. What the employee was doing, or the exact cause of the fatality, cannot be proved with certainty, all being matters of conjecture, and injury arising out of and in the course of employment, within the Workmen's Compensation Act, is not established.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Superior Court, Suffolk County.

Proceeding under the Workmen's Compensation Act for compensation for death of Charles McMahon, the employee, brought by Mrs. Anastasia McMahon, his mother and alleged dependent, and opposed by D. L. Page & Co., the employer, and the Liberty Mutual Insurance Company, the insurer. Compensation was awarded by the Industrial Accident Board, the award affirmed by the superior court, and claimant and the insurer appeal. Decree reversed, and decree ordered for the insurer.

John W. Cronin and Frederick A. Carroll, both of Boston, for insurer.

Qua, Howard & Rogers and Stanley E. Qua, all of Lowell, for claimant.

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CARROLL, J. Charles McMahon was killed on the night of September 9, 1918, between 6 and 7 o'clock. At the time of his death he was 15 years of age. The dining room and kitchen of the restaurant, where he was regularly employed as a "bus boy," were on the second floor of the building. In one corner of the kitchen there was a freight elevator. Its shaft extended from the basement to the top of the building, and was guarded by heavy doors, which were supposed to be closed and fastened when the elevator was not at the floor. He had been engaged in cleaning a water cooler situated in a passageway between the dining room and kitchen. At a quarter past 6, when this work was finished, he was seen by the head waiter, and when next seen he was standing in the kitchen near the elevator. The employee who saw him in this position stated that she did not know how long he had been there, that she went from the place where she was working to the sink, about half way across the kitchen, and returned immediately, when an outcry was heard, and the dead body was found at the bottom of the shaft. It was estimated that from one to ten minutes elapsed from the time he was last seen alive until the outcry was heard.

The upper and lower doors of the elevator, guarding the entrance to the shaft, when locked or fastened could be opened only from the inside of the elevator. At times the doors failed to catch as they came together. When this happened the doors could be opened from the kitchen by downward pressure on the lower door, and if so opened, "and it did not open all the way down to the bottom where there was a catch to hold it open, it would close of itself." There was also evidence that the catch holding the door open "might not be released when the elevator went up." The elevator operator testified that he finished his work at 6 o'clock and left the elevator in the basement and the doors on the second floor were closed. No one testified the doors were open, and there was no evidence that they were locked or fastened. When the boy was found, according to the evidence, the elevator was at the top of the shaft and the doors on the second floor were closed. It also appeared that if the elevator "is not stopped right still, it will gradually work up or down, whichever way the power is."

If there is any evidence or if it can be rationally inferred that the employee fell into the elevator well while in the course of his employment either because the doors were open, or he accidentally fell against them and pushed them open, then the finding of the Industrial Accident Board must stand. It was no part of the employee's work to operate the elevator. He had been instructed not to use or "go near it" and if there is no evidence to support the finding of the board or if on the whole evidence and drawing every reasonable inference, it can only be conjectured in what manner and from what cause he met his death, so that the mind is left in suspense and doubt whether he was at the time within the scope of his employment or attempting to use the elevator for purposes of his own, and where one conclusion is as rational as the other, then the cause of his death is a matter of mere speculation and it has not been shown as required by the Workmen's Compensation Act (St. 1911, c. 751, as amended by St. 1912, c. 571), that the injury arose out out of or in the course of his employment, Dube's Case, 226 Mass. 591, 116 N. E. 234; Sanderson's Case, 224 Mass. 558, 113 N. E. 355; Savage's Case, 222 Mass. 205, 110 N. E. 283.

Even if the evidence showing that the doors were closed at 6 o'clock was discredited, there was nothing to show they were open, and unless they were open at the time of the injury the fatality could not have occurred. The boy may have accidentally opened them by falling against them, or he may have intentionally opened them for the purpose of using

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the elevator but what actually happened on the evidence disclosed is entirely a matter of conjecture.

According to the operator's testimony, the elevator was left by him in the basement. After the fatality, it was found at the top of the shaft. If the employees attempted to operate it, the position of the elevator would be accounted for. On the other hand, there was evidence that when the elevator was not fully stopped, it would gradually move in the direction of the power, and if the board could assume that because of this the elevator could gradually move to the top of the shaft, it was still a matter of doubt what caused it to rise. The elevator may have been entirely stopped by the operator. The direction of the power may have been such that the elevator would not ascend, and on all the evidence it could not be reasonably inferred, to the exclusion of other inferences, that the elevator moved from its position at the basement by the mere force of the power, or was started by some one other than the employee himself. Taking all the facts and circumstances shown, and drawing every reasonable inference, it is not disclosed in what manner or from what cause the doors became open, no satisfactory explanation is given for the location of the elevator at the top of the shaft. What the employee was doing at the time or the exact cause of the fatality cannot be proved with any degree of certainty. These are all matters of pure conjecture and the claimant's case is not established. Sanderson's Case, supra; Savage's Case, supra; Dube's Case, supra. The case at bar is clearly distinquishable from Von Ette's Case, 223, Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641. As the claimant cannot recover we have not considered the other questions argued.

Decree reversed.

Decree for the insurer.

SCIOLA'S CASE.

(Supreme Judicial Court of Massachusetts. Berkshire. Oct. 28, 1920.)

128 Northeastern Reporter, 666.

1. MASTER AND SERVANT — FILING PAPERS IN SUPERIOR COURT COMPLIANCE WITH WORKMEN'S COMPENSATION ACT.

Filing in court of the required papers as a part of its records is a compliance with Workmen's Compensation Act, pt. 3, § 11, as amended by St. 1912, c. 571, § 14, and by St. 1917, c. 297, § 7, providing any party may present certified copies of an order of the Industrial Accident Board and papers to the superior court, whereupon the court shall render decree in accordance therewith.

(For other cases, see Master and Servant, Dec. Dig. § 417[4¼].)

2. MASTER AND SERVANT — FILING COPY OF DECISION OF INDUSTRIAL ACCIDENT BOARD IN SUPERIOR COURT WITHIN 10 DAYS NOT JURISDICTIONAL.

Filing of certified copy of decision of Industrial Accident Board in the superior court within 10 days is not a condition to the acquirement of jurisdiction by the court under Workmen's Compensation Act, pt. 3,

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§ 11, as amended by St. 1912, c. 571, § 14, and by St. 1917, c. 297, § 7, but the limitation of time relates only to cases where the parties may desire to appeal generally from the decree of the superior court.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

3. MASTER AND SERVANT—SUPERIOR COURT UNDER DUTY TO ENFORCE AWARD UNDER WORKMEN'S COMPENSATION ACT.

Under Workmen's Compensation Act, pt. 3, § 11, as amended by St. 1912, c. 571, § 14, and by St. 1917, c. 297, § 7, providing there shall be no appeal to the Supreme Judicial Court if the required papers are not presented to the superior court within 10 days of decision of the Industrial Accident Board, it is the duty of the superior court to enforce the award of the board, unless there is legal reason to the contrary.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

4. MASTER AND SERVANT—REQUIREMENT AS TO PRESENTATION OF CERTIFIED COPIES OF ORDER OF INDUSTRIAL ACCIDENT BOARD JURISDICTIONAL.

The requirement of Workmen's Compensation Act, pt. 3, § 11, as amended by St. 1912, c. 571, § 14, and by St. 1917, c. 297, § 7, as to the presentation of certified copies of an order or decision of the Industrial Accident Board to the superior court, is a condition precedent to the jurisdiction of the court.

(For other cases, see Master and Servant, Dec. Dig. § 417[4¼].)

5. MASTER AND SERVANT — DECREE OF SUPERIOR COURT WITHOUT JURISDICTION NOT APPEALABLE.

Where decree of the superior court, reciting that injury to an employee was due to the serious and willful misconduct of the employer, and ordering the payment of double damages under the Workmen's Compensation Act, was invalid and of no effect, because the court was without jurisdiction, no appeal could be taken therefrom to the Supreme Judicial Court.

(For other cases, see Master and Servant, Dec. Dig. § 418[1].)

6. MASTER AND SERVANT—REVIEWING COURT NOT BOUND TO GIVE EFFECT TO DECREE ENTERED WITHOUT JURISDICTION IN COMPENSATION CASE.

The Supreme Judicial Court is not bound to give any effect to a decree of the superior court in a workmen's compensation case entered wholly without jurisdiction.

(For other cases, see Master and Servant, Dec. Dig. § 418[1].)

7. MASTER AND SERVANT—COMPENSATION ACT DOES NOT AUTHORIZE REVIEW OF INDUSTRIAL BOARD'S FINDINGS OF FACT.

Under the Workmen's Compensation Act, as amended, no authority existed in the superior court to review or disturb the findings of fact made by the Industrial Accident Board, if they were founded on warrantable evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

8. MASTER AND SERVANT — ERROR AS TO EVIDENCE IN WORKMEN'S COMPENSATION CASE NOT GROUND FOR REVERSAL.

Error in the admission or exclusion of evidence by the Industrial Accident Board is not ground for reversal of its award, unless necessary

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to protect substantial rights; a like result following where there has been failure to offer evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[8].)

10. MASTER AND SERVANT—INDUSTRIAL ACCIDENT BOARD COULD TAKE JUDICIAL NOTICE OF RULES OF STATE BOARD OF LABOR.

The Industrial Accident Board, hearing an injured servant's proceedings for compensation, could take judicial notice of rules for the prevention of accidents in industry prescribed by the State Board of Labor and Industries, pursuant to St. 1913, c. 813, as amended by St. 1916, c. 308.

(For other cases, see Master and Servant, Dec. Dig. § 415.)

11. MASTER AND SERVANT — INDUSTRIAL BOARD SHOULD NOT BE ORDERED TO RECONSIDER DECISION ON QUESTION OF FACT.

The Industrial Accident Board, having already considered safety rules of the State Board of Labor and Industry should not have been ordered by the superior court to reconsider decision, in so far as it was one of fact, that the injury sustained by the employee was not due to serious and willful misconduct of the employer.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

12. MASTER AND SERVANT—CLAIMANT NOT ENTITLED TO DOUBLE DAMAGES FOR EMPLOYER'S MISCONDUCT.

Injured employee *held* not shown to be entitled to double damages under the Workmen's Compensation Act, on the ground that the employer had been guilty of serious and willful misconduct, causing the injury, through its violatiin of rules of the State Board of Labor and Industries.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

13. MASTER AND SERVANT—DECREE OF RECOMMITTAL OF WORKMEN'S COMPENSATION CASE TO INDUSTRIAL ACCIDENT BOARD REVIEWABLE.

While ordinarily the recommittal of a case to the Industrial Accident Board for further hearing is within the discretion of the sitting judge of the superior court, where it appears that the action was taken solely to direct a reconsideration of correct rulings of law or findings of fact based on due consideration of all questions of law or evidence, the action of the judge may be reviewed.

(For other cases, see Master and Servant, Dec. Dig. § 418[5].)

14. MASTER AND SERVANT — APPEAL LIES FROM INTERLOCUTORY DECREE OF RECOMMITTAL.

Where the final decree contemplated by the superior court's decree of recommittal of a workmen's compensation case to the Industrial Accident Board is one from which an appeal will lie in equity, in the absence of contrary provisions an appeal lies to the Supreme Judicial Court from both the interlocutory and final decrees.

(For other cases, see Master and Servant, Dec. Dig. § 418[2].)

15. MASTER AND SERVANT — INTERLOCUTORY DECREE IN COMPENSATION CASE REVIEWABLE.

Where statute, as the Workmen's Compensation Act, provides there can be no appeal from a final decree, to prevent error there may be an appeal from an interlocutory decree, at least where the appeal follows up questions of law not involving final disposition of the case; the rule that

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appeal from interlocutory decree will not be considered before entry of final decree not precluding consideration of such an appeal, where none lies from final decree.

(For other cases, see Master and Servant, Dec. Dig. § 418[2].)

Appeal from Superior Court, Berkshire County.

Proceeding for compensation under the Workmen's Compensation Act by Frederick Sciola, the employee, opposed by the W. N. Tillotson Manufacturing Company, the employer, and the Employers' Liability Assurance Corporation, Limited, the insurer. Compensation was awarded by the Industrial Accident Board, the cause, after intermediate decrees, was recommitted to the Board by the superior court, and from such decree the employer appeals. Decree of recommittal reversed.

All the material evidence is reported herewith:

Frederick Sciola, the claimant, testified: That he is 18 years old. He was employed by the W. E. Tillotson Manufacturing Company in May, 1918. He had worked there for over a year and a half. Mr. Kelly was his boss. He never worked in a mill of this kind before. He had no experience. He was working on the first breaker of a carding machine when he was injured. There was no safety guard on this machine. At the time he was injured he was cleaning the machine, which was supposed to be cleaned every day. As he went over one part the chain was tight over the shaft, and as he drew his hand over it his finger was cut off. The machine was in motion. He used nothing other than his hand with which to clean the machine. When he was first employed there he was told to clean the machine with his hand. His instructions were to clean the machine while in motion and to clean it with his hand. Previous to his injury he used a broom with which to clean the machine and was told to put it down. He was earning $14.85 a week at the time of his injury. Besides working in the mill, he worked for Mr. Papas in a bootblack parlor, earning $10 a week (admitted over Mr. Lavelle's objection, based on the Gagnon Case), so at the time of his injury his total wages were $24.85. Immediately after being injured he was taken to the hospital, where the first finger of the right hand was dressed and the first joint of the second finger of the same hand was amputated. He remained at the hospital from 4:30 p. m. Friday evening until about 2:30 p. m. Sunday. The doctor discharged him when the index finger nail had not fallen off, and it caused him pain if he touched anything. He told the doctor the amputated finger was not ready. Around August 12th or 13th he was discharged by the doctor. He took the letter to Tillotson Manufacturing Company and then remained out of work for 2 weeks after that. He went to work for Eaton, Crane & Pike on August 27th. He suffered pain and was supposed to wear a cover over both fingers. When he first went to work for the Tillotson Manufacturing Company, he was employed downstairs. Bill Marion was second boss there. Bill Marion is the person who told him not to stop the machine when it was in motion. Pat Carroll told him not to use the broom to clean the machine.

Cross-examination: The first week he worked for Eaton, Crane & Pike he earned $14, and the next week was raised to $15.30, and he has been receiving $15.30 every week since. His work is to fill the tables, pile up the paper for the counters, and empty out the boxes. He still works as a bootblack on Saturdays and Sundays, earning $5. The bootblack parlor has nothing to do with the W. E. Tillotson Manufacturing Company. The W. E. Tillotson Manufacturing Company has no control or management over the bootblack parlor. When the doctor gave him the letter, he told him to take it to the main office of the Tillotson Company, and told him also that he (witness) was supposed to go to work. He

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told the doctor that the finger was not ready to work with, as it was still numb. Mr. Carroll was his foreman. Mr. Carroll, or any of the other gentlemen, never told him they wanted him to be injured on that machine. He never heard them tell any one else they wanted him to be injured on that machine. They did not want him to be injured.

Joseph Mele, called by the employee, testified: That he lives in Pittsfield and has been employed by the W. E. Tillotson Manufacturing Company off and on for four years. All the time he was employed there he worked in the card room. He knows the machine on which Sciola was injured. He has worked on that machine before the accident, and since the accident. It had no safety guard. (Admitted over Mr. Lavelle's objection.) When he first went to work there he knew nothing about those machines. His brother instructed him in the use of the machine. Mr. McCarthy was boss there at that time. Mr. McCarthy told him not to get hurt, and when he went over the machine with the broom on the first and second breakers to look out for his hand. Mr. McCarthy said to use the broom on the first and second breakers. He was to use the broom to clean the machine. He told him to cut the handle off of a long broom. After Mr. McCarthy got through, Pat Carroll was his boss. When Pat Carroll was his boss, he used the broom on the finishers. Mr. Carroll told him not to clean the finishers with a broom. He said "to wipe down with my hand. I used the broom but he never said anything." He is not working at the Tillotson Company at the present time. He has worked on carding machines at the Pontoosuc mill. Some of the carding machines at the Pontoosuc mill are as close together as those at the Tillotson mill, and some of them are not as close. The machines at the Pontoosuc mill have safety guards. At the Pontoosuc mill they use brooms with which to clean the machines. He has been working there for 2 months, and he sees everybody using a broom, so he uses one. The company cuts down the long-handle brooms, making short brooms, which brooms are hung on the wall near the machine. He has worked on these machines four years. All the machines are dangerous, if you put your hand near them. They are dangerous with safety guards. You have to be careful. The machine is not as dangerous with the fender guard on as with it off.

Cross-examination: He did not see the accident. He did not see how Sciola got hurt. On the side of the machine is a sprocket wheel and chain, which goes around. Sometimes that chain might come off, and if you put the chain back on while the machine is in motion you are liable to get your hand caught. He did not see Sciola put the chain on. He never heard Mr. Carroll or Mr. Kelly say they wanted to see this boy injured. He never heard Mr. Carroll or Mr. Kelly say to anybody that worked there, or to the boy himself, that they wanted him to be injured; and that they wanted to see his finger come off.

Joseph Amuso, called by the employee, testified: That he lives in Pittsfield, and was at one time employed at the Tillotson Company. He worked there at the same time Sciola was employed by the Tillotson Company. Sciola worked downstairs, and he (the witness) worked upstairs. He knows the machine on which this employee was injured. It was No. 5 machine. He has worked on that machine. He worked for this company 6 or 7 months. Mr. Kelly was his boss. He was told to clean the machine when in motion, He took a broom to clean the machine with, and Mr. Carroll told him to put the broom back and use his hand. There were no safety guards on the machines upstairs. In July, 1917, he (the witness) was injured while cleaning a machine with his hand. Pat Carroll told him two or three times not to use the broom.

Cross-examination: He never heard Mr. Kelly or Mr. Carroll tell Frederick or anybody else that they wanted Frederick to be injured. He

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lost his finger at about 9 o'clock Saturday morning, July, 1917. He started in early that morning to clean the machine, so as to get through work in time. The boss never told him not to clean the machine while in motion. They cleaned the machines all the time when they were running. He is at present working at Eaton, Crane & Pike plant.

James Sciola, called by the employee, testified: That he is a brother of the claimant. He worked at the Tillotson Company 7 or 8 months. He worked on the carding machines downstairs. Bill Marion and Mr. Kelly were his bosses. He is familiar with the kind of carding machine on which his brother was injured. Marion and Kelly are the same men referred to before at this hearing. He cleaned the machine with his hands. That was the way Kelly instructed him to clean them. Only the finishers on the Tillotson machines have guards. The breakers have no guards. He worked in woolen mills for practically 3 years. He worked in the Taconic mill under Mr. Morrison. The breakers on the machines at the Taconic mill were equipped with safety devices. The carding machines at the Taconic mill are practically the same as those at the Tillotson, except the machines at Tillotson's have three breakers, and those at the Taconic mill have only two. The breakers on both machines are the same. (Admitted over Mr. Lavelle's objection.) The machinery on the gears of the breakers of both machines are just the same. The process of cleaning the breakers was just the same at the Taconic mill at it was at the Tillotson mill. The instruction he received at the Taconic mill was to use the short-handled broom in cleaning the machine. There was a broom hanging at the side of the machine. At the Tillotson mill the instructions were to clean the machines with your hand. He never attempted to use a broom in cleaning the machine at the Tillotson mill. He lived up to his instructions. Mr. Marion, who was second hand at that time, gave him the instructions. The breakers without guards on them are dangerous, and furthermore it is dangerous, as the machines at the Tillotson mill are set closer together than in other places. In cleaning the machines you have to go from one side to the other, and the gears and belting are revolving and not guarded.

Cross-examination: If he were running the factory, he would put safety guards on every gear running on chain and on every conjunction gear. He has never been injured. You are likely to get injured if you put a chain on a sprocket wheel when in motion. He did not see this accident. He worked under Mr. Carroll. He never heard Mr. Carroll or Mr. Kelly tell anybody that they wanted to see Frederick Sciola injured. Mr. Carroll or Mr. Kelly never told him (the witness) that they wanted to see Frederick Sciola injured. The carding machine downstairs, where his brother worked first, is run by gears, and the carding machine on which he worked upstairs was run by gears also. When he worked at the Taconic mill he cleaned the machine while in motion. They were supposed to clean them while in motion, but had a broom to clean it with. He was supposed to clean the machine at the Tillotson mill while in motion. He was never told to clean the machines while they were stopped. He never saw any broom at the Tillotson mill, except the broom which the sweeper used in cleaning the floor.

Joseph Argryropoules, called by the employee, testified: That he is a bootblack. He owns a place known as the Papas place. He knows Frederick Sciola. He was working for him on May 24th. He was working for him (the witness) at the time he lost his finger. Sciola worked for him 2 hours every night, and Saturday until 11 p. m. and Sunday morning until 11 o'clock. He paid him $10 a week.

Cross-examination: He owns the bootblack store with Mr. Papas. The W. E. Tillotson Manufacturing Company have nothing to do with that store.

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Thomas J. Kelly, called by the insurer, testified: That he is the superintendent of the W. E. Tillotson Manufacturing Company. He has worked for the Tillotson Company about 3 years. The total amount earned by Frederick Sciola, during the 52 weeks prior to May 24, was $614.-96, an average of $11.83 a week. (Witness had pay roll before him while testifying.) The week ending February 9, 1918, the employee did not receive any money. As he remembers, the mill was running. He does not know why Sciola did not work. He does not know whether the mill was shut down at any time in February. He investigated the accident, and made out a report to the Industrial Accident Board from information he got in the card room. He was not a witness to the accident. Under section D, No. 3, in the report, in answer to the question, "Describe fully how injury occurred," he reported, "He was trying to run chain on sprocket wheel, and got his fingers caught between chain and wheel." (Admitted over Mr. Baker's objection.) The sprocket wheel is as large as the distance between the pulleys—about a foot. There is a difference between the operation of the carding machines in this particular room and the carding machines in other parts of the building. This machine was driven by sprocket wheel and chain, and in the other part of the building the machines were driven by gear. The building is subject to state inspection, and the rules laid down by the state inspector have been carried out in every way. The state inspector has never asked that the sprocket wheels of the machine on which the boy was injured be covered. He knows Inspector Lawrence E. Bradbury, who inspected the factory about a year ago. Mr. Bradbury never to his knowledge ever suggested, advised, or recommended that the sprockets be covered. He has accompanied Mr. Bradbury on his visits around the factory, and he has never said anything about covering the sprocket wheels of this special machine. There is not another machine just like this one in the factory. He has been the superintendent for a year, previous to which time he was overseer of the carding. During the year he has been superintendent he has carried out all the instructions given by the inspector. He made out a supplementary report to the Industrial Accident Board, stating that the doctors reported that the employee could return to work August 1st. (Admitted over Mr. Baker's objection.) Mr. Carroll is foreman under him. They never intended that any one should be injured. (Admitted over Mr. Baker's objection.) The men usually took a piece of waste, and wiped the dirt from the side of the machine while the machines were in motion. If the machines were stopped every time they were wiped off, it would reduce the production about three-quarters. If the dirt were allowed to remain on the machine, it would injure the work by dropping into the machine and causing bunches. There is danger in wiping off the rollers if a person is not careful. If one is careful, there is no danger whatever.

Cross-examination: He has been superintendent about a year. He was not superintendent at the time the Amuso boy was injured, but was on his vacation at the time. He knew the kind of a machine he was working on at the time of his injury. He understood it was while he was cleaning a finisher while the machine was in motion that he lost his finger. No guards have been put on this machine, other than what were on at the time of the injury. Since the Amuso boy's injury a guard has been put on a finisher of the machine on which a boy lost the tip of his finger. That is the only guard he remembers being installed since he has been employed there. During his three years with the company he cannot recall any guard being put on these carding machines. The machine Sicola was working on at the time he was injured was the only machine of that type in the plant. That has a sprocket wheel, and the other machines have gears; that is about the

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only difference. There is some difference in the arrangement of the rolls, but they perform the same function. He would not call a sprocket chain driven machine more dangerous than a machine driven by gear. They are both modern, but made by different people. From the standpoint of safety he would say the one with the gear was the safest. He would not say the machine on which the boy was working when injured was the most dangerous type of carding machine; 16 and 17 year old boys run these machines. He does not call them dangerous machines. The sprockets revolve from 30 to 40 times a minute, the main cylinder on a breaker about 90 to 100 times a minute, and the fancy on the breaker about 800 times a minute. The gears, belts, and shafting are all moving at the same time, but in different directions. If you are not careless, it is not dangerous. A boy 15 years old could operate the machine with the same degree of safety as a man 40 or 50 years old. A boy working there a year could operate the machine with the same degree of safety as a man who had worked there 10 years. There is no safety guard on the machine on which Sciola was injured. He is not familiar with the machinery at the Pontoosuc and Taconic mills; does not know whether their machinery is guarded or not. He does not know exact date when he last saw Inspector Bradbury, but it was about a year ago. He cannot remember when he saw him before that. As far as he knows he saw Mr. Bradbury on one of his inspections. The machines are not stopped when being cleaned, except on Saturdays He does not know as they ever told the employees not to stop them. He knew they were cleaning the machines while in motion. It was done with his knowledge. Every new employee was always instructed to be careful and not get caught. In wiping off a machine, if a person is not looking and not watching what he is doing, he is liable to get caught. He (the witness) always wiped the machines with his hands when he was a boy. He cannot say that it is dangerous. He never got caught. He has been in the business since he was 13 years old. He should say that it would be just as dangerous for a man cleaning a machine with a broom as cleaning it with his hand. He never considered the machine dangerous, or he would have provided some sort of a guard for it. He never saw a guard on that type of machine.

Redirect: He is 42 years old, and his experience dates back to when he was 13 years old. This employee started working for the Tillotson mill on December 15, 1916.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason, of Boston, of counsel, for employer.

Robert M. Stevens, of Pittsfield, for employee.

JENNEY, J. Frederick Sciola, while in the employ of the W. E. Tillotson Manufacturing company, on May 24, 1918, received an injury in the course of his employment. It is agreed that he was entittled to compensation under the provisions of the Workmen's Compensation Act. On October 31, 1918, a member of the Industrial Accident Board after due hearing so found. There was no finding that the injury was caused by the serious and willful misconduct of the employer. A claim of review having been filed on November 23, 1918, the Industrial Accident Board affirmed and adopted the decision of the single member. The only issuable question, as clearly appears from that decision, was whether the injury had been caused by serious and willful misconduct. On November 30, 1918, the employee filed in the superior court uncertified copies of the decision of the board and all papers in connection therewith, and on September 3, 1919, a decree was entered in that court reciting that the injury was due to the serious and willful misconduct of the

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employer and ordering the payment of double damages. It did not appear whether the filing of uncertified copies was intentional or due to inadvertence or mistake. On September 16, 1919, the employer and the insurer appealed from said decree, and on September 19, 1919, they moved that it be vacated for the following reasons: (1.) The evidence presented did not warrant a decree that the injury received was due to serious and willful misconduct for which the employer was responsible; (2.) neither the insurer nor the employer had sufficient notice of the hearing on the motion for the issuance of said decree and no opportunity to be present at the hearing thereon; and (3) no certified copy of the decision of the Industrial Accident Board was filed in the superior court as required by law.

On October 2, 1919, a decree was entered vacating the decree of September 3 for the reason stated, that "no certified copy of the decision of the single member of the Industrial Accident Board or no certified copy of the decision of the Industrial Accident Board was presented to the court as required by law." No appeal was taken from this decree and all parties have since proceeded on the basis that the decree ordering the payment of compensation was no longer in force.

On October 1, 1919, duly certified copies of the proceedings before the Industrial Accident Board and its decision were entered in the superior court, but were not so entered under any order of the court permitting them to be filed nunc pro tunc or in amendment of the papers previously presented, assuming that such order could properly have been made. See Perkins v. Perkins, 225 Mass. 392, 114 N. E. 713.

[1-3.] TheWorkmen's Compensation Act. (St. 1911, c. 751, part III, §11, as amended by St. 1912, c. 571, § 14, and by St. 1917, c. 297, § 7) provides that "any party in interest may present certified copies of an order or decision" of the Industrial Accident Board and "all papers in connection therewith, to the superior court," whereupon "said court shall render a decree in accordance therewith." No appeal is permitted upon questions of fact or from a decree "based upon an order or decision of the board which has not been presented to the court within ten days after the notice of the filing thereof by the board." The filling in court of the required papers as a part of its records is a compliance with the statute. McPhee's Case 222 Mass. 1, 109 N. E. 633. It is clear that the filing of the certified copy of the decision within 10 days is not a condition to the acquirement of jurisdiction, but that the limitation of time relates only to cases where the parties may desire to appeal generally from the decree of the superior court. In many instances the required papers are never filed in the superior court and consequently no decree entered in that tribunal, because the decision of the Industrial Accident Board is generally complied with without any decree of an appellate tribunal.. Howevr, such a necessity may arise, even after a considerable time has elapsed, and there is no limitation as to the time of presentation, but merely the express provision that there shall be no appeal if the required papers are not presented within 10 days. In such case it is the duty of the superior court to enforce the award of the board unless there is legal reason to the contrary. Young v. Duncan, 218 Mass. 346, 106 N. E. 1; Hunnewell's Case 220 Mass. 351, 353, 107 N. E. 934; Browne Case, 228 Mass. 31, 116 N. E. 897; Dempsey's Case, 230 Mass. 583, 587, 120 N. E. 75. Although no appeal lies, "in cases of errors of law apparent on the face of the record, they may be corrected by certiorari, or perhaps by some other appropriate remedy." Young v. Duncan, supra, 218 Mass. at page 354, 106 N. E. at page 5; Swan v. Justices of the Superior Court, 222 Mass. 542, 111 N. E. 386.

[4.] The statutory requirement as to the presentation of certified copies is a condition precedent to the jurisdiction of the superior court.

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As was said in Commonwealth v. Dunham, 22 Pick. 11, 17, the right of appeal is conditional and depends "upon a compliance with the conditions requisite to a due administration of the law, and necessary to prevent disorder and an invasion of justice." Where such conditions have not been complied with, the "claim of an appeal * * * [is] inoperative and void." The clear words of the statute required the submission of copies which bear the requisite evidence of authenticity. Tibbetts v. Handy, 145 Mass. 537, 14 N. E. 645; McPhee's case, supra; Humphery's Case, 226 Mass. 143, 115 N. E. 253. It has been held that full compliance with the conditions of the statute is an "essential pre-requisite to the jurisdiction" of the Industrial Accident Board and that "its authority and the statutory limitation upon the exercise of it cannot be enlarged, diminished or destroyed by express consent or waved by acts of estopple." Levangie's Case 228 Mass. 213, 217, 117 N. E. 200, 201. Like limitations prevail upon the jurisdiction of the superior court on appeal. Sterling's Case, 233 Mass. 485, 124 N. E. 286. See also Martin's Case, 231 Mass. 402, 121 N. E. 152; Littlejohn v. Littlejohn, 128 N. E. 425.

[5., 6.] It follows that the superior court was without jurisdiction to enter the decree of September 3, and that said decree was of no effect. Because of its invalidity, no appeal could be taken therefrom. While it was decided in Sterling's Case, supra, that petitions and motions to vacate a void decree were denied rightly for procedural reasons, the court is not bound to give any effect to a decree entered wholly without jurisdiction. Fourth National Bank v. Mead, 214 Mass. 549, 102 N. E. 69; Eaton v. Eaton, 233 Mass. 351, 364, 124 N. E. 37, 5 A. L. R. 1246.

On April 15, 1920, an interlocutory decree was entered remanding the case to the Industrial Accident Board for further hearing, in order that the "General Safety Rules and Regulations and Machinery Standards" established by the State Board of Labor and Industries, hereinafter referred to as the rules, might be received in evidence and considered upon the issue of whether the injury sustained by the employee was due to serious and willful misconduct on the part of the subscriber.

The employer's appeal from this decree is now presented for decision. The questions to be decided are: (1) Whether the trial judge had the right to make this order; and (2) whether the appeal is properly before this court.

[7., 8.] When the proper papers had been entered, although more than 10 days from the filing of the decision of the Industrial Accident Board had elapsed, the case was properly before the superior court for such action as the statute permitted. No authority, however, existed to review or to disturb the findings of facts made by the board if they were founded on warrantable evidence. Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915 A, 737. Gorski's Case, 227 Mass. 456, 116 N. E. 811, Fitzgibbon's Case, 230 Mass. 473, 119 N. E. 1020; Moran's Case, 230 Mass. 500, 119 N. E. 956; Mallory's Case, 231 Mass. 225, 120 N. E. 591; McCarthy's Case, 231 Mass. 259, 120 N. E. 852. Error in the admission or exclusion of evidence is not ground for reversal unless necessary to protect substantial rights. Beckles' Case, 230 Mass. 272, 119 N. E. 653: A like result must follow where there has been failure to offer evidence. See Fierro's Case, 223 Mass. 378, 382, 111 N. E. 957; Gorski's Case, supra.

[9.] By St. 1913, c. 813, as amended by St. 1916, c. 308, the State Board of Labor and Industries was instructed to investigate employments to determine what suitable safety devices and other reasonable means and requirements for the prevention of accidents should be adopted, and to make "reasonable rules, regulations and orders for the prevention of accidents." The statute further provides that a violation of "any reasonable rule, regulation, order or requirement" so made shall be pun-

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ished by a fine of not more than $100 for each offense. No question can be made as to the right of the Legislature to delegate its powers by authorizing the making of such rules. Commonwealth v. Slocum, 230 Mass. 180, 190, 119 N. E. 687, and cases there collected.

[10.-12.] The Industrial Accident Board could take judicial notice of these rules. Carroll's Case, 225 Mass. 203, 114 N. E. 285; Walsh's Case, 227 Mass. 341, 116 N. E. 496, 6 A. L. R. 567; Caha v. United States, 150 U. S. 211, 221, 14 Sup. Ct. 513, 38 L. Ed. 415; Cosmos Co. v. Gray Eagle Co., 190 U. S. 301, 23 Sup. Ct. 692, 47 L. Ed. 1064; Low v. Hanson, 72 Me. 104; State v. Railroad, 141 N. C. 846, 54 S. E. 294; Smith v. Shakopee, 103 Fed. 240. 44 C. C. A. 1; Bruce v. United States, 202 Fed. 98, 120 C. C. A. 370. It appears that their effect was actually considered by the board, for at the request of his employee, it ruled that the employer was subject to the provisions of the statute under which they were made and to the rules themselves, and refused to rule as requested that, as matter of law, the failure to install safety devices as described in division "J" therof constituted serious and willful misconduct as defined by the statute, if such omission resulted in injury. Whether an injury was caused by serious and willful misconduct frequently is a question of fact. The board, having already considered these rules, ought not to have been ordered to reconsider their decision so far as it was one of fact. If the action of the board be regarded as a ruling of law, it was correct. Upon the evidence the employee was not entitled to double damages within the rule laid down in Burns' Case. 218 Mass. 8 105 N. E. 601 Ann. Cas. 1916 A, 787; Riley's Case, 227 Mass 55, 116 N. E. 259; and Beckles's Case, supra; and the rulings of the board were correct.

It has been held that, where justice requires it a broad power exists to recommit to the Industrial Accident Board. Recommitttal has been ordered for the purpose of correction and amplification of the record where it was incomplete (Doherty's Case. 222 Mass. 98. 109 N. E. 887; Brown's Case, supra); for the introduction of further evidence when it did not appear that any evidence had been offered on a material question and where no finding had been made with reference to that question (Fierro's Case, supra; Carroll's Case, supra); and where it appeared that the case had not been fully heard on an important issue (Comerford's Case, 224 Mass. 571, 113 N. E. 460).

[13.] While ordinarily the recommittal of a case to the Industrial Accident Board for further hearing is within the discretion of the sitting judge, where it appears that the action was taken solely for the purpose of directing a reconsideration of correct rulings of law or of findings of fact based on due consideration of all questions of law or evidence, the action of the judge may be reviewed.

[14., 15.] It is claimed, however, that the decree of recommittal should not now be considered, because it relates solely to an interlocutory matter, which should not be decided before the entry of a final decree. Keohane's Case, 232 Mass. 487, 122 N. E. 573; Gould's Case, 215 Mass. 480, 483, 102 N. E. 693, Ann. Cas. 1914D, 372. But as was said in Keohane's Case, the final decree contemplated is one from which an appeal will lie. The practice follows that in equity, and unless otherwise provided, an appeal lies from both interlocutory and final decrees. Gould's Case, supra; Keohane's Case, supra; R. L. c. 159, §§ 19, 25. St. 1911, c. 284, § 1. Where the statute provides that there can be no appeal from a final decree, we are of opinion that to prevent error there may be an appeal from an interlocutory decree, at least where the appeal brings up questions of law not involving the final disposition of the case. The rule that an appeal from an interlocutory decree will not be considered

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before the entry of a final decree does not preclude the consideration of such an appeal where no appeal lies from a final decree. The decree of recommittal must be reversed.

So ordered.

TRAVELERS' INS. CO. v. HEALY PLUMBING & HEATING CO. (No. 21833.)

(Supreme Court of Minnesota. Oct. 29, 1920)

179 Northwestern Reporter 686

(Syllabus by the Court.)

MASTER AND SERVANT—EVIDENCE HELD NOT TO SHOW NEGLIGENCE OF THIRD PERSON SUED BY INSURER OF EMPLOYER LIABLE UNDER COMPENSATION ACT.

Evidence examined, and held not sufficient to sustain a finding that the accident resulted from the negligence of the defendant.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

Appeal from District Court, Ramsey County; James C. Michael, Judge.

Action by Travelers' Insurance Company against the Healy Plumbing & Heating Company. Directed verdict for defendant, and, from an order denying a new trial, plaintiff appeals. Order affirmed.

Dille, Hoke, Krause & Faegre, of Minneapolis, for appellant.

K. A. Campbell and B. Burness, both of Minneapolis, for respondent.

TAYLOR, C. On November 28, 1917, Edward Polta fell from a ladder in the building then in course of construction for the St. Paul Atheletic Club, and died from his injuries on the following morning. He was in the employ of the Electric Construction Company, which was installing the electric wires in this building. His widow made a claim for compensation under the Workmen's Compensation Law (Gen. St. 1913, §§ 8195-8230). Her claim was conceded and allowed. Plaintiff, who had insured the construction company against liability for injuries to its employees, assumed the obligation to pay this compensation, and then brought the present suit to recover from the defendant, alleging that the accident was caused by the negligence of one of the employees of the defendant. When the plaintiff rested, the defendant offered no evidence, but also rested and moved for a directed verdict. The court granted the motion on the ground that the cause of the accident had not been shown, but rested wholly in conjecture, and the evidence would not sustain a finding of negligence on the part of the defendant or its employes. Plaintiff appealed from an order denying a new trial. The only question presented is whether the evidence made a case for the jury.

We have carefully examined all the evidence, and are satisfied that the conclusion reached by the learned trial court is correct. The building in which the accident happened is large and twelve stories in height. At the time of the accident, the main stairway had not been constructed, and a shaft or opening for this stairway extended from the second floor to the tenth floor. To enable the workmen to pass from one floor to another, planks were laid across this shaft at each floor on which

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ladders were placed extending to the floor above. On the day of the accident, the deceased and two other employees of the construction company— the witnesses Hodum and Otte—were at work on the ninth floor. At quitting time they started to descend by means of the ladders— Hodum first, Polta second, and Otte third. In this order they descended from the ninth to the eighth floor, from the eighth to the seventh, and started from the seventh to the sixth. When Polta was about midway of the ladder extending from the seventh to the sixth floor, he fell on the sixth floor. At the time he fell Otte was on the top of the ladder and Hodum had just stepped away from the foot of it. Otte says that some object fell past him and struck Polta. He took it to be a pipe knuckle or piece of pipe, but was not certain what it was. Hodum did not see anything fall or strike Polta. No other witness saw anything fall or strike Polta. The workmen were not at the building on the next day as it was Thanksgiving Day, but Louis Siring, foreman for the construction company, went there to look for the object that had struck Polta. He saw nothing on the sixth floor which he thought might have fallen but found a piece of concrete with a square edge or corner lying 4 to 5 feet from the stairway shaft on the fifth floor. Plaintiff's claim is based on the theory that an employee of the defendant, named Gallagher, who was at work on the tenth floor caused this piece of concrete to drop from that floor, and that it struck Polta in its descent. The various floors of the building were constructed of concrete and tile. Numerous small openings were left in each floor to accommodate the large number of pipes and conduits which were to be placed in the building Before pouring the concrete for the floor a rectangular wooden form was placed in these openings and filled with sand to keep the concrete from flowing into them. The concrete, however, had in fact overflowed into many of these forms where it had hardened, and from which it had to be removed before the pipes and conduits could be installed. A number of subcontractors had men at work in all parts of the building on the day of the accident, and it is undisputed that tools, pieces of pipe, pieces of timber, pieces of tile and concrete, and other articles were scattered throughout the building on all the floors. The defendant had a subcontract to install the plumbing including the drainpipes, and shortly before quitting time on the day of the accident its employee, Gallagher, had cut out and removed a quantity of concrete which had overflowed into an opening on the tenth floor through which a drainpipe was to pass. Siring took the piece of concrete, which he found on the fifth floor, to the tenth floor and found that it would fit perfectly into the wooden form from which Gallagher had removed the concrete. He frankly admits however, that it would have fitted equally well into any of the other numerous forms from which concrete had been removed, and would not undertake to say where it came from, as it might have come from an opening in the sixth floor or in any of the floors above that. He states, however, that there was a mark upon it corresponding to a defect in one of the boards of the form in the tenth floor to which he fitted it, and that there were particles of fabric upon it which might have come from a pair of overalls which were hanging in this form at the time he made his examination. Gallagher testified that he removed the concrete from this opening, and placed the pieces which he removed on the tenth floor, and that none of them fell to the floors below. No witness testified that anything fell through his opening or from its vicinity at any time. Furthermore, while there were several openings immediately adjacent to the stairway shaft, this opening was 10 or 12 feet from the stairway shaft and anything falling through it would strike on the ninth floor at least 10 feet from the shaft unless intercepted or deflected in some manner. Gallagher also testified that he

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compeleted the removal of the concrete and left the vicinity of the opening at least 15 minutes before quitting time, and by direction of his foreman was engaged in picking up tools at the time of the accident. In this he is corrobrated by the foreman, but is partially contradicted by another witness who states that about the time Gallagher began cutting out the concrete he, the witness, started for another part of the building to procure a stepladder and that the accident happened while he was after the stepladder. Plaintiff lays considerable stress upon the testimony of two witnesses, that, when Polta was being removed from the building and those gathered around him were talking about what had struck him, defendant's foreman, McGlynn, said it was a chunk of concrete. Both these witnesses state, however, that McGlynn did not say that he had seen the accident, but one of them states that he said something aobut a piece of concrete rolling over the edge of the shaft, but that he, the witness, did not catch the remainder of the remark owing to the noise and excitement. McGlynn denied making these statements, and testified that he knew nothing of the accident until he heard the outcry at which time he was on the seventh or eighth floor and 30 or 40 feet from the shaft. If McGlynn made the remarks attritbuted to him. he was evidently not stating anything of which he had knowledge, but merely expressing his opinion in common with others in the crowd. It is the testimony to which we have referred upon which plaintiff relies to fasten liability on the defendant. The accident happened at quitting time when employee's of different subcontracts were leaving from all floors of the building. Pieces of concrete and of other material were scattered about on all these floors. Assuming that Polta was struck by a piece of concrete, and this is conjectural only, there is nothing from which it may legitmately be inferred that Gallagher, rather than some other workman, was the one who dislodged it and caused it to fall.

Order affirmed.

WINSLOW v. WELLINGTON. (No. 1665.)

(Supreme Court of New Hampshire. Hillsborough. Nov. 3, 1920.)

111 Atlantic Reporter 631

1. MASTER AND SERVANT—BUILDER SUBJECT TO CONTROL AS TO DETAILS OF WORK A SERVANT.

One constructing a house, subject to the owner's control in respect to the details of work. is a servant, and not an independent contractor.

(For other cases, see Master and Servant, Dec. Dig. § 318[1].)

Transferred from Superior Court, Hillsborough County; Marble, Judge.

Action by Worcester L. Winslow against J. Frank Wellington. Transferred on defendant's exceptions to the denial of his motion for a directed verdict and to the charge. Exceptions overruled.

The plaintiff, who was an employee of John W. Flannigan, was injured by the collapse of the staging on which he stood to plaster one of the halls in the defendant's house. The defendant testified that he made a contract with Frank Smith by which Smith was to purchase the materials, hire the men, and build the house in accordance with the plans and specifications furnished by his architect, that he paid Smith what

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the materials and labor cost, $4 a day for his services, and a small commission on some of the materials and one the men he employed, and that he retained no control over the details of the work.

The evidence tended to prove that the defendant purchased the hardware and some of the lumber for the house, and employed the men who did the masonwork, the painting, and the papering, that Smith made no important purchase without consulting the defendant, and that the defendant could make any changes in the work or the way of doing it that he saw fit and could discharge Smith at any time.

Doyle & Doyle, of Nashua, for plaintiff.
Warren, Howe & Wilson, of Manchester, for defendant.

YOUNG, J. [1] It can be found that Smith was subject to the defendant's control in respect to the details of the work; consequently it can be found that he was not an independent contractor. Paro v. Whitefield Sav. Bank & Trust Co., 77 N. H. 394, 92 Atl. 331. It cannot be said, therefore, that the court erred when it denied the defendant's motion for a directed verdict, for it can be found that the staging was defective, and that Smith was acting for the defendant when he built it.

The court first instructed the jury as to the test it should apply to determine whether Smith was an independent contractor, and then instructed it that, if it found that Smith was an independent contractor, and as much employed Flannigan to do plastering, that was the end of the case. The defendant, in excepting to this, said:

"My contention is that, if the jury find that Smith was an independent contractor, that is the end of the case in respect to who employed Flannigan. I want to except to any other inference on the charge."

If this language is given any meaning of which it is fairly capable, the only question raised by this exception is whether there is any evidence to warrant the findings: (1) That Smith was an independent contractor; and (2) that the defendant employed Flannigan to do the plastering.

It is sufficient answer to the contention to say that Flannigan testified that the defendant employed him to do that work, and that it could be found that Smith was an independent contractor in so far as the carpenter work on the house was concerned, and also the defendant's agent in charge of the work, and that he was acting in that capacity when he built the staging in question.

[2] The defendant, however, both in his brief and in oral argument contends that that is not the question intended to be raised by this exception. He says that the charge was misleading in tha it gave the jury to understand that, if it found that he employed Flannigan, it could find for the plaintiff, but could not find for him. The facts, however, do not sustain this contention, for the case shows that the court, after giving the instructions to which exception was taken, instructed the jury in terms that it must find for the defendant even if it found that the defendant employed Flannigan to do the plastering, unless it also found: (1) That the defendant provided the staging on which the plaintiff was working when the accident happened as a completed structure for the use of Flannigan and his men; and (2) that the plaintiff was not guilty of contributory negligence.

Defendant's exceptions overruled.

Walker, J., was absent. The others concurred.

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LEVITAN EMBROIDERY WORKS v. LAMATINA.

(Supreme Court of New Jersey. Oct. 28, 1920.)

111 Atlantic Reporter, 648.

(Syllabus by the Court.)

2. MASTER AND SERVANT — EVIDENCE IN COMPENSATION CASE HELD TO SUSTAIN FINDING OF DEPENDENCY; FINDING BASED ON EVIDENCE HELD CONCLUSIVE.

In this case there is evidence from which the trial court could find dependency within the meaning of the statute; also, that the injury to the deceased arose out of and in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[5], 412.)

Appeal from Court of Common Pleas, Hudson County.

The Levitan Embroidery Works prosecutes an appeal from a judgment in favor of Vincenzo Lamatina, claimant in a workmen's compensation case. Judgment affirmed.

Argued June term, 1920, before Swayze and Black, JJ.

Lazarus & Brenner, of Bayonne, for prosecutor.

Peter A. Cavicchia and Jehiel G. Shipman, both of Newark, for defendant.

BLACK, J. [1] This is a workmen's compensation case. The first point made by the prosecutor for a reversal is one of procedure. It is urged that a petition should have been filed in the common pleas court, and not with the Workmen's Compensation Bureau which is created by the act (P. L. 1918, p. 429, c. 149). This act was approved February 28, 1918. It did not take effect, however, until July 4, 1918. The deceased, Antonio Lamatina, died March 18, 1918. On November 21, 1918, a petition was filed. Judgment was given on March 28, 1919, after a hearing before one of the commissioners of the Workmen's Compensation Bureau. From that judgment an appeal was taken to the court of common pleas of Hudson county. Judge Doherty heard the case in that court on May 23, 1919. A judgment was entered December 3, 1919, affirming the former judgment. The certiorari is issued to review that judgment. The case of Crew v. Trainor, 91 N. J. Law, 87, 102 Atl. 905, affirmed 92 N. J. Law, 512, 105 Atl. 893, settles this point adversely to the prosecutor. That case holds the act creating a Workmen's Compensation Aid Bureau does not provide a new remedy or impair contracts. It only prescribes a new method of procedure.

[2] The second point is there was no evidence of dependency. Vincenzo Lamatina, the father, testified, that the deceased made $10 per week, and he gave the money to his mother, and again testified:

"The only money your family received was the money that you made when you worked and what Tony made—is that right? A. Yes. The money Tony gave to my wife went to buy victuals, eat with it, and also buy clothes, live on it."

This point is settled adversely to the prosecutor by the case of Havey v. Erie R. R. Co., 88 N. J. Law, 684, 96 Atl. 995.

On the third point there is testimony from which the court could find that the injury resulting in the death of Tony Lamatina arose out of and in the course of his employment. This is conclusive. New York Switch,

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etc., Co. v. Mullenbach, 92 N. J. Law, 254, 103 Atl. 803; Lundy v. Brown & Co., 93 N. J. Law, 107, 106 Atl. 362. affirmed 93 N. J. Law, 469, 108 Atl. 252.

The judgment of the court of common pleas of Hudson county is affirmed, with costs.

LEONBRUNO v. CHAMPLAIN SILK MILLS ET AL.

(Court of Appeals of New York. Oct. 19, 1920.)

128 Northeastern Reporter, 711.

1. MASTER AND SERVANT—INJURY BY CO-EMPLOYEE ENGAGED IN HORSEPLAY HELD ONE "ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT" WITHIN COMPENSATION LAW.

Where an employee while devoting his time to his work was struck in the eye by an apple thrown by a fellow servant engaged in horseplay, the injury was one "arising out of and in the course of his employment," within Workmen's Compensation Law, § 3, subdiv. 7.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT—INJURY "ARISING OUT OF AND IN COURSE OF EMPLOYMENT" WITHIN COMPENSATION LAW DEFINED.

The test of liability under Workmen's Compensation Law, § 3, subdiv. 7. for injury arising out of and in the course of employment, is not the master's dereliction, whether his own or that of his representatives acting within the scope of their authority, but is the relation of the service to the injury, of the employment to the risk.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

Appeal from Supreme Court, Appellate Division, Third Department.

Proceedings by Salvatore Leonbruno under the Workmen's Compensation Law to obtain compensation for personal injuries, opposed by the Champlain Silk Mills, the employer, and the American Mutual Life Insurance Company, insurer. There was an award of compensation, which was affirmed by the Third Department of the Appellate Division of the Supreme Court (192 App. Div. 858, 183 N. Y. Supp. 222), and the employer and insurer appeal. Affirmed.

Jeremiah F. Connor, of Oneida, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel) for respondent.

CARDOZO, J. The claimant while engaged in the performance of his duties in the employer's factory was struck by an apple which one of his fellow servants, a boy, was throwing in sport at another, and as a consequence lost the better part of the sight of one eye. He did not participate in the horseplay, and had no knowledge of it till injured. The question is whether the accident was one "arising out of and in the course of employment," within the meaning of the statute (Workmen's Compensation Law. § 3, subd. 7; Consol. Laws, c. 67).

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[1] That it arose "in the course of employment" is unquestioned. That it arose "out of" employment, we now hold. The claimant's presence in a factory in association with other workmen involved exposure to the risk of injury from the careless acts of those about him. He was brought by the conditions of his work "within the zone of special danger." Thom v. Sinclair, 1917 A. C. 127, 142. Whatever men and boys will do, when gathered together in such surroundings, at all events if it is something reasonably to be expected, was one of the perils of his service. We think with Kalisch, J., in Hully v. Moosbrugger, 87 N. J. Law, 103, 93 Atl. 79. that it was "but natural to expect them to deport themselves as young men and boys, replete with the activities of life and health. For workmen of that age or even of maturer years to indulge in a moment's diversion from work to joke with or play a prank upon a fellow workman, is a matter of common knowledge to every one who employs labor." The claimant was injured, not merely while he was in a factory, but because he was in a factory, in touch with associations and conditions inseparable from factory life. The risks of such associations and conditions were risks of the employment. Thom v. Sinclair, supra; Matter of Redner v. Faber & Son, 223 N. Y. 379, 119 N. E. 842.

[2] We think the precedents in this state, whatever variance of view there may be in other jurisdictions, sustain our present ruling. This case is not within the principle of Matter of De Filippis v. Falkenberg, 219 N. Y. 581, 114 N. E. 1064. and Matter of Stillwagon v. Callan Brothers, 224 N. Y. 714, 121 N. E. 893, where the claimant, joining in the horseplay, had stepped aside from the employment. Cf. Matter of Di Salvio v. Menihan Co., 225 N. Y. 123, 121 N. E. 766. This case is rather within the principle of Matter of Verschleiser v. Stern & Son, 229 N. Y. 192, 128 N. E. 126, where the claimant, while engaged in his work, was assaulted by fellow workmen. who wished to tease and harass him. Cf. Markell v. Green Felt Shoe Co., 221 N. Y. 493, 116 N. E. 1060; Matter of Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344. We do not overlook the cases in other jurisdictions. Hulley v. Moosbrugger, supra, was reversed by the New Jersey Court of Errors and Appeals in 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203. It is in accord. however, with a decision of the Supreme Court of Illinois. Pekin Cooperage Co. v. Industrial Board, 277 Ill. 53, 115 N. E. 128. English cases hostile to the award (Armitage v. Lancashire & Yorkshire Ry. Co., 1902, 2 K. B. 178; Fitzgerald v. Clarke & Son, 1908, 2 K. B. 796) are inconsistent, it would seem, in principle with later rulings of the House of Lords (Thom v. Sinclair, supra; Dennis v. White & Co., 1917, A. C. 479. Cf. Matter of Redner v. Faber & Son, supra. and Matter of Grieb v. Hammerle, 222 N. Y. 382, 118 N. E. 805). They are certainly inconsistent with the broader conception of employment and its incidents to which this court is now committed. Matter of Verschleiser v. Stern & Son, supra. The risks of injury incurred in the crowded contacts of the factory through the acts of fellow workmen are not measured by the tendency of such acts to serve the master's business. Many things that have no such tendency are done by workmen every day. The test of liability under the statute is not the master's dereliction, whether his own or that of his representatives acting within the scope of their authority. The test of liability is the relation of the service to the injury, of the employment to the risk.

The order should be affirmed, with costs.

Hiscock, C. J., and Chase, Hogan, Pound, Crane. and Elkus, JJ., concur.

Order affirmed.

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TALLON v. INTERBOROUGH RAPID TRANSIT CO.

(New York Supreme Court, Appellate Division, First Department. November 12, 1920.)

184 New York Supplement, 588.

MASTER AND SERVANT—INJURY WHILE RIDING ON PASS ON WAY TO WORK HELD WITHIN COMPENSATION LAW.

Where an employee of a railway company, furnished with a family pass to ride on the company's passenger trains. entitling him to ride to and from his work, and wherever and whenever he chose, was injured in a collision of trains when aboard one of them on his way to report to work, the remedy is not in an action at law, but under the Workmen's Compensation Law, since the injury arose in the course of his employment.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

Dowling, and Greenbaum, JJ., dissenting.

Appeal from Trial Term, New York County.

Action by Annie Tallon, as administratrix of the goods, chattels, and credits of James P. Tallon, deceased, against the Interborough Rapid Transit Company. From a judgment for plaintiff, and an order denying its motion for new trial, defendant appeals. Judgment and order reversed, and complaint dismissed.

Argued before Clarke, P. J., and Laughlin, Dowling, Smith, and Greenbaum, JJ.

James L. Quackenbush, of New York City (M. E. Burke, of New York City, of counsel), for appellant.

John C. Robinson, of New York City, for respondent.

SMITH, J. The plaintiff's intestate was an employee of the Interborough Rapid Transit Company. His duty was to report for work at 177th street and Tremont avenue at 6:43 a. m., at which time his pay commenced. The employees of the company are given passes to ride upon the passenger trains of the company. This pass was a family pass, and entitled the employee to ride to and from his work and whe e-ever and whenever he might choose.

Upon October 21, 1919, plaintiff was living at 469 East 146th street. He boarded one of the defendant's trains on his way to 177th street, where he was to report for work. At 175th street two of the defendant's trains collided, and the plaintiff's intestate, while riding in the defendant's car was injured. This was about 8 mnutes from the time when he was to report for work at 177th street and Tremont avenue.

The sole question raised in the case is whether the plaintiff can maintain the action. or whether the plaintiff is confined to her remedy under the Compensation Act (Consol. Laws, c. 67). In Littler v. George A. Fuller Company, 223 N. Y. 369, 119 N. E. 554, the law held:

"Where claimant, a bricklayer, was injured in an accident to an automobile truck, which was furnished by his employer to carry him and other workmen from a house, which they were building, to and from a railroad station, the injury arose out of and in the course of his employment, and he is entitled to an award under the Workmen's Compensation Law."

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In that case the defendant, a contractor. was engaged in building a residence at Great Neck, Long Island, two miles from the railroad station. The workmen who lived at a distance came to Great Neck upon the railroad train. They refused to work unless the defendant would furnish transportation from the station to and from the place of work. The defendant thereupon furnished an automobile to meet the workmen at the station, to take them to the place where the residence was being constructed and to return them at night to the station. On one of these trips the automobile went into a ditch and the plaintiff was injured. He made claim for compensation under the Compensation Act, and the court held that he was going to or from his duty within the precincts of the company by which he was employed, and therefore that he was entitled to compensation under the act.

That case has one distinguishing characteristic that is not found in the case at bar, and that is that the automobile ws furnished for the special purpose of carrying these workmen to and from their work. I am unable to see, however, why that fact should alter the rule of liability. In the case at bar the defendant was carrying the plaintiff's intestate to his work upon a pass. The fact that the pass authorizes the plaintiff to ride for other purposes can hardly affect the question, nor the fact that it was the custom to furnish passes for the workmen's families. Nor can it matter, in my judgment, that the transportation furnished by the defendant was upon a regular passenger train which carried other passengers. as long as the plaintiff's intestate accepted the transportation offered and was actually going to his work upon the defendant's train and upon defendant's premises. The case cited, therefore, seems to me determinative of the question of the defendant's liability for compensation under the Workmen's Compensation Act, and, if so, this action cannot be maintained.

This test of liability to a person injured within the precincts of the company while going to and from his work was recognized in the matter of De Voe v. New York State Railways, 218 N. Y. 318, 113 N. E. 256, L. R. A. 1917A, 250. In that case, however, the employee was not going to or from his work to his home, but was going to a jeweler's to have his watch tested. which was held to be for an individual purpose, and the case was thus distinguished, and the defendant was not held liable under the Compensation Act. The employee was there running to catch a trolley car to go to the jeweler's for the purpose stated.

In the Matter of Kowalek for Compensation, 190 App. Div. 160, 179 N. Y. Supp. 637, it was held in the Third Department:

"An employee of a railroad, who is entitled to journey from his work, free of charge, upon the cars of his employer, is, while so traveling, in the course of his employment."

In that case the claimant before the State Industrial Commission, as a flagman. came to the station and requested extra work as a dispatcher. He was assigned as a guard on a train then about leaving. Having made his trip, he returned to the station at 8:20, gave in his time to a clerk, and went out on the platform to take a train bound west for his home. There was a train due to leave at 8:32, which train apparently he did not get. The next train was at 8:40. While the cars to make up this train were being shifted on a crossover between the tracks, an automatic brake on one of them tripped, and the train stopped. Upon examination, it was found that the object which tripped the brake was the body of the deceased, which lay dead upon the third rail of the crossover, about 20 feet west of the station building. The opinion of the court in part reads:

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"The deceased was entitled to journey from his work free of charge upon the cars of the appellant, and while so traveling would have been in the course of his employment [citing cases]. * * * Therefore, whether the accident happened while the deceased was thus waiting, or after his homeward journey had begun. he was in either case, under the authorities cited, unless guilty of some affirmative act removing him therefrom, still in the course of his employment when death overtook him."

The employee was there held entitled to compensation under the Workmen's Compensation Act. This conclusion seems to be in accord with decisions generally by the Compensation Commission, as well as with decisions in other jurisdictions.

In Ackerly v. Long Island R. R. Co., 19 S. D. R. 533, a railroad employee riding on an employee's pass was killed while on his way from home to his place of work. He was held entitled to compensation.

In Avanzato v. Erie R. R. Co., 4 S. D. R. 397, a railroad employee with his tools undertook to catch an east-bound train to ride where he was to work, fell under the train and received injuries and compensation was allowed.

In Potts v. Lehigh Valley R. R. Co., 4 S. D. R. 421, a railroad employee was on his way from work when the car caught fire. He jumped therefrom and sustained injuries. Compensation was allowed.

In Holmes v. Great Northern Railway Co., 2 Workmen's Compensation Cases, 19, the English Compensation Commission has upheld the same rule. In that case an engine cleaner, who lived at King's Cross, was carried free by his employer, the railroad company, to Hornsey. While crossing the metals for the purpose of getting to the place where he worked, and shortly before the time for commencing work, he was knocked down by a passing train and killed. It was there held:

"That the employment commenced when he entered the train at King's Cross. and that the accident arose out of and in the course of his employment."

The respondent, to sustain this judgment, relies strongly upon the case of Pierson v. Interborough Rapid Transit Co., decided in this department and reported in 184 App. Div. 678, 172 N. Y. Supp. 492, affirmed without opinion 227 N. Y. 666, 126 N. E. 920. It was there held that where an employee of an elevated railroad company, during a two-hour period off duty, was injured by collision of two trains, while on his way from a terminal, where he had just finished a tour of duty, to his dentist's, the injury did not arise "out of and in the course of" his employment. and therefore the employee was not entitled to compensation under the Workmen's Compensation Law. In that case the employee was using the defendant's train, not for the purpose of going between his home and his place of work, but for the purpose of going to some other place for an individual or personal purpose, and the case comes within the rule laid down in the Matter of De Voe, supra. This case is no authority, however, for determining the liability of the company in a case where an employee was using the transportation furnished by the master in going to his place of employment, and does not support the respondent's contention here.

The judgment and order should therefore be reversed, with costs, and the complaint dismissed, with costs.

Clarke, P. J., and Laughlin, J., concur.

Dowling and Greenbaum, JJ., dissent.

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BOYLE v. A. C. CHENEY PIANO ACTION CO.

(New York Supreme Court, Appellate Division, Third Department. September 8, 1920.)

184 New York Supplement, 374.

1. MASTER AND SERVANT — REMEDY UNDER COMPENSATION LAW EXCLUSIVE.

A complaint of an employee, alleging injury by employer's negligence in failing to supply a safe place to work, states no cause of action; Workmen's Compensation Law, § 11, supplying the exclusive remedy for accidental injuries arising from such omission.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

3. MASTER AND SERVANT—COMPENSATION LAW AFFORDS EXCLUSIVE REMEDY FOR INJURIES TO MINOR UNLAWFULLY EMPLOYED WITHOUT CERTIFICATE REQUIRED BY LABOR LAW.

Though defendant unlawfully employed plaintiff, less than 16 years old, in its factory. without procuring and filing the certificate required by Labor Law, § 70, plaintiff has no cause of action at law for injuries arising out of the employment, though the wrong causing the injuries was done by the employer before it became such; the employer's liability under the Workmen's Compensation Law, particularly in view of section 11, and despite section 29, being exclusive.

(For other cases, see Master and Servant, Dec. Dig. § 366.)

John M. Kellogg, P. J., and Kiley, J.. dissenting.

Appeal from Trial Term, Renesslaer County.

Action by Vincent Boyle, an infant, by George T. Boyle, his guardian ad litem, against the A. C. Cheney Piano Action Company. From an order dismissing the complaint, and from a judgment entered thereon, plaintiff appeals. Order and judgment affirmed.

See, also, 110 Misc. Rep. 540. 181 N. Y. Supp. 668.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

William E. Fitzsimmons, of Albany, for appellant.

Ainsworth, Carlisle, Sullivan & Archibald. of Albany (John N. Carlisle, of Albany, of counsel), for respondent.

HENRY T. KELLOGG, J. [1] The complaint alleges that the plaintiff was employed by the defendant in its factory; that while so employed he was seriously injured by the negligence of the defendant; that the defendant failed to supply the plaintiff with a safe place to work; that it directed him to undertake dangerous work; that it maintained machinery in its factory in an unsafe and improper condition; that it failed to protect plaintiff from injury by its machinery; that it omitted the use of safeguards and appliances to protect him; that it failed to disconnect its machinery when not in motion; that it failed properly to direct plaintiff in his work; that as a result of such omissions and other acts the plaintiff was injured. It is manifest that in all the allegations thus recited the plaintiff asserts no wrong as the cause of his injuries, other than a neglect by the defendant of its duties as a master, owed to the

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plaintiff as its servant. The Workmen's Compensation Law (Consol. Laws, c. 67) supplies an exclusive remedy for all accidental injuries arising from such omissions. Workmen's Compensation Law, § 11. The allegations specified, therefore, stated no cause of action.

[2] The complaint also alleges that the defendant—

"permitted plaintitff, being under 16 years of age, to work on a saw and assist in operating, handling, and cleaning the same, contrary to the provisions of section 93 of the Labor Law of the state of New York."

The section referred to forbids the employment of a child under 16 years of age in the operation of certain machines, including "circular or band saws." It is not alleged that the plaintiff was permitted to operate a saw either of the band or of the circular type. The same section also provides that no male child under the age of 18 years "shall be permitted or directed to clean machinery while in motion." It is not alleged that the machinery which the plaintiff was permitted to handle and clean was "in motion" when he handled and cleaned it. The allegations, therefore, state no facts constituting violations of section 93 of the Labor Law (Consol. Laws, c. 31). For this reason, as well as for the reasons hereafter to be stated for holding insufficient a further allegation of the complaint, it must be considered that the allegations quoted state no cause of action.

[3] The plaintiff also alleges that the defendant—

"unlawfully employed the plaintiff in its said factory without procuring and filing the certificate required by section 70 of the Labor Law of the state of New York."

The plaintiff evidently intended to allege a violation of that portion of section 70 of the Labor Law which, after forbidding the employment in any factory of a child under the age of 14 years, reads as follows:

"No child between the ages of fourteen and sixteen years shall be so employed. permitted or suffered to work unless an employment certificate, issued as provided in this article, shall have been therefore filed in the office of the employer at the place of employment of such child."

The plaintiff contends that under the authority of Karpeles v. Heine, 227 N. Y. 74, 124 N. E. 101, the act of employing him was in itself a tort; that the duty violated was not that of an employer to use care, but rather the duty of persons generally not to employ a child; that the wrong was not committed in the course of an employment, but before the employment was established; that therefore his injuries were not compensable under the Workmen's Compensation Law. He forgets that compensation is payable for injuries, not if a wrong to which they are due occurs in the course of an employment, but regardless of the commission of any wrong, provided only the injuries themselves arise from the employment in the course thereof. Whether or not the plaintiff was "lawfully" employed, the fact cannot be doubted that when he was injured the relationship of master and servant did in point of fact exist. The plaintiff had subjected himself to the orders and directions of the defendant, and when hurt was actually working upon machinery in the defendant's factory in accordance with directions given. He undoubtedly could have collected his stipulated wages as employee for the work thus done. The reasoning that there was no employment because the statute forbade it is reducible to an absurdity. It would compel the deduction that, an employment being impossible because of the prohibition, a violation of the prohibition, though made a crime by the Penal Law. is equally impossible.

Clearly the plaintiff's injuries arose out of and in the course of his employment. That he has a remedy by filing a claim for compensation is supported by decisions of this court. Ide v. Faul & Timmins,

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179 App. Div. 567, 166 N. Y. Supp. 858; Kenny v. Union Railway Co., 166 App. Div. 497, 152 N. Y. Supp. 117. The plaintiff contends that, although he may have such a remedy, he may likewise maintain an action against the defendant for the results of a wrong committed by it before it became an employer, as he might do were the defendant a third party who had wronged him. Section 29 of the Workmen's Compensation Law does give a remedy against a third party, if injuries sustained are due to "the negligence or wrong of another not in the same employ." This defendant, as the employer, was in the same employ as the plaintiff employee. Moreover, the argument ignores that portion of section 11 of the Workmen's Compensation Law which reads:

"The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or any one otherwise entitled to recover damages, at common law or otherwise on account of such injury or death."

The liability of the employer under the Workmen's Compensation Law for all injuries arising from an employment being exclusive, no action at law for such injuries will lie, even though the wrong causing them was done by the employer before he became an employer. For all these reasons the conclusion is irresistible that the plaintiff cannot maintain this action. The order and judgment should be affirmed.

Order and judgment affirmed, with costs.

Woodward and Cochrane, JJ., concur.

JOHN M. KELLOGG, P. J. (dissenting). At the trial the complaint was dismissed upon the ground that the remedy given to the employee against the employer, under section 11 of the Workmen's Compensation Law (Consol. Laws, c. 67), excludes all other remedies.

The complaint showed that the plaintiff, a boy under 16 years of age, was employed by the defendant in operating a saw, in violation of subdivision 1 of section 93 of the Labor Law (Consol. Laws, c. 31). That section absolutely prohibits such employment. Its violation is a misdemeanor. Penal Law (Consol. Laws, c. 40) § 1275. The boy, therefore, was injured by the criminal act of the defendant. The liability arose, not on account of the defendant's negligence, but because plaintiff is the victim of his crime. Amberg v. Kinley, 214 N. Y. 541, 108 N. E. 830, L. R. A. 1915E, 519. Karpeles v. Heine, 227 N. Y. 74, 124 N. E. 101. The employer, when sued by the infant, cannot shield himself by alleging his own crime; but he must respond as if the employment were valid. But the boy, who was not a criminal, may at his election rely upon the employment or repudiate it. An infant who agrees to work for a fixed wage can repudiate the contract and sue upon a quantum meruit, or he may affirm and sue upon the contract. Infancy is a privilege to him, not a defense to his employer. The alleged employment having been in absolute violation of law, section 11 of the Workmen's Compensation Law does not apply. Wolff v. Fulton Bag & Cotton Mills, 185 App. Div. 436, 173 N. Y. Supp. 75; Karpeles v. Heine, supra. But, if the infant seeks the benefit of the Workmen's Compensation Law, his infancy cannot shield the employer. Matter of Kenny v. Union Railway Co., 166 App. Div. 497, 152 N. Y. Supp. 117; Ide v. Paul & Timmins, 179 App. Div. 567, 166 N. Y. Supp. 858. The recent case of Karpeles v. Heine, supra, clarifies the situation, and seems to remove any doubt which might have previously existed in a case where the employment of the child is absolutely prohibited.

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It is now urged that the complaint does not show that the saw in question was a band saw or circular saw. A band saw and circular saw are the only ones referred to in section 93, and the allegation that the boy was injured while operating a saw in violation of that section is, on demurrer, equivalent to a statement that it was a band saw or a circular saw.

"It is the general rule. however, that a complaint, when challenged for insufficiency, is to be liberally construed, and that the pleader is to be deemed to have alleged, not only the facts set forth, but those also to be implied therefrom by reasonable and fair intendment. Coatsworth v. Lehigh Valley R. R. Co., 24 App. Div. 273, affirmed 156 N. Y. 451; National Contracting Co. v. Hudson R. W. P. Co., 170 N. Y. 439; Ellsworth v. Agricultural Society, 99 App. Div. 119; Milliken v. Western Union Tel. Co., 110 N. Y. 403." Peterson v. Eighmie, 175 App. Div. 113, 115. 161 N. Y. Supp. 1065, 1067.

I favor a reversal and a new trial, with costs to the appellant to abide the event.

Kiley, J., concurs.

CHIMORA v. INTERNATIONAL ICE CREAM CO. ET AL.,

(New York Supreme Court, Appellate Division, Third Department. November 10, 1920.)

184 New York Supplement, 500.

1. MASTER AND SERVANT — COMPENSATION CLAIMANT HAS BURDEN OF ESTABLISHING CONTINUANCE OF DISABILITY.

One claiming compensation for temporary total disability. within Workmen's Compensation Law. § 15, subd. 2, has burden of establishing that his disability did not end on the date his attending physician pronounced him well and able to work. and he is not relieved of this burden by the presumptions declared in section 21.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

2. MASTER AND SERVANT—EVIDENCE HELD NOT TO PROVE CONTINUANCE OF DISABILITY.

In a proceeding by an employee claiming compensation for a fracture of the wrist causing temporary total disability, within Workmen's Compensation Law, §§ 10, 15, subd. 2, medical evidence and statements of claimant to his interpreter *held* not to prove disability subsequent to the date his attending physician pronounced him well and able to work, though he was unwilling to work because he was made sore by a renewal of active labor.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

John M. Kellogg, P. J.. dissenting.

Appeal from State Industrial Commission.

Proceedings by Walenty Chimora for compensation under the Workmen's Compensation Law, opposed by the International Ice Cream Company, employer, and the Ætna Life Insurance Company, insurance carrier. From an award for the claimant, the employer and insurance carrier appeal. Reversed, and claim dismissed.

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Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

William H. Foster, of Syracuse, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. The State Industrial Commission has found as a conclusion of fact that the claimant was injured on the 23d day of July, 1919, resulting in a "fracture of the middle of the left radius and ulna, and as a result of which he was disabled from July 23, 1919, to December 22, 1919, on which date he was still disabled," and has made an award for various sums subsequent to the 10th day of September, 1919, upon the basis of alleged decrease of earning power, holding the case open for further hearings. The insurance carrier and the employer appeal, contending that there is no evidence to support the conclusion that the claimant was "disabled from July 23, 1919, to December 22, 1919, on which date he was still disabled."

On the 29th of September, 1919, the claimant, in making his claim for compensation, under oath says that recovery was complete "about September 7, 1919," and gives Dr. J. B. Garlick as his attending physician. Dr. Garlick, in his first report, under date of September 3, 1919, says that the claimant's symptoms are entirely due to the injury, and that he will not be able to attend to any part of his present duties "for first six weeks"; that the disability due to the accident is likely to exist for 6 weeks. In a second report, this same physician says that from the date of the accident the disability, from the surgical viewpoint, is likely to last for 6 weeks, and from the vocational viewpoint for a period of 7 weeks. In his final report, he gives as the date when the injured employee was able to return to work, September 10, 1919, and in a memorandum at the close of the report he says:

"This man was perfectly able to work on September 10, 1919, but I understand would not do so on that date."

[1, 2] There is some suggestion that the claimant. who does not speak English, was induced by his interpreter to sign the statement that he was fully recovered on the 7th of September, without the claimant's free consent; but the record discloses no improper act on the part of the interpreter. He merely took the answers of the claimant to the formal questions and recorded them, and then, when the claimant hesitated about signing the statement, the interpreter said that it was a matter for him to decide; that he would have to sign the paper before he could get his money, and, that if he did not sign it he would have to "fight the doctor," meaning, of course. that he would have to overcome the doctor's report as to his condition. The burden of establishing that the disability did not end with the 10th day of September, 1919, up to which time there is no controversy as to the compensation, is upon the claimant. The presumptions provided in section 21 of the Workmen's Compensation Law (Consol. Laws, c. 67) have no bearing upon this situation. Matter of Modra v. Little, 223 N. Y. 452, 454, 119 N. E. 853, Ann. Cas. 1918D, 177. No. fraud is shown to have been practiced upon the claimant by any one. He says he was fully recovered on the 7th day of September, 1919, and his attending physician certifies that the nature of the injury was such that it should last about 6 weeks, and that he was fully recovered and prepared to go to work on the 10th day of September. more than 6 weeks after the happening of the accident.

Dr. Garlick testified in detail to the condition of this man, and while the claimant says that he went to work upon a sewer job about the 25th day of October and worked 4 days, and then went onto a farm

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on or about the 1st of November, it is clear that there is no evidence on this case to warrant the conclusion that the claimant was not relieved of his disability on or before the 10th day of September, 1919. The statute provides for the compensation "for disability or death" (section 10) and subdivision 2 of section 15 provides for a "temporary total disability," which covers the present case, and this is to continue during the continuance of such temporary total disability, and the provision of subdivision 4 relate to a "case of temporary partial disability," and do not contemplate a case of temporary total disability extending beyond the period when such total disability is at an end. When this comparatively simple fracture of the wrist was healed, when the arm responded to the usual tests, and the man was pronounced well, the temporary total disability was at an end. Because this man. after 6 to 7 weeks of inaction, was unwilling to work, or because he may have been made sore by renewal of active labor, did not produce a "case of temporary partial disability." such a case would have arisen of the claimant had been injured only to the extent that he was unable to perform all of his duties and does not grow out of a "case of temporary total disability."

The determination and award of the State Industrial Commission should be reversed, and the claim dismissed. All concur, except John M. Kellogg, P. J., who dissents.

ERETZA v. FT. MONTGOMERY IRON WORKS et al

(New York Supreme Court, Appellate Division, Third Department. November 18, 1920.)

184 New York Supplement, 789.

1. MASTER AND SERVANT — DEPENDENCY, WITHIN COMPENSATION LAW, MUST BE PROVED BY COMPETENT EVIDENCE.

Though Workmen's Compensation Law, § 68, provides that the Industrial Commission shall not be bound by common-law or statutory rules of evidence, there must be, in matters relating to dependency before the commission can find such fact.

(For other cases, see Master and Servant Dec. Dig. § 405[5])

2. MASTER AND SERVANT—DEPOSITION IN COMPENSATION CASE MUST CONFORM TO CODE.

Under workmen's Compensation Law, § 72, authorizing the commission to cause depositions of witnesses to be taken in the manner prescribed by law for like depositions in civil actions in the Supreme Court evidence to be produced before the commission through depositions must conform to the provisions of the Code of Civil Procedure relating to depositions, though the evidence need not be formal, where the investigation is carried on directly by the commission or one of the deputies.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

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3. MASTER AND SERVANT—EVIDENCE INSUFFICIENT TO SHOW DEPENDENCY OF ALIEN FATHER, WITHIN COMPENSATION LAW.

Under Workmen's Compensation Law, § 16, subd. 4, authorizing compensation to dependant father, and requiring the question of dependency to be determined as of the time of the accident, and section 17, as to proof of dependency of aliens, an award to an alien father cannot be sustained, where there was no competent evidence of any kind to show dependency at the time of the accident.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Florentino Sagardi Eretza for compensation for the death of Placido Sagardi, opposed by the Ft. Montgomery Iron Works, employer. and the Travelers Insurance Company, insurance carrier. From an award of compensation by the Industrial Commission, the employer and insurance carrier appeal. Reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Benjamin C. Loder, of New York City (E. C. Sherwood and William B. Davis, both of New York City. of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. The employer and the insurance carrier appeal from an award made to the father of Placido Sagardi, resident of Spain, on the ground of dependency. The appellants contend that there is no competent evidence of dependency on the part of Florentino Sagardi Eretza, the father, and that no claim was filed in the office of the commission within the time fixed by the Workmen's Compensation Law (Consol. Laws, c. 67).

One of the comfissioners writes an opinion in this case. in which, upon the question of proofs of dependency, he says he thinks "the proofs are in proper form." and that they come within the rule sugested in Pifumer v. Rheinstein & Haas, Inc., 187 App. Div. 821, 175 N. Y. Supp. 848.

[1.] It is true, of course, that under section 68 of the Workmen's Compensation Law the commission " making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure except as provided by this chapter"; but it has been held that in matters relating to dependency there must be some competent evidence to establish the fact of dependency. Birmingham v. Westinghouse Electric & Mfg. Co. 180 App. Div. 48, 167 N. Y. Supp. 520; Frey v. McLoughlin Bros.. Inc. 187 App. Div. 824, 175 N. Y. Supp. 873.

[2.] It is to be noted that section 68 of the statute is qualified by the provision "except as provided in this chapter." Section 72 does qualify the rule of section 68 by the provision that the "commission may cause depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the supreme court." In other words, where the investigation is being carried on directly by the commission or one of the deputies, the evidence need not be formal; but when the evidence is to be produced through depositions the requirement of the statute is

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that it must be done "in the manner prescribed by law for like deposition in civil actions in the supreme court." It is entirely clear. it seems to us, that the record in this case does not conform to this requirement, and that the commission has no power to make awards solely upon the bas s of informal depositions, such as are here involved. This was the rule asserted, independently of the statute, in Pifumer v. Rheinstein & Haas, Inc., supra, and we see no good reason for holding that anything less than the character of depos'tions required by the Code of Civil Procedure should be accepted.

[3.] It is to be remembered that at common law the cause of action for injuries terminated with the life of the injured party; no one had any right to recover. This was changed by sections 1902, 1903, of the Code of Civil Procedure, and the damages were exclusively for "the benefit of the decedent's husband or wife, and next of kin," and might never reach the father. It was only with the adoption of the Workmen's Compensation Law, and then in a remote contingency (section 16, subd. 4) that the father would be entitled to any share in the award, and this is further complicated by the requirements of section 17 in the case of aliens. The statute requires that "all questions of dependency shall be determined as of the time of the accident" (section 16, subd. 4), and in the case of an alien it must appear, in addition, that the employee has supported, either wholly or in part, the alleged dependent for "the period of one yeaar prior to the date of the accident." The record here makes no effort to prove the dependency at the time of the accident, which occurred in 1916, and on the contrary it indicates, so far as it indicates anythng, that the claimant owned a home, had a small grocery, and was in a position to help himself. But there is clearly an entire lack of competent evidence to prove dependency, and for this reason the award should be revearsed.

The award should be reversed. and the claim dismissed. All concur; John M. Kellogg, P. J., in the result.

FERST v. DICTAGRAPH PRODUCTS CORPORATION et al.

(New York Supreme Court, Appellate Division. Third Department. November 10, 1920.)

184 New York Supplement 422

MASTER AND SERVANT—COMPENSATION AWARD FOR DEAFNESS FROM TESTING DICTAGRAPHS HELD NOT SUSTAINED BY EVIDENCE.

An award, under the Workmen's Compensation Law. in favor of a dictagraph tester, based on a finding that his deafness was a result of vibrations, *held* not sustained by his testimony that it was his belief that vibrations caused irritation and final swelling and bleeding. without medical evidence to prove causal connections between his work and the injury.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law (Consol. Laws, c. 67) by Charles W. Ferst for compensation for injuries, opposed by the Dictagraph Products Corporation, employer, and the Ætna

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Life Insurance Company, insurance carrier. From the award of the State Industrial Commission for claimant the employer and insurance carrier appeal. Reversed and matter remitted to the commission.

Argued before John M. Kellogg, P. J. and Woodward, Cochrane, Henry T. Kellogg, and Kiley J. J.

James B. Henney, of New York City (William H. Foster, of Syracuse, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty Gen., of counsel), for State Industrial Commission.

COCHRANE, J. The work of the claimant was to assemble and test motor dictagraphs, which were manufactured by his employer. The testing was done by speaking into a transmitter and receiving the sound from an earpiece. The commission finds:

That the claimant's ear "were subject to an extra hazard caused by the strong vibratory sound waves continually striking his ear drum." and that "on January 24, 1920, while engaged in the regular course of his employment, he felt in his left ear after which there immediately issued thereform blood and matter, which caused plaintiff to suffer from temporary deafness in both ears."

The claimant had been engaged in this work about three weeks, when his right ear began to trouble him with pains and temporary deafness. He thereafter received the sounds of the dictagraph with his left ear, instead of his right ear. After thus continuing his work about one week, he suddenly felt sharp pains in the left ear and found it bleeding freeley. He says that he held the receiver about one foot from his ear, and never held it close to his ear. He futher testifies that it was his "belief that the continual wear of the ear vibrations on the ear caused the irritation and final swelling and the bleeding." He tested about 30 or 40 dictagraphs each day, and had never had any previous difficulty with his ears.

Claimant was the only witness before the commission. He received medical treatment, but no medical evidence was offered. The medical adviser of the commission reported after examination that the left ear, from which blood and other substances was discharged, showed no evidence of injury to the drum; that the right ear showed evidence of a slight retraction and some fibrous band over the left upper half of the drum; that there was good hearing in both ears, with slight diminished hearing in the right ear, as compared with the left; and that the claimant was able to continue his usual vocation.

In Matter of Woodruff v. R. H. Howes Construction Co. 228 N. Y, 276, 127 N. E. 270, the claimant, who was a carpenter, had a frog felon on his hand. which it was claimed was developed by the constant use of a screwdriver, brusing the palm of the hand. In that case as in this, the claimant testified to his belief that the injury came from the work in which he was engaged, and that the pain had existed several days. It was held that the testimony was insufficient to establish an accident, and an award in favor of the claimant was reversed.

No causal relation has been established between the work performed by the claimant and his injury. It may have resulted from natural causes entirely independent of his work. The hiatus between cause and effect has not been bridged. In the absence of all proof on the subject, the commission was not justified in finding that the disease of the ears was the result of vibrations caused by the dictagraphs. No effort was made to prove that the vibrations could have caused such a result.

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It would seem that the physicians who examined claimant and prescribed for him could supply the necessary evidence, if his theory of an accident is correct. Under the authority of the Woodruff Case, supra, and Mater of Cavalier v. Chevrolet Motor Co., of New York, Inc., 189 App. Div. 412, 178 N. Y. Supp. 489, this award is not sustained by the evidence.

Award reversed, and matter remitted to the commission. All concur.

SCHEDZICK v. VOLNEY PAPER CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 10, 1920.)

184 New York Supplement 424

MASTER AND SERVANT — PARENT, SUPPORTING FAMILY BY OWN RESOURCES, NOT "DEPENDENT" ON SON, WITHIN COMPENSATION LAW.

The mere fact that a father receives money from a son and expends it is not alone sufficient to establish dependency, within Workmen's Compensation Law; but the necessity must also be established, and therefore a father owning farm, who is supporting his family and increasing his capital without the assistance of a son, contributing some of his earnings, is not a "dependent," within the law.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

For other definitions, see Words and Phrases, First and Second Series, Dependent.)

Appeal from State Industrial Commission.

Proceeding by Carl Schedzick under the Workmen's Compensation Law (Consol. Laws, c. 67) for compensation for death of son, opposed by the Volney Paper Company, employer, and the Employers' Liability Assurance Corporation, Limited, insurance carrier. From an award of the Industrial Commission for claimant, made January 8, 1920, employer and insurance carrier appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Bertrand L. Pettigrew, of New York City (Walter L. Glenney, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken. Deputy Atty. Gen., of counsel), for State Industrial Commission.

COCHRANE, J. The question here is whether the claimant, who was the father of the deceased employe, was dependent on his said son. On October 3, 1919, the latter received the injury which caused his death. He was unmarried. He served in the army from June to December in the year 1918, and during that time the claimant states, in his claim filed with the commission, that he recived $20 a month from the

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goverment and $15 a month from the deceased. Prior to entering the army, the son planted about six acres for his father, who was a farmer. The first four months of the year 1919 the son worked in Cooperstown, N. Y. During the months of May and June he was home, and helped in the work on the farm. From July, 1919, until the time of his death, he worked for the appellant employer. During the year 1919 he contributed some of his earnings to his father but the testimony of the later as to the amount of such contributions is somewhat unintelligible and inconsistent. At one time he stated that he had received from his son "close to $500" in the year 1919. He subsequently testified that he had received $150. His verified claim, filed with the commission, contains this statement:

"This contribution consisted of $150 (about) in money and $60 in other things, such as farm labor upon father's farm. all since January last, when decendent was discharged from the army."

In view of the other evidence in the case, the amount contributed by the son is not very material.

The claimant's farm consisted of 170 acres. He bought it about 10 years ago for $4,200, of which $2,800 remains unpaid. He testifies that he has paid each year on this indebtedness $100, besides interest. He had 17 cows, 3 horses, and a quantity of poultry. He sold his milk, and his income therefrom was $1,200 a year. In 1919 he raised 200 bushels of potatoes, and sold 100 bushels for $100. He produced hay, wheat, oats, and corn. The $1,300 received from the milk and potatoes did not, of course, represent all his income, because his family lived on the farm, and much of the food for the family was supplied thereform. Some of the produce of the farm was exchanged for family supplies. The claimant had nine children, of whom one daughter and three youngest sons were living at home. The other children were adults and had left home. Of the three boys at home the eldest was 19 years old and in poor health, and unable to do much work. The next younger one was 17 and worked on the farm. The youngest was 14, and went to school, but helped with the farm work when not in school. The claimant was 62 years old and in good health. He and the three boys did substantially all the work on the farm. At the time of the death of the deceased son the claimant had over $600 in the bank, which shortly thereafter was increased by another deposit of $100. He testifies that of this amount $400, which was last deposited, belonged to another son, who was in the army, and that $300 of the deposit belonged to himself. This $300. according to the evidence, included a balance of $216 on May 1, 1918, before the deceased son entered the army, and which balance could not, therefore, include any contribution from the deceased son.

"The mere fact that a father receives money from a son, and expends it, is not alone sufficient to establish dependency." Matter of Profeta v. Retsof Mining Co., 188 App. Div. 383, 177 N. Y. Supp. 60; Matter of Birmingham v. Westinghouse Electric & Manufacturing Co., 180 App. Div. 48, 167 N. Y. Supp. 520.

The necessity for such contributions must also be established. Here no such necessity appears. Nothing is shown to indicate a change in the circumstances of the claimant, differentiating the year 1919 from previous years. It does not appear that the deceased son had given any assistance in former years, except as stated. Whether his contributions in the latter part of his life were the result of filial devotion, or, like the money which the claimant received from his other son, were to be held and accounted for by the claimant, is not in this case material. The controlling circumstances are that the claimant, independently of any assistance from the son in question, was supporting his family, re-

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ducing each year the indebtedness on his farm, and accumulating a fund deposited in the bank. A man who by his unaided resources is supporting his family and increasing his capital is not a dependant within the meaning of the Workmen's Compensation Law. That is what the claimant was doing according to his own testimony. His claim for compensation on the ground of dependency must therefore be denied.

The award should be reversed, and the claim dismissed. All concur.

STATE INDUSTRIAL COMMISSION ET AL. v. TASSELL & FAIRBANKS ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 10, 1920.)

184 New York Supplement, 426.

1. MASTER AND SERVANT — ENGINE REPAIRER. PAID ON HOUR BASIS, HELD AN "EMPLOYEE," WITHIN COMPENSATION LAW, AND NOT AN "INDEPENDENT CONTRACTOR."

A mechanic, repairing engines for heating and plumbing contractors at a specified rate per hour, depending on the particular kind of work, for which he rendered his bill for a gross amount, without itemizing it, his name being carried on the pay roll used as a basis for calculating the insurance premium, *held* an "employee," within Workmen's Compensation Law and not an "independent contractor."

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Employee; Independent Contractor.)

2. MASTER AND SERVANT—FINDINGS OF FACT IN COMPENATION CASE FINAL.

On appeal from an award under the Workmen's Compensation Law, the findings on questions of fact in evidence cannot be disturbed.

(For other cases, see Master ad Servant, Dec. Dig. § 417[7].)

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law (Consol. Laws, c. 67) by Arlie F. Peck for compensation for death of husband, opposed by Tassell & Fairbanks, employers, and the Fidelity & Casualty Company of New York, insurer. From an award of the State Industrial Commission to claimant and her two minor children, the employer and insurer appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Nadel, Jones & Mowton, of New York City (Edward P. Nowton, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (Bernard L. Shientag and E. C. Aiken, Deputy Attys. Gen., of counsel), for respondents.

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KILEY, J. The only question involved upon this appeal is whether claimant's husband, at the time of the accident, was an independent contractor or an employee of Tassell & Fairbanks, of Williamstown, N. Y., when the accident occurred. The firm of Tassell & Fairbanks was engaged in business as heating and plumbing contractors, installing water supply systems, including engines. Lewis Peck was a mechanic, working for whoever employed him; he did much work in the repair of auto engines as well as other engines. Previous to March 13, 1919, he had done considerable work repairing engines for the water systems, and on automobiles and automobile trucks, for the appellant employers. When he finished the particular kind of work he was employed to do by said appellants, he handed in his bill for the gross amount, without itemizing it, sometimes including the value of the use of his own automobile, when required to carry himself, tools, and material to the place this repair work called him. His name was carried on the employers' pay roll; it appearing from the evidence of one of the members of the firm that he was considered an honest man, and he was not asked to itemize his bill, and that it was understood that his rate of wages per hour was 60 to 70 cents, depending somewhat on the particular kind of service he was called upon to perform.

Claimant testified and stated in her claim that his wage rate was 70 cents an hour. The pay roll upon which Peck's time and compensation was carried was used as a basis upon which the appellant insurance carrier figured the amount of the yearly premium to be paid by the employers for compensation insurance. The employers further testified that Lewis Peck never worked for the firm by the job as an independent contractor. On the 13th day of March, 1919, Tassell & Fairbanks employed Peck to go out of town some five or six miles and repair an engine of one of its water systems. He had done the same work for this firm on previous occasions. He used his own automobile on this occasion. After finishing his work he was returning home, when the auto turned over and Mr. Peck was killed. It appears further from the record that the employers furnished tools and machinery on different occasions to be used by Peck in the work he was doing for the firm. The employers claimed this was one of the men they insured.

[1] The appellant insurance carrier urges that on this state of facts claimant's husband was an independent contractor. I have stated that the above is the only question involved, and I so consider it, for it appears beyond contradiction that the firm of Tassell & Fairbanks was engaged in the business continuously in which they employed the deceased, and that he was their engine repair man, and it follows that the accident arose out of and in the course of the employment. Appellant carrier relies, as authority for its contention that this man was an independent contractor, upon Prince v. Schwartz, 190 App. Div. 820, 180 N. Y. Supp. 703, and Litts v. Risley Lumber Co., 224 N. Y. 321, 120 N. E. 730. In both these cases there was a contract to do the work by the job for a lump sum, and they are therein distinguishable from the case at bar. That claimant's husband was not an independent contractor seems clear from the evidence, and finds support in Liberatore v. Friedman, 224 N. Y. 710, 121 N. E. 876, which was a piece work case. To the same effect is Abromowitz v. Hudson View Construction Co., 188 App. Div. 356, 177 N. Y. Supp. 187, affirmed 228 N. Y. 509, 126 N. E. 898; Woods v. Tupper Lake Chemical Co., 178 App. Div. 942, 165 N. Y. Supp. 1118, affirmed 221 N. Y. 660, 117 N. E. 1087.

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[2] Questions of fact were presented upon the several elements in the evidence that go to make up the case of the claimant. We cannot disturb the findings.

The award should be affirmed. All concur.

GALE v. MUNRO.

(New York Supreme Court, Appellate Division, Third Department. Novemberr 10, 1920.)

184 New York Supplement, 413.

1. MASTER AND SERVANT—COMPENSATION CLAIMANT HAS BURDEN OF PROOF.

The burden of proof is on the claimant, under the Workmen's Compensation Law, to show that the accident arose out of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

2. MASTER AND SERVANT — MULTIGRAPHING MACHINE OPERATOR'S INJURY NOT SHOWN TO HAVE ARISEN OUT OF EMPLOYMENT UNDER COMPENSATION LAW.

In a proceeding under the Workmen's Compensation Law by a multigraphing machine operator to recover for the loss of a finger, amputated when infection developed after a cut so slight as not to arrest the attention of the claimant, who was unable to indicate its origin on the machine, shown to have no sharp edges, *held*, that a finding that the accident arose out of the employment was unsupported by evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Ruby Gale to obtain compensation for a personal injury, opposed by James W. Munro, the employer. There was an award of compensation. and the employer appeals. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Henry J. Kimball, of Watertown, for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

COCHRANE, J. The employer was conducting an advertising business in an office 15 feet square divided by a partition. He used in such business a multigraphing machine and typewriting machine. The claimant was his only employee, and she operated both machines. She was 23 years old. On February 22, 1919, while using the multigraphing machine, she cut the end of the second finger of her left hand. The following day the finger showed signs of infection, and was ultimately amputated, and the hand otherwise affected. The State Industrial Commission has found that, because the employer used a multigraphing

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machine, he was engaged in the printing business (Workmen's Compensation Law [Consol. Laws, c. 67] § 2, group 40,) and has accordingly awarded compensation to the claimant for partial loss of the use of the hand. As I view the case, it is unnecessary to determine whether the employer was in the printing business, within the meaning of the statute.

[1-3] The award must be reversed, because the evidence fails to establish that the injury arose out of the employment. The finding of the commission is that the claimant cut her finger on the multigraphing machine. This finding is unsupported by evidence. The employer was absent at the time, and no one witnessed the accident. The entire testimony of the claimant on this point is as follows:

"Q. Now just describe to the commissioner what happened, and just exactly how you hurt or cut your finger—what there was to it. A. I was working around the machine; cut was so slight I did not pay any attention. When I got up Sunday morning, I told my mother I hurt my finger. It was sore. I went to doctor. Had blood poisoning. Q. What part of the machine was it? A. Around the segment there. * * * Q. Would you be able, if the machine were brought here, to point out on what part of the machine you injured your finger? A. No; I can't tell that. I don't really know where I did hurt it. Q. You don't really know you hurt it on the machine? A. No. Q. Didn't you tell me you hurt it on the segment? A. Down around the segment, I said. Q. So, if we brought the machine into court here, you would not be able to show where you hurt your finger? A. No; I don't think I could. Q. How soon did you leave the office after you got this cut? A. I worked until noon. Q. Did it bleed? A. Not much. Q. Did it bleed any? A. Yes; some, I didn't pay any attention, it was so slight."

Although the claimant cut her finger while operating the multigraphing machine in the course of her employment, she is unable to say how she hurt it, or even that she hurt it on the machine. A cut so slight as not to arrest the attention of its victim, and the origin of which she is unable to indicate, cannot be said to have been caused by a machine on which she was at the time working. Furthermore, the evidence is that the multigraphing machine had no sharp edges, nor any place where an operator could cut himself. This evidence is uncontradicted. although, if incorrect, it was susceptible of contradiction by the claimant herself. She had several interviews with her employer after the accident concerning the condition of her hand, but admits that she never claimed to him that she injured it on the machine. From her testimony it does not appear that she ever made such claim to any person. She did not even so state in her claim for compensation filed with the commission. It has been so frequently held that the buredn of proof is on the claimant in these proceedings as to render superfluous the citation of authorities to that effect. The nature of some injuries is such as to indicate their origin, but that is not true of a slight cut or scratch on the finger, which may have occurred in various ways. In my opinion it cannot be held on the evidence produced that this accident arose out of the employment.

The award should be reversed, and the claim dismissed. All concur, except John M. Kellogg, P. J., who dissents.

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HAGER v. GRIFFIN MFG. CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 18, 1920.)

184 New York Supplement. 750.

MASTER AND SERVANT—EVIDENCE AS TO INJURY, WITHIN COMPENSATION LAW, HELD INSUFFICIENT.

Evidence *held* not to show that injury producing inguinal hernia occurred in the course of claimant's employment, within Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

John M. Kellogg, P. J., dissenting.

Appeal from Award of State Industrial Commission.

Proceeding under the Workmen's Compensation Law (Consol. Laws, c. 67) by Harry Hager, employee, opposed by the Griffin Manufacturing Company, employer, and the Travelers' Insurance Company, insurer. From an award of the State Industrial Commission, the employer and insurer appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley. JJ.

Benjamin C. Loder, of New York City (Clarence S. Zipp, of Hartford, Conn., of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. This is another of the right inguinal hernia cases. in which there is no evidence to support the happening of the alleged accident. The claimant, in his claim for compensation, describes the alleged accident as follows:

"Lifting of sliding door from elevator leading to street, I felt a sting on the right side, but did not think it serious until the 23d of December, and on the 24th of December I had to give up and was sent to the hospital, but am not able to do any hard work."

Subsequently upon a hearing the claimant testified that the accident happened on the 24th of December; then he modified this by saying that he thought the accident occurred two weeks before that, and that he was not sure when the accident happened. The claimant apparently had some confused ideas as to the happening of the accident and did not seem to understand the necessity of fixing a date for the accident; but he finally, after much prompting, concluded that the date of the accident was December 10th, "because I felt a sting there when I pulled the door." He says he had no medical attention between the date of the alleged accident and the 24th of December; that he made no examination of himself until the 24th. and that at that time he felt sore and found a little lump, which was largely increased on the following morning. The claimant made a statement in writing, a statement which he wrote himself, on the 5th day of January, 1920, in which he says:

"I do not know exactly what was the cause of this rupture. I could not say that lifting the elevator door on that occasion referred to was the cause. I did not feel any ill effects from the day I felt the sting in

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my side until December 23; but it is the only cause to which I can attribute it. I have no recollection of ever straining myself before or since that time."

Generally his testimony is in harmony with this statement, except that under the leading questions propounded by the deputy commissioner he does suggest that he received a strain in lifting the elevator door. In answer to the question, "You also tell us you don't know exactly what was the cause of this rupture?" the claimant at the second hearing said, "I couldn't tell you, sirs, unless it was heavy lifting." But when or where he did any heavy lifting, other or different from that involved in his everyday work of operating an elevator and lifting the doors, is not told, and there is no medical or other evidence to show that the alleged lifting of the elevator doors could produce hernia.

The case is not different in principle from that of Matter of Alpert v. Powers, 223 N. Y. 97, 119 N. E. 229, and the award should not be permitted to stand. The fact that the claimant is honest, and tells us that he does not know what produced his hernia, while most commendable, does not justify a conclusion of fact that an accident happened to him, growing out of and in the course of his employment.

The award appealed from should be reversed. All concur.

KRINSKY v. WARD & GOW.

(New York Supreme Court, Appellate Division, Third Department. November 10, 1920.)

184 New York Supplement, 443.

MASTER AND SERVANT — NEWS STAND SALESMAN PROTECTED BY WORKMEN'S COMPENSATION ACT; "HAZARDOUS EMPLOYMENT."

A salesman at one of the 125 news stands operated by the employer at stations of the Interborough Rapid Transit Company in New York City, although not one of the "workmen or operatives" of his employer, within Workmen's Compensation Law, § 2, second group 45, is within the protection of the act as an employee in a "hazardous employment"; all such being within the protection of the statute, irrespective of whether or not their particular duties bring them within the hazards of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases. First and Second Series, Hazardous.)

Appeal from Award of State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Himan Krinsky, employee, opposed by Ward & Gow, employers. From an award in claimant's favor, the employers appeal. Award unanimously affirmed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley. JJ.

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Everett, Clarke & Benedict, of New York City (Herman S. Hertwig, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (I. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

COCHRANE, J. The employer conducts the news stands at the various stations of the Interborough Rapid Transit Company in New York City. At such news stands are sold periodicals and confectionery. The merchandise is collected and kept at 39 Park Place. where it is loaded on trucks and then distributed to the different news stands. It is not disputed that in connection with such business there are more than four "workmen or operatives," within the meaning of the second group 45 of section 2 of the Workmen's Compensation Law (Consol. Laws, c. 67). There are many more employees who cannot be classified as "workmen or operatives." Among the large number who cannot be thus classified is the claimant. He was a salesman at one of the news stands, of which there were 125. He received an injury which arose out of and in the course of his employment. The contention is that, because he was not a workman or operative, he is not within the protection of the act.

Such construction of the statute cannot be upheld. Section 2 divides employments into various groups, which it characterizes as "hazardous employments." The second group 45 includes all employments not before enumerated in which there are engaged four or more workmen or operatives under conditions more specifically described in said group. All employees of a "hazardous employment" are within the protection of the statute, irrespective of whether or not their particular duties bring them within the hazards of the employment. Matter of Dose v. Moehle Lithographic Co., 221 N. Y. 401, 117 N. E. 616; Matter of Spang v. Broadway Brewing & Malting Co.. 182 App. Div. 443. 169 N. Y. Supp. 574; Joyce v. Eastman Kodak Co., 182 App. Div. 354, 170 N. Y. Supp. 401. That is true of all the other groups of section 2. and it is impossible to make any distinction in respect to second group 45.

The award should therefore be affirmed. All concur.

LAURITZEN v. TERRY & TENCH CO., INC., ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 18, 1920.)

184 New York Supplement, 683.

MASTER AND SERVANT — LUMP SUM COMPENSATION AWARD TO WIDOW. WITH DAUGHTER. FOR PURCHASE OF FARM, NOT WITHIN POWER OF INDUSTRIAL COMMISSION.

The State Industrial Commission did not act within its powers under the Workmen's Compensation Law in directing that two awards of compensation made to the widow and daughter of the deceased employee be commuted and paid in a lump sum aggregating $5,258.85, the widow being about 40 years of age, of no financial experience, earning only some $10 a week doing scrubbing and washing, while her daughter, a girl of 14 years, was in delicate health; the avowed purpose for which the lump sum award was asked being that the widow might purchase a farm in Iowa.

(For other cases, see Master and Servant, Dec. Dig. § 386[4].)

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Cochrane and Henry T. Kellogg. JJ., dissenting.

Appeal from State Industrial Commission.

In the matter of the claim for compensation under the Workmen's Compensation Law, made by Mrs. Hedwig Lauritzen for death of her husband, Edward Lauritzen, employee, against the Terry & Tench Company, Incorporated, employer, and the United States Fidelity & Guaranty Company, insurance carrier. From awards of the State Industrial Commission to the widow and her daughter, and from an order directing payment of a lump sum, the employer and insurance carrier appeal. Award reversed, and periodical payments ordered resumed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley. JJ.

William Warren Dimmick. of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. The question involved in this case is whether the State Industrial Commission has acted within its powers in directing the commutation of the awards to a widow and her infant daughter and the payment of a lump sum. There is no dispute that Edward Lauritzen, aged 45 years, suffered injuries on the 17th of January, 1917, resulting in his death, while in the employ of the Terry & Tench Company, Incorporated, of New York City. and that his average earnings per day were $5.50. There is no question as to the amount of the award, but the appellants do insist that the State Industrial Commission erred in its order directing that the two awards, made to the widow and daughter of the decedent, be commuted and paid in a lump sum aggregating $5,-258.85.

Section 25 of the Workmen's Compensation Law (Consol. Laws, c. 67) provides that—

"Compensation under the provisions of this chapter shall be payable periodically by the employer, in accordance with the method of payment of the wages of the employee at the time of his injury or death, and shall be so provided for in any award; but the commission may determine that any payments may be made monthly or at any other period, as it may deem advisable."

And it was obviously the intelligent purpose of the Legislature to continue the wage income as nearly uniform as the provisions of the law would permit after the injury or death of the employee. "The evident purpose of the provisions of section 25 regulating the times of payment of compensation, was not only for the convenience of the employees and dependents by requiring the payments to be in general made with the usual frequency of the payment of wages," say the court in Spaduccino v. Hayes & Co., 180 App. Div. 37, 167 N. Y. Supp. 483, "but also to guard against the liability of unfortunate or improvident employees or dependents becoming charges upon public charity," and in the case cited it was held that the State Industrial Commission had the power to rescind a lump sum award and restore the periodical payments, under the provisions of section 74 of the Workmen's Compensation Law, giving continued jurisdiction of each particular case, and authorizing the commission to make such modificatons or changes from time to time as in its opinion might be just. Ths section (74), in connection with section 22, clearly indicates the purpose of the Legislature

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to keep the whole matter of compensation within the jurisdction of the commission, and we should not make any strained construction of the statute to permit of the payment of a lump sum to a widow for the purpose of permitting her to engage in an alleged farming proposition outside of the jurisdiction of the commission.

The claimant here has asked, and has been awarded, a lump sum in excess of $5,000 for the avowed purpose of purchasing a farm in Iowa, and one of the commissioners has expressed the opinion that no better investment could be made, although the record now before us is utterly barren of any evidence to support such a conclusion, and, so far as we may know from anything in the record, the permission granted might as well have been made for the purchase of "castles in Spain" or municipal milk plants in Mars. The provision of the statute under which this lump sum award is assumed to be made, and which is a part of section 25, is that the "commission, whenever it shall so deem advisable, may commute such periodical payments to one or more lump sum payments to the injured employee, or, in case of death, his dependents, provided the same shall be in the interest of justice"; and we are to determine whether the commission, without any evidence to support its conclusion, may defeat the primary object of the statute and work an injustice upon the insurance carrier, such as is indicated by the discussion in Sperduto v. New York City Interborough R. Co., 186 App. Div. 145, 151, 173 N. Y. Supp. 834.

In the first place, there is no assurance that the claimant will, if she reduces the award to possession, purchase a farm in Iowa. In the second place, while it may be accepted as a truism that the purchase of a farm in Iowa would be a good investment in the abstract, there is nothing to justify the assumption that every purchase of a farm in Iowa would prove profitable or desirable. The claimant appears to be a woman who is earning now less than $10 per week washing and scrubbing, which suggests the thought that she is not making the most of her opportunities, that she is lacking in the business faculty of getting the best price for her labor which the market will stand, or that she is a very poor washer and scrubber. If we may travel afield with the same assurance of the learned commissioner, who thinks the purchase of a farm in Iowa is the best kind of an investment, we will find that Iowa is a corn and hog raising state; that this is its chief industry. We will find, also, that land which raises corn in profitable quantities in Iowa in these days is worth in the market from $300 to $400 per acre. If we accept the lower figure, and assume the available sum at $6,000, we find that this claimant might purchase 20 acres of Iowa farm land, without buildings or equipments of any kind, while it is well known that profitable farming in Iowa requires a large acreage and a machinery equipment equal to that of many small factories and a capital which enables the farmer to handle his output to advantage. If any one asserts that this is a good investment for a woman of 40 years of age with a delicate daughter of 14 years of age on her hands to support, he is stronger on assertion than he is upon knowledge of conditions which prevail in the Middle West in these days. But 20 acres are not available in Iowa. They are held in large parcels and cultivated at wholesale, and you probably could not find a 20-acre farm in the state of Iowa of any practical value which could be purchased at any price within reason.

But, beyond this, and assuming that such a farm might be found, who is to know that these alleged brothers-in-law would give her sound advice, and that the proposed venture will not in the end leave her to come back into the state of New York to become a charge upon the community? Such things have happened, and this woman in her tea-

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timony displays no such knowledge of business affairs as justifies any one in intrusting her with more than $5,000 in money outside the jurisdiction of the state of New York and its Industrial Commission. Perhaps at no time in the history of the country have there been so many "get-rich-quick" schemes to lure the inexperienced into futile investments, and the policy of the Workmen's Compensation Law and every consideration of the welfare of this woman, as well as the justice which belongs to the insurance carrier, demands that this lump sum award should be reversed, and that the claimant should be paid the compensation which the law contemplated should be paid under such circumstances. The discussion of this court in the recent cases of Adams v. N. Y., O. & W. R. Co., 175 App. Div. 714, 161 N. Y. Supp. 919, and Sperduto v. New York City Interborough R. Co, 186 App. Div. 145, 173 N. Y. Supp. 834, and of the Court of Appeals in affirming Adams v. N. Y., O. & W. R. Co., 220 N. Y. 579, 114 N. E. 1046, all lead to the reversal of this award and the substitution of the periodical payments which it attempts to supersede. There must be special facts and circumstances to justify an exception to the specific rule laid down in section 25 of the Workmen's Compensation Law, and generally the fund which is provided for promoting the comfort and safety of citizens of the state of New York should not be gathered into a lump sum and sent into a remote jurisdiction to gratify some passing fancy of the claimant. The experience of those who have come into the possession of insurance funds does not justify the lump sum system except under very special circumstances, and the radical innovation in our industrial system growing out of the adoption of the Workmen's Compensation Law can only be justified by a prudent care over those whose daily wants were proposed to be cared for in the event of death of the breadwinner. The condition precedent to a lump sum award is that justice shall be done, and this involves actual knowledge, so far as prudence and foresight can go, of facts and circumstances which justify a deviation from the primary spirit of the law.

The award should be reversed and the periodical payments, should be resumed. All concur, except Cochrane and Henry T. Kellogg, JJ., who dissent on the authority of Dodd v. 461 Eighth Avenue Co., Inc., 227 N. Y. 597, 125 N. E. 916.

WOOD v. PAPAW ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 10, 1920.)

184 New York Supplement, 686.

MASTER AND SERVANT—INJURY TO FRUIT STORE EMPLOYEE HELD NOT INCIDENTAL TO EMPLOYER'S PRINCIPAL BUSINESS, WITHIN COMPENSATION ACT.

Where proprietor of meat market carried on during the summer a fruit store in a separate building not adjoining the meat market, services of an employee, employed to work in the fruit store until the close thereof in the fall or sooner, *held* not incidental to the meat business, so as to entitle the employee to compensation under the Workmen's Compensation Act for injuries sustained while working in the store.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

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Appeal from State Industrial Commission.

Proceeding by Lila Wood under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by A. T. Papaw, the employer. and the Travelers' Insurance Company, the insurance carrier. From an award of compensation, the employer and insurance carrier appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Benjamin C. Loder, of New York City (E. C. Sherwood and William B. Davis, both of New York City, on the brief). for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent.

JOHN M. KELLOGG, P. J. The employer carried on a meat market at Lake Placid, at which he sold fruit, which was carried on by himself and two employees. During the summer months he carried on a fruit store in a separate building not adjoining the meat market. His wife and the injured employee attended to the business. The employee had never worked in the meat market, but was employed June 28th to work in the fruit store, and her employment would terminate at the close of the store in the fall, or sooner. It was not the intention that she should perform any service in or about the meat market. She sustained the injury while at work in the fruit store. The commission has found that the principal business of the employer was carrying on the meat market, and that the fruit store was merely incidental to it, and that the claimant is within the act (Consol. Laws, c. 67).

There is no evidence which justifies the conclusion that the claimant was employed in or about the meat market; the fruit store was so separated from it, and so far an independent business, that it cannot be said that the services of the claimant was merely incidental to the meat business.

In May, 1920, in the Matter of Sabatelli v. De Robertis, —— App. Div. ——, 183 N Y. Supp. 796, where the employer carried on a liquor saloon, and an ice cream business in an adjoining store, the facts were similar to the situation here. There a person who was a customer of each store was arrested, and the employer directed the employee to go with him to the police headquarters and attend to his bail, and the injury was sustained while he was at the headquarters giving the bail. It was held that the injury did not arise out of and in the course of the employment. While this case is not in all respects like the Sabatelli Case, it seems to fall within the rule.

The award should therefore be reversed, and the claim dismissed. All concur.

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McHALE v. SHEFFIELD FARMS CO., INC

(New York Supreme Court, Appellate Division, Third Department. November 10, 1920.)

184 New York Supplement, 576.

MASTER AND SERVANT — UNSUPPORTED HEARSAY EVIDENCE INSUFFICIENT TO ESTABLISH INJURY IN COURSE OF EMPLOYMENT, WITHIN COMPENSATION LAW.

Hearsay evidence that a driver came to his death by a fall, unsupported by facts and circumstances, and the autopsy disclosing death due to disease having no relation to any accident, *held* insufficient to establish the jurisdictional fact of accidental injury arising out of and in the course of employment, within Workmen's Compensation Law, § 10; a fact required to be established by evidence of probative force unaided by the presumptions declared in section 21.

(For other cases, see Master and Servant. Dec. Dig. § 405[4].)

Appeal from State Industrial Commission.

In the matter of the claim of Elizabeth C. McHale for compensation under the workmen's Compensation Law against the Sheffield Farms Company, incorporated, employer and self-insurer. From an award of the State Industrial Commission, the employer and self-insurer appeals. Award reversed, and matter remitted to the Commission.

Argued before, John M. Kellogg, Woodward, Cochrane, Henry T. Kellogg, and Kiley, J. J.

Alger & Coughlin, of New York City (George W. Alger, of New York City, of counsel), for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD ,J. The question presented upon this appeal is whether there was any evidence of a probative character before the State Industrial Commission to establish that Patrick J. McHale came to his death through "accidental injuries arising out of and in the course of employment" in a hazardous occupation. He was the driver of a milk wagon for the Sheffield Farms Company, Incorporated, and had been so employed for about 10 years, and the theory on which the award has been made, is that he came to his death by reason of a fall received on the 24th day fo April, 1919; the death following on the 30th of the same month.

The learned counsel for the State Industrial Commission says in his brief that "the evidence as to the accident is almost entirely hearsay, but the circumstances show that the man must have had an accident of some kind," but when or where this alleged accident occurred nowhere appears. The claimant decedent's widow, tells us of his coming in in the morning and acting silly, so that she thought some one had doped him, and the local physician who was called in certified that "in my opinon" the death was "due to an injury of the brain on account of an accident." It appears that the decedent was irrational or unconscious all of Thursday, and that on Friday he "got his senses" and talked with everybody; that on Thursday he "couldn't even talk to

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the doctor, and when the doctor went to examine him he wanted to bite him, and he acted terribly." On Friday a second physician was called in consultation, because we saw he was getting worse," and it was at this time that the claimant says "he told me he was on the wagon and said one of the cases of milk—some cases have bottoms and some have no bottoms where they pack ice all around—I don't know if he said where be fell from; but he said he kicked the ice aside for a while, and he went to take the case off the wagon, and he slipped on the ice and struck the back of his head."

A Mrs. Lynch testifies that she heard some man with the word "inspector," on his hat say that the decedent fell from the wagon on 161st street, but no one testifies directly to the happening of any accident, and it appears that at no time subsequent to Friday, the day following the alleged accident, was the decedent able to make any intelligent communication. Claimant says the Friday was "the only time" he was rational betweenThursday, when he acted silly and wanted to bite the doctor, and the following Wednesday, when he died; and the only foundation for this award are the alleged commuications of this man on Friday to his wife and some of the neighbors and friends. His attending physician testified that he was conscious on Friday morning; that "Friday all day he acted fairly good; of course, at times he was absolutely sick, and at times he didn't answered to the point asked him," and that on Saturday morning he lapsed into semiconsciousness and grew worse until his death. This physician says the decedent gave him a history of the case.

'He said something happened to him, and he couldn't recollect what happened;" that "he thinks he fell, and thinks he was injured. but couldn't give any clear answer. He said he hurt himself, he doesn't know, and doesn't know where it happened, but that he was injured. We went over him; Dr. Berg and I gave him a very thorough examination; this was absolutely negative."

In other words, aside from a slight abrasion on one of the legs, which concededly had nothing to do with the death, the examination of the decedent showed no injury, and this was fully confirmed by the autopsy, which disclosed that the chief and determining cause of his death was tubercular meningitis, and the contributing cause chronic pulmonary tuberculosis. The decedent had been ill with the grippe from March 10th to April 16th, and this alleged accident occurred on the 24th day of the same month, and the autopsy discloses an adequate cause of the death, with no evidence whatever of any injury which could have contributed to the death.

It thus appears, not only that there is no evidence of probative force to support the conclusion that the death resulted from an accident, but that it affirmatively appears that the death was due to disease, which is not shown to have had any relation whatever to any alleged accident. The presumptions declared in section 21 of the act do not help the claimant. They do not relate to the fundamental question of the happening of the accident, which is in the nature of a jurisdictional fact to be supported by direct or circumstial evidence, and the presumptions do not prevail over "substantial evidence to the contrary." Workmen's Compensation Law (Consol. Laws, c. 67) § 21. If any authority is needed for this proposition, it is to be found in Matter of Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540, and we are clearly of the opinion that hearsay testimony, unsuppored by facts and circumstances to justify a reasonable inference, is not sufficient to establish the primary fact of an

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"accidental personal injury sustained by the employee arising out of and in the course of his employment." Workmen's Compensation Law, §10.

The jurisdiction of the State Industrial Commission to make an award depends upon the happening of an accident under the conditions named in the statute, and this requires evidence of probative force. Hearsay testimony is competent in explanation or corroboration, no doubt; but it must itself be corroborated by relevant facts, or it cannot be made the basis of an award under the statute here considered.

The award should be reversed, and matter remitted to the commission. All concur.

MACKEY v. CITY OF NEW YORK.

(New York Supreme Court, Appellate Division, Third Department November 10, 1920.)

184 New York Supplement 495.

MASTER AND SERVANT—COMPENSATION NOT ALLOWABLE AGAINST CITY AS SPECIAL EMPLOYER OF DRIVER INJURED WHILE RETURNING TEAM TO GENERAL EMPLOYER'S BARN; "HAZARDOUS EMPLOYMENT."

Driver of a garbage wagon employed by one who contracted with city of New York for the use of his team with driver at so much a day, the driver reporting to the section foreman of the city, who directed him where and when to have his wagon loaded with garbage and ashes, after he had completed his day's work for the city, his special employer, and was returning his team to the barn of his general employer, was not employed by the city, which is not liable for injury to him, not having employed him in "hazardous employment," within Workmen's Compensation Law, § 3, subd. 3; the injury having occurred while the employee was driving a vehicle, a case provided for by section 2, group 41.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Hazardous.)

Appeal from State Industrial Commission.

In the matter of the claim of Anna Mackey for compensation for herself and children under the Workmen's Compeensation Law for the death of John Mackey against the City of New York, the employer. From an award of the State Industrial Commission, the City appeals. Award reversed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Riley, JJ.

John P. O'Brien, Corp. Counsel, of New York City (John F. O'Brien, William A. Walling, and Isaac F. Cohen, all of New York City, of counsel), for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

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WOODWARD, J. There is no dispute as to the facts in this case. The decedent was employed by one Schauerte as a driver, and was paid the sum of $18 per week. The city of New York contracted with Schauerte for the use of the latter's team with a driver at the rate of $6.50 per day. The decedent, with the team, reported to the section foreman of the city of New York, who directed him where and when to have his wagon loaded with garbage and ashes. Usually the work began at 8 o'clock in the forenoon and closed at 5 in the afternoon. On the day of the accident it rained, and the section foreman permitted decedent to work through the noon hour for the purpose of quitting earlier at night. Decedent's wagon was loaded for the last time at about 3:15 p. m., on the 1st day of May, 1919. He went to the dumping ground, about one mile away, and unloaded his wagon, and started for the stable of his employer, Schauerte. It was while he was thus engaged in returning to his employer's barn at Walcott and Steinway avenues, at about 4 o'clock in the afternoon, that a wheel came off the wagon and threw decedent to the pavement, producing injuries from which he died. The State Industrial Commission has made an award against the city of New York, and appeal comes to this court. The State Industrial Commission attempts to justify the award on the theory that under the decision in Matter of DeNoyer v. Cavanaugh, 221 N. Y. 273, 116 N. E. 992, the commission has an option to make an award against either the general or special employer.

What was held in the case relied upon was that a man might be in the employ of both a general and a special employer, and that if the man was under the exclusive control of the special employer in the performance of work which is a part of his business he is, for the time being, an employee of the special employer; that under such circumstances he might look to the general employer for his compensation, and to his special employer for damages for injuries, as under the common law. But the same case recognized as law the rule laid down in a Massachusetts case that—

"Where a horse and driver have been let by a general employer into the service of another, the driver is subject to the control, and therefore is the agent, of his general employer as to the care and management of the horse."

In the present case, therefore, the decedent was not, at the time of the accident, in the employ of the city of New York. He had completed his day's work for the special employer and was returning the team to the barn of his general employer. He was in the care and management of the team; he was fulfilling the duties and obligations of his general employment, and not that of his special employment, at the time of the accident; and the city of New York could not be held liable for the injury, because it was not an employer, for it was not employing the decedent in a hazardous employment (Workmen's Compensation Law [Consol. Laws, c. 67] § 3, subd. 3), and the decedent was not injured by an accident arising out of and in the course of his employment in removing ashes or garbage, provided for in subdivision 13, but while driving a vehicle, provided for in group 41 of section 2 of the Workmen's Compensation Law. After the work for the city of New York was done for the day, the decedent reverted to the complete control of his general employer; he was managing and caring for the team, and the accident arose out of and in the course of the employment in driving the team back to the stables of the general employer.

The award should be reversed.

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MICHELOV v. CENTURY METAL SPINNING & STAMPING CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 18, 1920.)

184 New York Supplement 615.

MASTER AND SERVANT—EVIDENCE HELD NOT TO SHOW FATAL INJURY BY FALL IN COURSE OF EMPLOYMENT, WITHIN COMPENSATION LAW.

Evidence showing that decedent remained in his factory after working hours for his own purposes, and was found outside the building, on premises not within the control of the master and where he could not be in performance of any duty pretaining to his work, and with the windows fastened. established that the injuries could not have occurred in the course of employment, and a finding within Workmen's Compensation law, that they so occurred, based on the presumption in section 21, was unauthorized.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from State Industrial Commission.

Claim by Gussie Michelov against the Century Metal Spinning & Stamping Company, as employer, under the Workmen's Compensation Law and the United States Fidelity & Guaranty Company, as insurance carrier. Award for claimant, and the employer and insurance carrier appeal. Award reversed and claim dismissed.

Argued before John, M. Kellog, P. J.. and Woodward, Cochrane, Henry T. Kellogg, and Kiley, J. J.

William Warren Dimmick, of New York City, for appellants.

Charles D. Newton, Atty. Gen.)E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. There is no dispute that Morris Michelov was employed by the Century Metal Spinning & Stamping Company on the 26th day of November, 1919, and that he died on the day following. The plant of his employer was located on the second floor above the basement of the premises at 49 Elizabeth street, New York City. The day's work was completed at 6 o'clock in the evening. At 6:15 the decedent had some conservation with the fellow laborer, and gave as a reason for not going home at once that he wanted to count up the pieces he had produced, upon which his compensation depended. At about 6:35 of the same evening the decedant was found in the back yard of the premises, some little distance from the building, with his hat and coat off, and suffering from broken ribs and internal injuries, from which he died the following day. He was unable to tell how he came in the position in which he was found. There was no way of getting to the point through any regular passageway without traveling more than 200feet, and the point where decedent was found was not in the use of the employer, nor did any part of his employment call for his presence at this point.

The evidence is to the effect that the windows were down and fastened on the inside when an investigation was made, and that entrance to the fire escape could have been made only through the windows,

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and it seems highly improbable that the decedent could have accidentally fallen from the windows of this factory building under the circumstances shown to exist immediately after the discovery of the decedent. There were other workmen employed on the floor below, and a nephew of the decedent called th district attorney's attention to the case and suggested homicide; that a foreman of the employer was hostile to the decedent, and that he (the nephew) believed the decedent was thrown from the window by his hostile foreman—a theory more in harmony with the known facts than that of an accidental fall, with the windows fastened on the inside. At any rate, the evidence shows that the decedent had completed his day's work and remained in the plant after the other workmen had left for his own purposes, not in the discharge of any duty to the employer.

The learned counsel for the State Industrial Commission says in his brief that—

Samuel Singer who was the stationary engineer in the basement, "and who, with the proprietor, found the body of the deceased, says that he heard a noise about a quarter of an hour past 6, and, when asked what sort of a noise it was he says, 'Well not like man; I expected maybe they threw a dog there; they throwed them down sometimes through the window— the Italians there.'."

This gives color to the suggestion of homicide, and does tend to show that the death was due to accidental causes. Again counsel says:

"It is difficult to say what the exact facts are with reference to the accident which happened to this man. The Industrial Commission has found that the natural inference from the evidence is 'that the said Morris Michelov in some manner, not explained, fell from the window or the fire escape of his place of employment to the ground below, and that such injuries were sustained by reason of such fall.' This seemed to be about the only hypothesis that can be made, and to sustain the award we have to fall back on section 21 [Consol. Law, c. 67], and assume the accident occurred in the course of the employment."

Here there was undisputed evidence that the decedent remained in the factory for his own purposes; that he was found outside the building, upon premises not within the control of the master, and where he could not be in the performance of any duty owing to the employer, and with the window leading to the fire escape, which the decedent had no occasion to use, fastened on the inside; and to presume that he met with an accident, and then to assume that this presumed accident arose out of and in the course of his employment, is reaching out after the unattaainable in law, for it cannot be justified. The evidence establishes that the injuries could not have been due to any risk growing out of the employment, and the award should be reversed. The award appealed from shold be reversed.

award reversed, and claim dismissed. All concur.

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SOLOMONE v. DEGNON CONTRACTING CO.

(New York Supreme Court, Appellate Division, Third Department. November 18, 1920.)

184 New York Supplement 735

1. MASTER AND SERVANT—COMPENSATION CLAIMANT'S SETTLEMENT WITH WROGDOER HELD NOT TO AFFECT CLAIM AGAINST EMPLOYER EXCEPT AS TO AMOUNT.

Under Workmen's Compensation Law § 29, relative to actions against third persons a settlement by an injured employee of a judgment against a third person without the consent of the employer did not affect his claim against the employer, except as to the amount received on such settlement.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

2. MASTER AND SERVANT—DEPENDENTS' CLAIM FOR COMPENSATION FOR DEATH NOT DEFEATED BY EMPLOYEE'S SETTLEMENT WITH WRONGDOER.

Under Workmen's Compensation Law, § 29 where an injured employee recovered judgment against a third person, and subsequently died from the injuries, his settlement of the judgment for less than its amount without the employer's consent did not destroy the claim of his dependents after his death.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

3. MASTER AND SERVANT—DEPENDENTS' CAUSE OF ACTION AGAINST WRONGDOER UNDER COMPENSATION ACT INDEPENDENT, AND NOT DERIVED FROM RIGHTS OF EMPLOYEE.

Workmen's Compensation Law, § 29, relative to the right of election in case of injury or death from the wrong of a third person, bestows on an employee's dependents in case of death a cause of action, independent of any cause of action existing at common law or by any other statute, and not derived from any right of benefit existing in favor of the injuried employee, but springing into existence as an original right at his death under the conditions specified.

(For other cases, see Master and Servant, Dec. Dig. § 388)

4. MASTER AND SERVANT—AMOUNT RECEIVED FROM WRONGDOER BY EMPLOYEE IN LIFETIME NOT CHARGEABLE AGAINST DEPENDENTS, WITHIN COMPENSATION ACT.

Under Workmen's Compensation Law, § 29, where an employee recovered a judgment against a third person, which he settled for less than its amount without the employer's consent, and subsequently died of the injuries the amount received by decedent could not be charged against the claim of his widow, except to the extent that it was actually received by her.

(For other cases, see Master and Servant, Dec. Dig. §§ 382, 389.)

Appeal from state Industrial Commission.

Proceeding under the Workmen's Compensation Act by Angelina Solomone for compensation for the death of her husband, Leonardo Solomone, opposed by the Degnon Construction Company, employer and self-insurer. From an award in favor of claimant, the employer and self-insurer appeals. Reversed, and remitted to the commission.

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Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, J. J.

Frederick J. Flynn, of New York City (R. A. Mansfield Hobbs, of New York City, of counsel), for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., and Bernard L. Shientag, of New York City, of counsel), for State Industrial Commission.

COCHRANE, J. The husband of the claimant, while in the course of his employment, was injured through the negligence of a third party. He recovered a judgment against that party for $30,000, which he settled for $7,500 without the consent of his employer, which consent was required by section 29 of the Workmen's Compensation Law (Consol. Laws, c. 67). Thereafter he died, admittedly in consequence of his said injury. His widow makes a claim herein in behalf of herself and her children, which claim has been recognized by the commission, and an award made in their behalf against the employer, who appeals therfrom.

[1, 2] The settlement of the judgment by the employee did not affect his claim against his employer, except as to the amount received on such settlement. Matter of Woodward v. E. W. Conklin & Son, Inc., 171 App. Div. 736, 157 N. Y. Supp. 948. A settlement by the claimant herself with the third party would not affect her claim against the employer, except as to the amount received by her on such settlement. Matter of Matta v. Dennings Point Brick Works, 224 N. Y. 596, 121 N. E. 878. It necessarily follows that the settlement by the employee in his lifetime did not destroy the claim of his dependents after his death.

[3, 4] It remains to be considered whether the amount received by the employee on such settlement should be applied against the claim of his dependents. Said section 29 bestows upon them a cause of action independent of any cause of action which existed at common law or by any other statute. Such cause of action is not derived from any right or benefit which existed in favor of the injured employee, but springs into existence as an oringinal right at his death under conditions making the statute applicable and the employer liable. That was substantially held in Travelers' Insurance Co. v. Louis Padula Co., Incorporated, 224 N. Y. 397, 121 N. E. 348. It follows that the dependents are not chargeable with what they have not received.

It appears, however, that some of the money paid on the settlement of the judgment is now in the possession of the claimant. Such portion as may have been used or expended by her husband is not to any extent chargeable against her; but she should be charged to the extent of the money paid on the judgment, and which she has actually received. This is on the principle of "subrogation to remedies of employees" given by said section 29. The statute makes the employer liable for "the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case." As applied to the widow and children the question is, not how much has been actually collected by the employee, but how much has been actually collected by them. This principle was applied by this court in Matter of Dietz v. Solomonwitz, 179 App. Div. 560, 166 N. Y. Supp. 849, and counsel for the commission concedes that the amount received by the widow herein should be credited to the employer. That has not been done. There is some uncertainity in the record as to the correct amount which

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the claimant has received, and the proceeding must therefore be remitted to the commission, to determine that amount and to make the proper application thereof in favor of the employer.

The award should thererfore be reversed and the matter remitted to the commission. All concur.

KILEY, J. (concurrring). On May 7, 1918, Leonardo Solomone was at work for the Degnon Contracting Company, appellant, as a laborer. Appellant was a contracting company. While the said Solomone was at work, and in the regular course of his employment, on said 7th day of May, 1918, he was struck by an automobile owned and driven by a third party. He was severely injured. The report made by the employer as to the kind and extent of the injuries seems to be sustained by the evidence, and is briefly as follows:

"At the time of the accident he suffered and received injuries, consisting of fracture of the base of the spine, that paralyzed his lower limbs and also caused in continuence of urine."

The employer had notice of the injury. While there is some conflict of evidence as to rate of daily wages, there was overtime and Sunday work, so that the actual wage rate was reached, and does not seem to be questioned. On September 23, 1918, the injured employee filed with the commission a notice of election to sue, the part of which, necessary to consideration here, reads as follows:

"Please take notice * * * I elect, under the provisions of section 29 of the Workmen's Compensation Act, to pursue my remedy against a third party not in the same employ, to wit, against Harry Sager, of Cherome, N. Y., and I hereby make claim to compensation for any deficiency between the amount I may recover in said action and the compensation provided by the Workmen's Compensation Law to which I may be entitled, and in the event that I do not recover anything by said action, I hereby claim the compensation to which I am entitled under said law due to the above-mentioned accident, which arose out of and in the course of my employment," etc.

Solomone brought the action as above indicated, and succeeded. His recovery, damages and cost amounted to $30,101.81. He compromised with the defendant and his (defendant's) insurance company, and settled the judgment for $7,500, and satisfied and discharged said judgments of record. In January, 1919, he was operated on for incontinence of urine, and during the course of the operation he contracted pneumonia, and died January 22, 1919. Thereafter, and on February 18, 1919, the claimant herein, Angelina Solomone, widow, made claim to the State Industrial Commission for compensation on account of the injury and death of her husband, Leonardo Solomone, for herself and for his two stepchildren and his own child. all under the age of 18 years. It was admitted, upon the several hearings had, that decedent's death was the result of the accident. The award appealed from allows the claimant $6.924, and the three children $2.308 each, weekly.

Two questions are presented on the appeal: (1) Did the compromise and satisfaction of judgment cut off the rights of claimant and children to seek compensation under the Workmen's Compensation Law? and (2) if not, should the whole amount paid by the defendant Sager and his insurance company he deducted from the compensation so allowed?

The first contention of the appellant is based upon what it urges should be the proper interpretation and construction of section 29 of the Workmen's Compensation Law, which section reads as follows:

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"If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, shall, before any suit or any award under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commission may rule or regulation prescribe. If such injured employee, or in case of death, his dependents, elect to take compensation under this chapter, *the awarding of compensation shall operate as an assignment of the cause of action against such to the state for the benefit of the state insurance fund, if compensation be payable thereform, and otherwise to the persons, association, corporation, or insurance carrier liable for the payment of such compensation,* and if he elected to proceed against such other, the state insurance fund, person, association, corporation, or insurance carrier as the case may be, shall contribute only the deficiency, if any, between the amount of the *recovery* against such other person *actually collected,* and the compensation provided or estimated by this chapter for such case. Such a cause of action assigned to the State may be prosecuted or compromised by the commission. *A compromise of any such cause of action by the employee or his dependents at an amaount less than the compensation provided for by this chapter, shall be made only with the written approval of the commission,* if the deficiency of compensation would be payable from the state insurance fund, and otherwise with the *writtten approval of the person, association, corporation, or insurance carrier,* liable to pay the same. Wherever an employee is killed by the negligence or wrong of another not in the same employ and dependents of such employee entitled to compensation under this chapter are minors, such election to take compensation and the assignment of the cause of action against such other and such notice of election to pursue a remedy against such other shall be made by such minor, or shall be made on behalf of such minor by a parent of such minor, or by his or her duly appointed guardian, as the commission may determine by rule in each case."

The deceased in his lifetime, filed with the commission his election to bring suit against the third party. By reference to section 29 above quoted it will be seen that "the awarding of compensation shall operate as an assignment of the cause of action," etc. Notwithstanding this provision, appellant contends that the compromise, settlement, and satisfaction of the judgment destroys any right of the claimant and the children to compensation thereafter as their rights are derivative from the cause of action for which the injured husband and father received compensation and which was evidenced by the $30,000 judgment he obtained against the third party, and which he destroyed by satisfaction of the same.

As sustaining its position reliance is had upon cases decided under Laws 1847, c. 450, later amended and now codified and embodied in section 1902 of the Code of Civil Procedure in that a double penalty is not permitted in that law, and, by analogy, is not authorized under the workmen's Compensation Law. One of the earlier cases cited by appellant, Littlewood v. Mayor, etc., of New York, 89 N. Y. 24, 42 Am. Rep. 271, holds, under the circumstances of that case, in accordance with appellant's contention in so far as it was held that action for personal injury, prosecuted by him in his liftime, ended when life ended, under the law of 1847, supra. In May 1918, the whole subject of the force and effect of the law of 1847 and subsequent amendments, and sections 1902-1904 et seq. of the Code of Civil Procedure, was taken up and ably considered in Ishie v. Norton Co. 183 App. Div. 94, 170 N. Y. Supp. 655. In the view here taken of this

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question, none of these authorities apply, and do not avail the appellant. They all have some fact established, which depends upon some statute for its virtue, and depend upon facts of that particular case for its operation.

I do not concur in the opinion incorporated in the findings of the State Industrial Commission, where it is held that claimant's rights are "not derivative, but primary and original." The right to make the claim is original, and in addition to any and all other rights heretofore confered by law upon a claimant similarly situated; but the right is based upon a claim validly running in favor of her husband in his lifetime, and the injury suffered before he died, which, if he had not died, would have entitled him to compensation under this statute, and by this statute a right founded upon the injury was preserved to his dependents to the extent of a full compensation as against a third party, or a third party and the insurance carrier. In Michigan Central R. R. Co. v. Veerland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann, Cas. 1914C, 176, the court, speaking of a compensation statute quoted from the opinion of Lord Blackburn in Seward v. Vera Cruz, 10 App. Cases, 59, as follows:

"A totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of widow, parent or child, who under such circumstances suffers pecuniary loss."

The court then proceeds:

"But as the foundation of right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.

I think this fairly states the position of the claimants here concerned. We cannot, at this juncture, dispose of this matter without further consideration of appellant's objections to the award. Section 29 of the Workmen's Compensation Law, following the portions already considered, lays down this rule:

"A compromise of any such cause of action by the employee or his dependents at an amount less the compensation provided for by this chapter shall be made only with the written approval of the commission, if the deficiency of compensation would be payable from the state insurance fund, and otherwise with the written approval of the person, association, corporation, or insurance carrier liable to pay the same."

It is conceded, or at least proven without contradiction, that no such written approval was obtained or given. Appellant urges that this omission defeats the claim of the dependents, and further that the satisfaction of the judgment prevents subrogation of any claim or remedy against the third party to the appellant, who is a self-insurer.

Take the first proposition under this last head first: The statute was not enacted as a prohibition to the injured person only. When it says no compromise shall be effected only with written approval, etc., it speaks generally, and binds and is applicable to all parties to the compromise, the same as the statute gainst usury, or any other general prohibitory statute. When the third party effected the compromise, he is held, under this statute, to know it would have no validity so far as preventing suborgation of the claim or remedy against him passing to the person or carrier who was finally liable to pay amount great-

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er than he paid for his wrongful injury of claimant's husband. The holding here is that suborgation took effect as a matter of law when such compromise was made.

This brings us to the last question: With what amount shall claimants be charged for moneys already paid by the third party? Section 29 provides that the amount to be paid by the insurance carrier shall be "the deficiency, if any, between the amount of the *recovery* against such person *actually collected,* and the compensation provided or estimated by this chapter for such case." There are several definitions, in the different dictionaries, of the word "recovery," and it has judicial definition in Keiny v. Ingraham et al., 66 Barb. 250. However, the word "recovery" is modified by the subsequent words "actually collected." It will be assumed that these words mean the idea they plainly are intended to convey, viz. the amount actually received by the injured party, in this case the claimant's husband, and such amount was $7,500; otherwise, the third party would. assuming he is or becomes financially responsible, be compelled to pay $3,750 twice, not as compensation, but as an extravagant fee to lawyers, under an arrangement to which he was not a party, and over which he had not control. It would be a double penalty, which is not provided for in the statute which creates his liability in this case. Penalties are of statutory creation. While the third party is held to the rigor of this statute. he cannot be deprived of any benefits that flow from his connection with or relation to it.

The award should be reversed, and remitted to the commission, to be corrected as herein indicated, viz. by crediting $7,500 on the compensation allowable under this claim.

STATE INDUSTRIAL COMMISSION ET AL. v. AMERICAN HIDE & LEATHER CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 18, 1920.)

184 New York Supplement, 808.

MASTER AND SERVANT—EVIDENCE HELD NOT TO SUSTAIN COMPENSATION AWARD FOR INJURY CAUSING HERNIA.

Compensation claimant's testimony that, while pulling a loaded hand truck he suffered a strain, and felt a pain which he had never felt before, and the report of the attending physician that a hernia from which claimant was suffering was due to the strain, without any fact showing how such conclusion was reached, and with the suggestion of another physician that the hernia was of long standing *held* insufficient to sustain an award on the theory that the hernia was due to injury in the employment; there being no potential evidence justifying it, but merely a guess as to the cause of claimant's condition.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

John M. Kellogg, P. J., dissenting.

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Appeal from State Industrial Commission.

Proceeding under Workmen's Compensation Law by Tony Gentelong for compensation, opposed by the American Hide & Leather Company, employer, and the Employers' Liability Assurance Corporation, insurance carrier. Award by State Industrial Commission for claimant, and employer and insurance carrier appeal. Reversed, and remitted to commission.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Bertrand L. Pettigrew, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, and Bernard L. Shientag, of New York City, of counsel), for respondents.

KILEY, J. The State Industrial Commission has made a finding as to this claim as follows:

"On May 29, 1919, Tony Gentelong was working for his employer at his employer's plant, and while engaged in the regular course of his employment, assisting a fellow workman to move a hand truck loaded with about 1,000 pounds of hides, one of the wheels of said truck descended into a hole in the floor, and in trying to liberate same by pulling on the handle of said truck Tony Gentelong received a severe strain, which resulted in an inguinal hernia in the right groin. Prior to said accident Tony Gentelong was in good physical condition, and daily performed laborious work, and had never suffered from hernia in the right side. As the result of said accident, which resulted in a hernia in the right side. Tony Gentelong was disabled from the date thereof to July 29, 1919, and on that day he was still disabled."

The above finding is based upon the following evidence taken from the record on this appeal: The attending physician was not sworn, but made a report to the State Industrial Commission in which the following appears:

"Q. Are the symptoms from which he is suffering due entirely to this injury? A. Yes. Q. Has previous sickness, injury or disease contributed to his disability? A. No."

This information was obtained by the physician upon an examination made by him of claimant on June 27, 1919, nearly a month subsequent to the date finally fixed as the date of the alleged accident. A rupture was developed on one side, and the beginning of one was found on the other side, according to the same report. Dr. Hancock examined claimant July 2, 1919, and says:

"I believe this hernia to be one of long standing," etc.

In the evidence given by claimant as to how he claims he was injured, appears the following:

"Q. How did you hurt yourself? A. Right back of the truck was a little hole, and on both sides of me there were loaded trucks. I couldn't move from right to left, and the only way I could load truck was to pull hide on truck, and while pulling it I felt a strain."

One of claimant's witnesses testified as follows:

"Q. Will you tell what happened upon that occasion? A. We were working together; he was pulling a truck, and I was pushing behind, and on the bottom of the floor there was a little hole, and he tried to pull, and can't pull, and I went over and pulled myself, and afterwards he told me: 'I got hurt; I got a strain.' "

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Claimant also testified that he had worked for this employer six years and that he "never felt any pain."

There were several hearings on this claim, and claimant, strenuously insisted that the accident occurred on June 6, 1919; but the records of the employer showed claimant had been laid off several days before that date, and he finally fixed the date as of May 29, 1919, which was the day he was laid off. The unsatisfactory condition of this evidence appears from the following on the examination of the claimant:

"Q. When was the first time you ever felt pain? A. The 6th of last month. Q. On the 6th of last month, when you felt this pain, what was you doing. A. I was turning a wheel. Q. What kind of a wheel? A. A wheel that opens the hides. Q. That is when you felt the pain first? A. Yes, sir."

Claimant explained that he understood the inquiry was as to the class of work he was doing at the time he was hurt; but at the moment of injury he was loading a truck. He had previously said his work for six years had been lifting hides. The evidence of the claimant is that he never felt this pain before. So far as his evidence is concerned, it does not show that he did not have this hernia before the time of the alleged injury. Claimant did not produce any medical testimony outside of the report of the physician who first made the examination appearing in the record. What he states, as to the injury causing the hernia, is a conclusion, without any fact or circumstance, outside of the alleged strain, to give color to the conclusion reached.

The State Industrial Commission had to base its conclusion upon the unsupported conclusion of the examining physician; that was done, notwithstanding the suggestion of a second physician that the hernia was of long standing. It cannot be the purpose of the Compensation Law (Consol. Laws, c. 67) to insure against the possibility of some internal organ or part of the body giving away when an extra exertion is put forth by the employee to perform the task he is hired to perform especially when nothing comes in contact with the body, and when no slip or fall is experienced.

While the insurer, in making his contract, is bound to take notice of the force of the statute under which it or he assumes liability, and that the broad powers are conferred therein upon the Industrial Commission, and that slight accidental injuries may entail fairly large compensation payments, yet he is justified in anticipating that courts will not sanction the functioning of the process without some potential evidence as a basis. It ought to show that the conclusion of the commission had for its foundation something more substantial than a guess as to the cause, and from that evolve the effect. Evidence should be and is required, so that the court can trace the cause through to the effect, before compensation is awarded. This standard, if correct, is not met by the statement of the physician in his report that claimant's hernia came from the injury, without any facts to show how he reached the conclusion. The rule laid down in Cavalier v. Chevrolet Motor Co., 189 App. Div. 412, 178 N. Y. Supp. 489, seems to be applicable to this case. See Matter of Alpert v. Powers, 223 N. Y. 97, 119 N. E. 229, and Matter of Hansen v. Turner Construction Co., 224 N. Y. 331, 120 N. E. 693.

The award should be reversed, and remitted to the commission for further consideration. All concur, except John M. Kellogg, P. J., who dissents.

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STATE INDUSTRIAL COMMISSION ET AL. v. DOWNEY-SNELL LOGGING CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 10, 1920.)

184 New York Supplement, 417.

MASTER AND SERVANT — COMPENSATION AWARD HELD NOT SUSTAINED BY TESTIMONY BASED ON HEARSAY STATEMENTS.

An award under the Workmen's Compensation Law, in favor of an employee loading logs, who claimed that he fell unconscious as a result of injury, and not as a result of epilepsy, *held* not sustained by testimony of physicians based on claimant's hearsay statements, which were not true, according to his subsequent evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

Appeal from State Industrial Commission.

Proceeding by Leon Brown under the Workmen's Compensation Law (Consol. Laws, c. 67) for compensation for injuries, opposed by the Downey-Snell Logging Company, employer, and the Ocean Accident & Guarantee Corporation, Limited, insurance carrier. From an award of the State Industrial Commission for claimant, employer and insurance carrier appeal. Reversed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Robert H. Woody, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, and Bernard L. Shientag, of New York City, of counsel), for respondents.

KILEY, J. The employer's first report in this case is to the effect:

"This man was on the load of logs, and must have strained himself, as he soon said he was sick, and jumped to the ground, and lay there in an epileptic fit, and whe he came to his jaw was out of joint."

Claimant in his claim for compensation says:

"Catching a log on skidway, I was jerked forward, I felt sick at stomach and faint, and fell down in the snow."

The attending physician makes the next report, and states what the patient told him, same as given in the claimant's report, and says he thinks the symptoms are due to the injury. The accident was November 2, 1919, according to this report, and this physician did not see him until April 23, 1919. His opinion s based upon what claimant told him as to how the accident happened. Dr. Flood makes the next report, and says he first saw the claimant April 16, 1919, and gives the date of accident as March 2, 1919, and says patient told him: "Log struck his stomach." Based upon that information, he says he thinks the symptoms are due to the injury. Dr. W. A. Wardner, who reduced the dislocation of the jaw on the day of the injury, which he says was March 2, 1919, says, from the description, claimant had a fit. Dr. Mathew saw him, but could not give any information or opinion, except to say: "Symptoms were much like epilepsy." Dr. Farmer, of Watertown, N. Y., says, under date of October 23, 1919, that claimant told him "he sudden-

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ly felt badly, stepped off the load and fell unconscious." The claimant was sworn upon the hearing and represented by an attorney. The attorney stated his understanding of the case as follows:

"On March 2, 1919, this claimant was employed by Downey-Snell Logging Company loading logs. As I understand it, he was on top of the load of logs, and while there he felt dizzy, and got down off the load, and fell unconscious in the snow.

Deputy Commissioner Richards asked claimant if that was so, and he answered, "Yes." In answer to another question he said that he strained or hurt himself, and was doing it all the morning, catching logs on the skidway. At a subsequent hearing on the examination of his own counsel he testified:

"I felt good up until I was standing on the load, and I commenced to feel kind of faint, sick, and dizzy, and I said I felt ill. I stepped off the load into the snow."

Later he testified that the doctor misunderstood him when he made his report; that he told the doctor that he was standing on the load when he felt ill; that the doctor "got it I was catching a log." It is very evident the doctors depended upon the first statement, which was hearsay, and was not true at that as appears by the subsequent evidence of the claimant. He (claimant) insists that he was standing on the load, felt ill, etc. With great effort the commission did not seem able to change it. Under the ruling in Carroll v. Knickerbocker Ice Co. 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 450: Belcher v. Carthage Machine Co., 224 N. Y. 326, 120 N. E. 735, and Collins v. Brooklyn Gas Co., 171 App. Div. 381, 156 N. Y. Supp. 957, I do not see how this award can be sustained.

I favor reversal. All concur.

ROACH v. HIBBARD & GIFFORD ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 10, 1920.)

184 New York Supplement, 418.

MASTER AND SERVANT—ONE CUTTING POLES WITH OWN TEAM AND HELPER HELD AN "INDEPENDENT CONTRACTOR," NOT AN "EMPLOYEE," WITHIN COMPENSATION LAW.

One working under an agreement with purchasers of poles to cut and skid for specified amount per pole, who has absolute control of himself and his own hired helper, and works at such time as he desires and furnishes his own team, is an "independent contractor," and not an "employee," within the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Employee; Independent Contractor.)

Appeal from State Industrial Commission.

Proceeding by Frank Roach for compensation for injuries under the Workmen's Compensation Law (Consol. Laws, c. 67), opposed by Hibbard & Gifford, employers, and the Travelers' Insurance Company, in-

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surance carrier. From awards of the State Industrial Commission, made in favor of claimant November 11, 1919, and December 2, 1919, the employer and insurance carrier appeal. Reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Benjamin C. Loder, of New York City (E. C. Sherwood and William B. Davis, both of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

COCHRANE, J. The question here is whether claimant was in the employ of Hubbard & Gifford or whether he was an independent contractor.

The claimant lived on a farm owned by his mother, on which farm was growing timber. Hibbard & Gifford purchased all the poles on the farm measuring 25 feet in length and 7 inches at the top, paying $1.50 each for those 30 feet long or more, and 75 cents each for the others, and they to cut and remove them. They removed about 245 poles. A discussion then arose between the purchasers and the claimant as to whether the former had removed all the poles required by the contract. Manifestly there was in some instances a question as to whether they would measure up to the required size, which question could only be determined after they had been cut. The purchasers thought there might remain 75 or 100 poles which would answer the requirements of the contract. The claimant thought there were three times that number. As a result of the discussion it was agreed that the claimant should hire a man to assist him in cutting the remaining poles, and that the claimant should be paid for cutting them 20 cents each and for skidding them 30 cents each. For the latter work he was to use his own team. Claimant thereupon arranged with one Henderer to pay him $50 a month to help him with the ordinary farm work, and in addition thereto to board the family of Henderer. who thereupon with his family moved into the house on the farm. It was further agreed between claimant and Henderer that the latter should assist him in cutting the poles, and the time when he was thus engaged should be deducted from the time for which he was paid as a farm laborer, and that for such cutting he should be paid one-half of the 20 cents for each pole paid by the purchaser for such cutting. Claimant thereupon, with the assistance of Henderer, at intervals cut 201 poles. While engaged in skidding them, claimant broke his leg, for which injury awards have been made him herein, on the theory that he was the servant of Hibbard & Gifford.

It is sometimes difficult to determine whether one stands in the relation to another of servant or independent contractor. Within certain principles, wihch have been quite definitely enunciated, it seems clear that in the present instance the claimant falls within the latter category. His time was his own. He could and did work at such times as he desired. It was agreed that he should do so. He furnished his assistant and paid him. He furnished his own team. It was his judgment which determined the trees which were to be cut. He expressly testified that the purchasers left the determination of that question to himself. He further testified: "I could cut any amount I wanted to; skid any amount I wanted to." He exercised control over the manner and details of the work, and was responsible to the purchasers only for the consequences of his work. The 20 cents a pole for cut-

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ting and 30 cents a pole for skidding was merely a method of arriving at the compensation for the completed task. The employment was not by the day or the hour. The days and the hours during which the work was prosecuted were intermittent, and were selected by the claimant. He was practically paid a lump sum, measured by the number of poles he delivered. As in Matter of Litts v. Risley Lumber Co., 224 N. Y. 321, 120 N. E. 730, so also here, the claimant had—

"absolute control of himself and his helper. He was independent as to when, within a reasonable time after the agreement was made between him and the company, and as to where, he should commence the work. He was free to proceed in the execution of it entirely in accord with his own ideas. He was not to any extent subject to the directions of the company in respect of the method, means, or procedure in the accomplishment."

Claimant represented the will of the purchasers only as to the result of his work, and not as to the means by which it was accomplished. Thorn v. Clark, 188 App. Div. 411, 177 N. Y. Supp. 201, and cases there cited; Matter of Prince v. Schwartz, 190 App. Div. 820, 180 N. Y. Supp. 703; Hopkins v. Empire Engineering Corporation, 152 App. Div. 570, 137 N. Y. Supp. 478; Brown v. Munn Piano Co., 172 App. Div. 372, 158 N. Y. Supp. 1026. The arrangement had all the characteristics of an independent contract, and applying the tests usually employed in determining the question here involved, as indicated in the foregoing authorities, the conclusion is compelled that claimant was an independent contractor.

The awards should be reversed, and the claim dismissed. All concur.

STATE INDUSTRIAL COMMISSION ET AL. v. HIRES CONDENSED MILK CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 10, 1920.)

184 New York Supplement, 402.

MASTER AND SERVANT — COMPENSATION AWARD FOR DEATH FROM TUBERCULOSIS, RESULTING FROM INJURY, HELD WARRANTED.

An award, under the Workmen's Compensation Law, based on a finding that employee's death from tuberculosis was caused by injury, *held* sustained by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from State Industrial Commission.

Proceeding by Elizabeth Van Gordon under the Workmen's Compensation Law (Consol. Laws, c. 67) for compensation for death of her husband, opposed by the Hires Condensed Milk Company, employer, and the Employers' Liability Assurance Corporation, Limited, insurance carrier. From the award of the State Industrial Commission for claimant, the employer and insurance carrier appeal. Award affirmed.

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Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Bertrand L. Pettigrew, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, and Bernard L. Shientag, of New York City, of counsel), for respondents.

KILEY, J. At the close of the evidence in this case, the representative of the insurance carrier stated the appellant's position as follows:

"It is the contention of the carrier in this case that the weight of the testimony presented shows that there has been no connection between the accident to the deceased, which happened on May 21, 1918, and the death of the deceased, which took place on October 1, 1919; said death having resulted from tuberculosis of the lungs."

The evidence shows that the deceased, husband of this claimant, worked for the employer appellant at Port Dickinson, N. Y., as a mason; that on the 21st day of May, 1918, while so at work, a ladder which he had mounted to the height of 18 or 20 feet tipped over, causing him to fall that distance, where he struck his left side on a pipe or box, strained his left side, back, and ankle, and one of the physicians, the one who had treated him from the time of the injury, said that some of his short ribs were fractured and loosened. There is no potential evidence against these facts, and the last is disputed by inference only. On the 5th day of August the employer entered into an agreement with the injured man, conceding the injuries and agreeing upon compensation, which agreement was approved by the State Industrial Commission. He did some work after that, but did not recover, to any extent, his strength or previous health, and in about one year developed tuberculosis of the right lung, from which he died on the 1st day of October, 1919.

Doctors for both sides agree that for a period of time after the injury the several examinations did not disclose tuberculosis, and that there was an absence of any symptoms denoting active presence of that disease. After death the widow, the claimant here, sought and was awarded compensation for the death of her husband, as if the trouble which caused his death finally, was traceable to the injury he received on the 21st day of May of the previous year. It is not disputed, and is in this case conceded, that the tubercular germs inhabit the human system generally. The suggestion in this evidence is that tuberculosis was present in the injured party's system at the time of the accident, in the form known as incipient or latent, and the conclusion that the injury so lowered the man's vitality and lessened his resisting power that it was a contributing cause of death finds some substantial basis in this evidence. The commission says by its finding:

"A latent tubercular condition was lighted up, so as to cause the decedent to die from pulmonary tuberculosis."

The statement of appellant's representative at the close of the evidence, and with which I commenced this opinion, indicates that the carrier was conscious that there was some evidence to sustain claimant's contention; its complaint being that it was outweighed by evidence produced by it. In its brief the ground for reversal taken is that the evidence on this sole question in the case was hearsay. The evidence here for claimant is not uncorroborated hearsay evidence. It was the evidence of the physician, who knew deceased before the accident and treated him almost continuously after the accident until his death. Immediately, or within three days, after the accident his lungs were examined, and soon thereafter his blood pressure was taken, and both

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found practically normal. He was a strong man, doing the hard work of a mason, and never sick or ailing. This physician treated claimant for some years before her husband was injured, and he knew. His evidence was as positive as any that can be given by a physician of internal conditions, and is such evidence as is relied upon generally in the vicissitudes of everyday life.

The conditions here are not at all similar to those prevailing in Belcher v. Carthage Machine Co., 224 N. Y. 326, 120 N. E. 735. In Nestor v. Pabst Brewing Co., 191 App. Div. 312, 181 N. Y. Supp. 477, the only physician sworn was the attending physician, and he swore that there was no connection between the injury and cause of death. The only evidence to the contrary was the death certificate, made out upon hearsay information, and bore upon its face a disclaimer of knowledge of the truth of the statement of facts contained therein.

Award should be affirmed. All concur.

STATE INDUSTRIAL COMMISSION ET AL v. GEORGE W. STILES CONST. CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 18, 1920.)

184 New York Supplement, 598.

MASTER AND SERVANT — FINDING ON CONFLICTING EVIDENCE IN COMPENSATION CASE CONCLUSIVE.

Finding of Industrial Commission that employee received a strain, from slipping while at his work, causing an acute dilatation of the heart, resulting in his death, which was the direct result of the accidental injury, having support in legal evidence, will not be disturbed, notwithstanding evidence in support of claim of death resulting from a previous diseased condition.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Award of State Industrial Commission.

Proceeding by Alta Klein for compensation under the Workmen's Compensation Law for death of her husband, opposed by the George W. Stiles Construction Company, employer, and the Zurich General Accident & Liability Insurance Company, Limited, insurance carrier. From an award of the State Industrial Commission, the employer and insurance carrier appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Philip J. O'Brien, of New York City (John N. Carlisle, of Albany, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, and Bernard L. Shientag, of New York City, of counsel), for respondents.

KILEY, J. Claimant's intestate was a carpenter, at work for the employer appellant at Niagara Falls on the 15th day of January, 1919. He and a fellow workman were at work on the construction of an

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apartment house, and at the time pertinent here they were fitting, laying, and securing joists on the ground floor of the building. While so at work claimant alleges her husband received accidental injuries which resulted in his death on May 13, 1919. After an extended hearing before the State Industrial Commission it made the following finding.

"On January 15, 1919, while the said Henry Klein was engaged in the regular course of his employment, and while working on a building in the course of construction on Orleans avenue, betweenTwenty-Fourth and Twenty-Fifth streets, Niagara Falls, N. Y., the said Henry Klein, while endeavoring to push a joist in position with one foot, in order that a fellow workman might nail the joist in place, his other foot slipped in the mud, went into a hole, thereby causing him to sustain a strain of the internal organs, which caused an acute dilatation of the heart, which never compensated, and which finally resulted in his death on May 13, 1919; his death being the direct result of the accidental injuries sustained by him while engaged in the regular course of his employment on January 15, 1919."

There is no evidence in the record contradicting what took place at the time it is urged he was injured, viz.: While standing on the ground, he threw up one of his legs, so as to bring his foot against the joist, which was two feet and upwards elevated above the ground where he was standing, and that the other foot on the ground slipped in the mud, and that he complained and showed in his face and actions that he had received an injury then and there.

Appellants' ground of contest is that death resulted from a previous diseased condition ot the heart. This question was sharply litigated before the commission. Medical experts were called as witnesses by both parties, and on this question expressed divergent views. The condition of the heart, upon which the opposition to claimant was based, was described by deceased's physician. He had attended him when he had pneumonia in 1918, and previous for a sprained knee, and the history of the medical case disclosed that he had had measles when a boy, and previous pneumonia when about 18 years of age. He was about 28 years old when he died, and at one time he suffered from a couple of fractured ribs. He had examined his heart before the time of the alleged accident, and found what he described in the following answer to a question asked of him:

"A. The condition of the heart—there was a systolic murmur, but no sign of any diseased condition of the heart. There was no hypertrophy of the heart at that time" (1918).

And in reply to question from the commission he said there was no dilatation. He further testified:

"There may be some little defect of the valve, or in the approximation of the valve."

—as the cause of the systolic murmur. Systole means the contraction of the heart and arteries, and decedent's physician testified that it did not necessarily mean loss of compensation. Hypertrophy means the abnormal increase in the size of an organ. Dilatation of the heart means an increase in size of one or more of the heart cavities from weakening of the muscles. After the injury the last two conditions of the heart were manifest.

The evidence of appellant's experts is to the effect that the first condition, systolic murmur, being present, developd into the last two conditions, and while the strain might have taken place as described by claimant, yet the heart was ripe for the breakdown from such strain, or from any other unusual exertion. As heretofore observed, the contest was sharp upon this point, and claimant's position was ably assailed, yet her position is not devoid of support in the evidence, and,

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as Judge Cochrane said in Campbell v. Clausen-Flanagan Brewery, 183 App Div. 449, 171 N. Y. Supp. 522, quoting from the opinions in Matter of Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344:

"Where conflicting inferences from the same facts are possible, different triers of facts may draw different conclusions, and the weight of evidence is not for the consideration of this court."

In the Matter of Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540, the court, speaking of section 68 of the Compensation Law (Consol. Laws, c. 67), and of that statue generally, says:

"The section does not declare the probative force of any evidence, but it does declare that the aim and end of the investigation by the commission shall be 'to ascertain the substantial rights of the parties.' * * * The act may be taken to mean that, while the commission's inquiry is not limited by the common-law or statutory rules of evidence, or by technical or formal rules of procedure, and it may in its discertion accept any evidence that is offered, still in the end there must be a residum of legal evidence to support the claim before an award can be made."

Legal evidence on the part of the claimant was submitted on the hearing before the commission, and therefore does not come under the criticism found necessary in Carroll v. Knickerbocker Ice Co., supra. Nor do I think it comes within the rule laid down by Mr. Justice H. T. Kellogg in his very able opinion in Richardson v. Greenberg, 188 App. Div. 248, 176 N. Y. Supp. 651. While a slight defect, in an otherwise healthy heart, existed before the day of the injury, it was not presently fatal. It was not necessarily remotely fatal, if at all which the contention the evidence fairly upholds, except the evidence of experts based upon hypothetical questions. So far as my previous personal history of the case was concerned, they did not have it.

A question of fact was presented, and the award should be affirmed. All concur.

STATE INDUSTRIAL COMMISSION et al. v. TOLHURST MACH. WORKS et al.

(New York Supreme Court, Appellate Division, Third Department. November 10, 1920.)

184 New York Supplement 608

MASTER AND SERVANT—BLISTER PERMITTING INFECTION OF HAND HELD ACCIDENTAL INJURY, WITHIN COMPENSATION LAW.

Where an employee, engaged in making metal brushes requiring the combination of strands of wire closely knit or wound together, necessitating a constant pressure with the hand developed a blister on the palm of his right hand, which broke and blood came from a crack in the flesh, and the wound became infected, he sustained, an injury in the course of his employment, entitling him to compensation for 33⅓ per per cent. of loss of hand.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

Woodward and Henry T. Kellogg J. J., dissenting.

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Appeal from State Industrial Commission.

In the matter of the claim of James P. Scoville for compensation under the Workmen's Compensation Law, opposed by the Tolhurst Machine Works, the employer, and the American Mutual Liability Insurance Company, the insurance carrier. From an award of the State Industrial Commission, reversing awards previously made and granting modified award, the employer and insurance carrier appeals. Award affirmed.

Argued before John M. Kellogg P. J. and Woodward, Cochrane, Henry T. Kellogg, and Kiley J. J.

J. Arthur Hilton, of New York City, for appellants.

Hon. Charles D. Newton, Atty. Gen. (E. C. Aiken and Bernard L. Shientag, both of New York City, of counsel), for respondents.

KILEY, J. The employer was engaged in the business of machinery and woodworking at Troy N. Y., and had been so engaged for several years prior to September 14, 1917. The claimant had worked for this concern for 4 or 5 years before that date. Among the commodities manufactured was some kind of metal brushes requiring the combination of strands of wire closely knit or wound together, so as to require drawing with pinchers held in the hand. The work with the hands, when and while so engaged, was strenuous. Constant pressure with the hand upon the prongs of handles of the pinchers or nipers was necessary to hold the grasp upon the wire. While so engaged, on the 14th day of September, 1917, the claimant produced a blister on the palm of his right hand. He continued to work until the blister broke and blood came, or a crack in the flesh under the skin was seen by his felow workman. Almost immediately it commenced to smart, pain, and swell; the swelling extending to and involving the back of the hand. Some way, in connection with the work, dye was present, and by that, or something from some other source then and there present, infection entered the hand through this cut or broken skin. Claimant painted his hand with iodine, it continued to swell and grow worse, and the following day or the second day thereafter he went to a doctor, who pronounced it a "palmar abcess," and who testified upon the hearing:

"There must be some cut, scratch, or break in the skin to cause infection." "There must be some point of infection."

There was some confusion in claimant's testimony as to whether the skin broke at the works, but was later cleared up, so that the commission found it as a question of fact. The condition of claimant's hand portended serious results; and the result was serious. Appellant contends that this was not an accident; that it was vocational, and naturally flowed from the nature of the employment; that nothing unusual occurred; that the blister was the usual sequence of continued pressure of the hand upon the nippers he was required to use to perform his task within his employment; that such result was to be anticipated; that experience and observation during the years he worked at this employment apprised claimant that what happened to him was the usual, rather than the unusual. So far as the blister is concerned that may be admitted, and there can be no quarrel with the definition of "accident" as promulgated in Mutual Accident Association v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60. It is so understood.

Matter of Woodruff v. Howes Construction Co. 228 N. Y. 276, 127 N. E., 270, does not disturb the rule upon which the finding is made in this case. There a frog felon developed in the palm of the hand

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from constant pressure of striking of the hand against the handle of a screw driver; no question of infection and resultant blood poisoning there, as here. The evidence is weak in one essential, viz. as to the kind of germ present in the surrounding where claimant was working. I mean as to whether there were conditions there so that infection might happen. In the attending physicians repori he says the symptoms from which he was then suffering were due entirely to this injury, and later swears that the condition of the hand was due to infection. This with the evidence of claimant as to first appearances, condition of hand and surroundings, it seems to me, takes it by Matter of Eldridge v. Edicott-Johnson Co. 228 N. Y. 21, 126 N. E. 254, and makes applicable the holding in Lewis v. Ocean Accident & Guarantee Corp, 224 N. Y. 18, 120 N. E. 56, 7 A. L. R. 1129, and Horrigan v. Post Standard Co., 224 N. Y. 620, 121 N. E. 872.

Considerable evidence was taken. Different awards were made and rescinded. The percentage of loss of hand shown by the evidence upon which the award appealed from is based ranges from 20 to 50 per cent. The award for 33⅓ per cent. of loss of hand, and is about right.

The award should be affirmed.

John M. Kellogg, P. J., and Cochrane, J., concur.

Woodward, J. (dissenting). The claimant, James P. Scoville, was employed by the Tolhurst Machine Works, and on the 14th of September, 1917, he was using a pair of pliers to draw wire. The particular operation required him to grasp the wire with the pliers and bear down upon the handles in order to pull the wire to its desired position. This operation was constantly repeated, and was the ordinary and customary method used in the work. It appears from the evidence that the claimant in the course of this work developed a blister; that after discovering the soreness he continued to work. Subsequently the blister appears to have broken, through whether this occurred during the progress of the work does not appear, and an infection set in resulting in a partial loss of the use of the had. Upon the original hearing the commission denied an award—the claimant having testified that he could not say whether the blister was broken or not; that he could not say whether it was punctured or not. Subsequently the claimant wrote to the commissioner and claimed that he misunderstood the question; that he understood the question to be whether he (the claimant) had purposely punctured the blister; and upon this representation a further hearing was held, in which the claimant radically changed his attitude; but we do not find that there was anything in the nature of an accident, or that the blister broke during the employment.

The Court of Appeals, in the very recent case of Matter of Woodruff v. Howes Construction Co., 228 N. Y. 276, 278, 127 N. E. 270, has declared that "an accidental event takes place without one's foresight or expectation an event that proceeds from an unknown cause, or is an unusual effect of the known cause, and therefore not expected." and that was a case in which a carpenter was supposed to have injured his hand by the customary and ordinary use of a screwdriver, producing an irritation giving rise to a felon much as in the case here under consideration. It is true that the court did not dismiss the claim, but sent it back for the further consideration of the commission. It did however, hold that the mere showing that the claimant had, in the ordinary use of a screwdriver, irritated his fingers and that a felon had followed, did not operate to show that the injury was the result of an accident; and we are unable to discover anything in the present case which partakes of the nature of an accident.

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Injury and personal injury "mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom" (Workmen's Compensation Law [Consol. Laws, c. 67] § 3 , subd. 7), and until it is shown that there has been an accident something which apart from the natural and inevitable results of the proper performance of the duties of the employment there is no foundation for the application of the statute. The fact that an infection results from the breaking of a blister produced in the oderly and ordinary work of the employee, such blister not being shown to have broken because of any accident in the course of employment, cannot of itself give rise to an accidental injury, and the fact that the claimant had to come back to meet the adverse decision with a changed claim does not justify a forced construction to bring his case within the law. If an accident occurs, and an injury results, the employee is entitled to compensation for the injury growing out of such accident, including "such disease or infection as may naturally and unavoidably result therefrom"; but the primary purpose of the statute is to deal with the accidents peculiar to the hazardous occupations, and the happening of an accident is necessary to bring the statute into operation in any individual case. No accident is shown to have occurred, and the award cannot be sustained on this record.

The award appealed from should be reversed, and the claim dismissed.

Henry T. Kellogg, J., concurs herein.

VASSILAKIS v. FAIRFAX HOTEL CO., INC. et al.

(New York Supreme Court, Appellate Division, Third Department. November 18, 1920.)

184 New York Supplement 774

1. MASTER AND SERVANT—MISNOMER OF DECEASED EMPLOYEE IN COMPENSATION AWARD REQUIRES CORRECTION.

Error of the State Industrial Commission in misnaming the employee as Joseph, instead of James, where award in lump sum is made to his widow, is sufficiently serious to require correction.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT—DEPENDENCY, WITHIN COMPENSATION LAW, MUST BE PROVED BY LEGAL EVIDENCE.

Workmen's Compensation Law § 68, providing the State Industrial Commission shall not be bound by common-law or statutory rules of evidence, did not dispense with the necessity for a residuum of legal evidence, and an award can be based on nothing else, a principle or requirement which applies to questions of dependency and relationship.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

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3. MASTER AND SERVANT—EVIDENCE INSUFFICIENT TO ESTABLISH DEPENDENCY AND RELATIONSHIP OF ALIEN CLAIMANTS UNDER COMPENSATION LAW.

Unverified certificate, purporting to have been signed by president of a community in Greece, and statement of claimed widow of the deceased employee that she was his wife, *held* not competent evidence that the individuals in whose favor a lump sum award was made by the State Industrial Commission were the widow and children of the deceased employee, so that the award could not stand without compliance with Workmen's Compensation Law § 72, providing for the taking of depositions; the widow and children, if such, being resident in Greece.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

John M. Kellogg, P. J. dissenting.

Appeal from State Industrial Commission.

In the matter of the claim of Maruyo Vassilakis for compensation under the Workmen's Compensation Law for death of James Vassilakis, employee, opposed by the Fairfax Hotel Company, Incorporated, employer, and the Zurich General Accident & liability Insurance Company, limited, insurance carrier. From an award to claimant, the employer and insurance carrier appeal. Award reversed, and matter remitted to the Commission.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley J. J.

Philip J. O'Brein, of New York City (John N. Carlsile, of Albany, of counsel, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

COCHRANE, J. [1] James Vassilakis, the deceased employee, left him surviving, as is claimed, a widow and minor children residing in Ververato, in the sland of Chios, Greece. The commission has made an award to the widow and children of "Joseph" Vassilakis, and has commuted the award to a lump sum of $3,811.92, and directed payment of the same to the widow of "Joseph" Vassilakis. The error in the name would be sufficiently serious to require correction, but there is another objection which requires a reversal of the award.

[2] It has been repeatedly held that an award must be based on legal evidence. Section 68 of the Workmen's Compensation Law (Consol. Law, c. 67), providing that the commission shall not be bound by common-law or statutory rules of evidence, does not dispense with the necessity for a residum of legal evidence. However much the commission, in making their investigation, may depart from the established rules of evidence or procedure, there must be found some evidence recognized as legal before an award can be made. Hearsay evidence and unauthenticated documentary evidence may be used to satisfy the conscience of the commission, in connection with legal evidence; but it the latter on which an award must ultimately be sustained. Matter of Belcher v. Carthage Machine Co., 224 N. Y. 326, 120 N. E. 735; Matter of Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 173 N. E. 507, Ann. Cas. 1918B, 540; Matter of Eldridge v. Endicott, Johnson & Co., 228 N. Y. 21, 126 N. E. 254; Matter of Minerly v. Kingsburg Construction Co. 191 App. Div. 618, 181 N. Y. Supp. 901; Matter of White v. American Society for Prevention of Cruelty to Animals, 191 App. Div. 6, 180 N. Y. Supp. 867. The

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foregoing principles apply to question of dependency. and relationship. Matter of Bonnano v. Metz Brothers Co., 188 App. Div. 380, 177 N. Y. Supp. 51; Matter of Profeta v. Retsof Mining Co., 188 App. Div. 383, 177 N. Y. Supp. 60; Matter of Pifumer v. Rheinstein & Hass, Inc. 187 App. Div. 821, 175 N. Y. Supp. 848. The cases of Matter of Moran v. Rodgers & Haggerty Inc., 180 App. Div. 821, 168 N. Y. Supp. 410, and Matter of Hansen v. Flinn-O'Rourke Co.. Inc., 192 App. Div. 878, 183 N. Y. Supp. 213, do not oppose. but confirm, the foregoing views inasmuch as there was in those cases legal evidence of the facts under consideration, and the documentary evidence which was attacked was merely corroborative of such legal evidence.

[3] There is presented to us no competent evidence that the individuals in whose favor this award has been made are the widow and children of James Vassilakis. No witness was sworn before the commission. There was presented to the commission an unverified certificate, purporting to have been signed by the president of the community of Ververato, the "Demetrios Nicholas Vassilakis" left as his wife and children the individuals for whose benefit an award has been made herein; but the signature of the president of the community is in no way authenticated, except by some individual whose authority to do so is unknown. There was also presented a statement of the widow that she is the wife of "James (Demetrios) Vassilakis," and giving the names of there children; but this statement is not verified, and is not even signed in any manner recognized by the laws of this state. There was also submitted the marriage certificate, signed by the priest who performed the marriage ceremony, and certificates of baptism of the children, signed by the priest and godparents. But none of these latter certificates are verified, or purport to be authenticated, in any manner whatever.

The foregoing documents may constitute evidence in Greece, but no one will contend that they possess that dignity in New York. There should be no great difficulty in establishing by competent evidence the simple facts required in the case; in fact, less difficulty than must have been experienced in collecting the cumbersome documents submitted herein. Section 72 of the act provides for the taking of depositions, and two or three questions properly directed to the widow would doubtless procure all the necessary information. No one better than she can tell the commission that she was the wife of the deceased and the names and ages of their children. The method of procuring such evidence is clearly defined, and it is not unreasonable that the facts should be properly established.

The award should be reversed, and the matter remitted to the commission. All concur, except.

JOHN M. KELLOGG, P. J. (dissenting). The commission, as the result of a clerical error, has given the name of the employee as Joseph. This mistake may be disregarded or corrected, under sections 721 and 1317 of the Code of Civil Procedure. It does not call for the reversal of the award or sending of the case back to the commission.

I cannot agree that section 72 of the act requires that the evidence of foreign witnesses be taken by depositions. It provides: The commission may cause depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the Supreme Court."

The section relates to all witnesses. If it were mandatory, probably most of the awards by the commission have been unauthorized, as they proceed upon the evidence, affidavits, and statements received by

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the commission, in open session. The section is clearly permissive, and not mandatory, and we have so held in Moran v. Rodgers & Hagerty, Inc. 180 App. Div. 821, 168 N. Y. Supp. 410.

Neither can I agree that documents cannot be used by the commission as a basis of an award, unlesss they are authenticated in the manner required by the Code of Civil Procedure to entitle them to be used in court on the trial of a common-law action. Section 68 expressly provides to the contrary. It says that—

"The commission * * * shall not be bound by common-law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter, but may make such investigation or inquiry or conduct such hearings in such manner as to ascertain the substantial rights of the parties."

By subdivision 2 of section 67 the commission may make rules providing for—

"the nature and extent of the proofs and evidence, and the method of taking and furnishing the same to establish the right to compensation."

The commission in this case followed its usual practice. If the case must be proved by legal evidence, and the informal evidence contemplated by this section is only admissible as to facts otherwise proved, it has no force, because the award cannot be questioned upon the facts, if there is any evidence to sustain it, and if that evidence must be common-law evidence, then it is useless to put in other evidence merely cumulative, as contemplated by this section. It it means anything, it means that this board is to proceed in an informal manner and ascertain the facts in its own way, and that in so proceeding it need not regard the technical rules of evidence. The cases relied upon in the prevailing opinion establish that the unconfirmed statement by the injured party, not in accord with the known facts of the case, are not sufficient to sustain an award.

Here it was fully established, outside of the depositions, that the dependents upon the deceased were entitled to compensation. These proceedings are conducted in an informal way; the claimant is usually without counsel, and it is evidently the intent of the act that the proceedings shall be so simple and informal that it is not necessary to incur the expense of counsel. The only question raised here is that there is no legal evidence that the claimants are the widow and minor children of the deceased. Many certificates and documents were put in evidence to establish those facts, and if the certificates are not required to be authenticated as technically prescribed by the Code for admission in evidence in an action, they establish beyond controversy the needed facts. No person can doubt, after reading them, that the parties are entitled to the compensation. To refuse to receive them as evidence is sacrificing substance to form and technicality, which the section we have referred to prohibits.

Appellant employer, in its report, certifies that the deceased was a married man, and that it is informed that the widow and children live in Greece, leaving only the indemity to the widow and the names and ages of the children to be established. The question of dependency is not involved. The power of attorney upon which the claim was made states the relationship, and was executed before a notary public, who called in two disinterested witnesses who knew the family; he also knew it. His certificate is signed by the witnesses and by the notary with his official seal. She, having declared her illiteracy, did not sign; but evidently the witnesses were used to take the place of her signature. The president of the court of first instance authenticated under his seal and signature of the notary; the governor of Chios, under his seal, certified to the signature of the president, and the vice consul,

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who apparently was acting in behalf of the United States, certified to the signature of the Governor. A certificate from the matriculation book of the community of Ververator, in the department of Chios, certified under the hand and seal of the president of the community, certifies to the birth and death of the deceased, the identity of the widow, and the names and ages of the children. The certificate is also certified by the pastor, under his seal of office; the genuineness of the president's signature being certified by the prefect under his seal of office.

The affidavit of the widow is in due form, and declares that she solemnly swears to its contents, which show that she is the widow and the names and ages of the children. She signs with a finger mark, being illiterate; but the affidavit is sealed and delivered in the presence of the president of the community of Ververato. Attached to it is the certificate of the English vice counsul, charged with the United States interests which instead of saying that she swears to it, says that she acknowledged that she "executed the same." If this certificate had said that she swore to it before him, there would be no question as to its being legal proof as to the facts stated. I think, when he certifies that she executed it, and the paper shows that it is an affidavit, that the inference, before this commission at least, is fairly admissible that she swore to it. The certificates as to the birth of the widow, the deceased, and their children, with their ages, and the marriage certificate by the priest who officiated, are shown, and carry conviction, although they would not be admissible in a court of justice, because not technically authenticated as required by the Code of Civil Procedure. They cannot be ficticious.

The commission is not the only body which may proceed without formal evidence; the various assessing bodies and various boards transacting business of the utmost importance throughout the state proceed upon information not gained acording to legal rules, but upon facts which have been satisfactorily established. Each case cited in the prevailing opinion must be read with reference to its particular facts. Each decision is controlling only on the actual point decided. In Bonnano v. Metz Brothers Co., 188 App. Div. 380, 177 N. Y. Supp. 51, it was necessary to show that the parents in a foreign country had been supported either wholly or in part for the period of one year prior to the date of the accideint by a 15 year old boy. We held that the facts stated in the depositions did not warrant the conclusion that they were dependents. We commented on the manner in which the certificates were authenticated, and suggested the proper way to furnish evidence, meaning undoubtedly with reference to such an extreme case as we were considering. The decision rested principally, however, upon the want of proper allegations of fact in the documents.

Here the statements in the documents are absolutely convincing and are not subject to criticism, and none of the cases cited compel or permit us to affirmatively repeal a statute or to treat it as of no force. We are required by all rules of practice, even in civil practice, to disregard technical errors which do not affect the real merits. The commission could not have made any decision other than the one under review.

I favor its affirmance.

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BOOTH & FLINN, LTD., v. COOK ET AL. (No. 11140.)

(Supreme Court of Oklahoma, October 12, 1920.)

193 Pacific Reporter 36

(Syllabus by the Court.)

1. MASTER AND SERVANT—EMPLOYER LIABLE UNDER WORKMEN'S COMPENSATION ACT FOR INJURY AGGRAVATED BY UNSKILLFUL MEDICAL TREATMENT.

Under the Workmen's Compensation Act, it is incumbent upon the employer to promptly provide medical and surgical aid, and a schedule of compensation is adopted providing specific amounts of recovery for specific results of accidents. In an action before the Industrial Commission for compensation under said act, it was conclusively found by the commission that the workman's injuries had been aggravated and his disability increased by improper treatment of the physicians so provided without fault of the workman himself. *Held,* the employer is liable for all legitimate consequences following the accident, including unskillfulness of error of judgment of the physician furnished as required, and the employee is entitled to recover under the schedule of compensation for the extent of his disability based upon the ultimate result of the accident regardless of the fact that the same has been aggravated and increased by the intervening negligence or carelessness of the employer's selected physician.

(For other cases, see Master an Servant, Dec. Dig. § 393½.)

2. EVIDENCE—JUDICIAL NOTICE NOT TAKEN OF SCHEDULE TIME OF ARRIVAL AND DEPARTURE OF TRAINS AT PARTICULAR PLACE.

The schedule time of the arrival and departure of trains at a particular place is so variable that courts will not take judicial notice thereof.

(For other cases, see Evidence, § Dec. Dig. 20[2].)

(Additional Syllabus by Editorial Staff.)

3. MASTER AND SERVANT—INDUSTRIAL COMMISSION'S FINDING OF FACT CONCLUSIVE.

Under Workmen's Compensation Act, a finding by the Industrial Commission that the employee's injury was aggravated by improper medical treatment is conclusive.

(For other cases, see Master and Servant, Dec. Dig. 417(7).)

Appeal from Order of State Industrial Commission.

Petition by Booth & Finn, limited, employer, against W. F. Cook, injured employee, and the State Industrial Commission of Oklahoma, for the discontinuance of payments awarded to the claimant. From an order of the commission vacating the former award and allowing claimant a greater award by reason of aggravated injury, petitioner appeals Award affirmed.

Berck Moss, of Oklahoma City, for appellants.

Pennel& Harrison, of Bartlesville, for respondents.

RAINEY, C. J. On September 28, 1918, one W. F. Cook, while in the employ of Booth & Flinn, Limited, had his leg broken, for which the Industrial Commission, on December 30, 1918, allowed him compensation at the rate of $10 per week until recovery. Thereafter, Booth &

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Flinn, Limited, filed an application before the commission to discontinue the payments granted by the award and the claimant, in an amended answer, alleged that since the making of said award it had become necessary to amputate his leg and asked that a new award be made giving him, the compensation provided by the Workmen's Compensation Act (Laws 1915, c. 246) for the loss of a leg. The commission granted a hearing in the matter, which was had in Bartlesville, Okl., on June 20, 1919, and in Oklahoma City on August 20, 1919, as a result of which it found that the claimant had suffered the loss of his leg by reason of his injuries and was entitled to compensation fixed by the act for the loss thereof, and entered an order vacating the award made on December 30, 1918, and allowing claimant compenstion at the rate of $10 per week for 175 weeks from October 12, 1918, less any sums paid under the first award. From this order Booth & Flinn, Limited, as petitioners, have appealed to this court.

The commision, in its written opinion by Commissioner Taylor, filed December 5, 1919, made the following findings of fact:

"The facts, as proved in this case, are that the claimant Cook suffered a fracture of his leg while in the employ of the respondent, Booth & Flinn; that on the 28th day of September, 1918, the date of injury the claimant was taken by their respondent to a hospital at Bartlesville Okla., where the fractured leg was set; that he remained at said hospital until the evening of November 17, 1918; that thereupon he went to his home at Coffeyville, Kan.; that his injury was treated by a physican at Coffeyville, who found that the man's leg was in a bad condition; that on the 29th day of January, 1919, claimant was taken to Coffeyville hospital, and on February 13th underwent a surgical operation for the purpose of correcting a vicious union of the broken fragments of the leg; that the condition of his left leg was about four inches short and his toes turned toward the ankle of the right foot; that the lower fragment of the fracture was drawn up about four inches above the lower end of the upper end of the lower fracture was firmly united to the side of the upper fragment; that the upper end of the lower fracture was firmly united to the side of the upper fragment about four inches above the end of the break of said fracture and also that there was a bony union between the sides of the two fragments; that, to correct this vicious union, the usual operation was done, and there was applied what physicians call a Lane plate; that after said oueration no union between the fragments took place, and in consequence it because necessary to amputate the leg, which was done on June 2, 1919."

It is the contention of the petitioners that the claimant's leg was properly set by their physicians at the Bartlesville Hospital, and that if the claimant had remained there it would not have been necessary to have amputated his leg. Petitioners further contend that the claimant left without their knowledge or consent, but that on the contrary Dr. D. O. Crawford advised against his leaving the hospital and requested him to remain at least a week longer in order to get used to his crutches with the aid of his nurse. Dr. Crawford also testified that he, himself, removed the splints and found that there was a union of the fractured parts before the claimant left the hospital. Petitioners say that claimant's leg was rebroken, resulting in the amputation, for which it is not responsible. The plaintiff's evidence shows that he was taken home from the Bartlesville hospital on a stretcher, and that his leg was not rebroken nor injured in any way from the time he left the Bartlesville hospital, and that at the time he left said hospital the broken leg was shorter than the other leg and the toes were urned over toward the ankle of the other leg. In this he was corroborated by other witnesses, including physicians at the Coffeyville hospital, who testified that his left leg was

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about four inches shorter than his right, with his toes turned toward his ankle; that the upper end of the fractured femur was drawn out and the lower femur was drawn up, thereby causing the shortening of the leg. The physicians also testified that their examination of the fractured leg disclosed it had not been rebroken since it was first set.

[1, 3] The commission, in its opinion, held that if the claimant's leg was properly set at the Bartlesville hospital by the respondent's physician and he left the hospital prematurely without the consent of said physician or authorities in charge, and that such action aggravated the injury and resulted in the rebreaking of his leg, he would not be entitled to recover the compensation fixed by the law for the loss of a leg; but that if the claimant's leg was improperly set by petitioners' physicians and a vicious union resulted therefrom, the loss of the leg would be upon the respondents.

We agree with this view. It is true that an injured workman cannot recover compensation for an increase of disability where he himself caused the aggravation. See Pacific Coast Casualty Co. v. Pillsbury-Industrial Accident Comm., 171 Cal. 319, 153 Pac. 24, and cases cited therein. This is on the theory that the increase of disability was a subsequent injury occcassioned by the negligence of the injured person himself and therefore the employer is not liable. But this doctrine has no application to this case, for after a full hearing, as above stated, the commission found that the amputation of cliamant's leg result from his injury aggravated by improper treatment by petitioners' physicians, and that his leaving the hospital prematurely did not affect his condition. This was a question of fact determinable by the commission under the Workmen's Compensation Act, and its finding is conclusive. Section 10., art. 2, c.246 session laws 1915. Raulerson v. State Industrial Commission et al., 76 Okl. 8, 183 Pac. 880; Board of Com'rs of Cleveland County v. Barr et al., 173 Pac. 206.

We are aware that, in negligence cases not arising under compensation acts, many courts hold that the master's liability ceases when he exercises reasonable care in selecting competent physicians or surgeons. But workmen's compensation acts are a departure from cases of liability resulting from negligence and fix specific amounts of recovery for specific results of accidents. To deny recovery for the ultimate result of the accident where the disability has been increased by the intervening negligence or carelessness of the employer's selected physician would be to defeat one of the purposes of the act. Under workmen's compensation acts an employer is liable for all legitimate consequences following an accident, including unskillfulness or error of judgment of a physician furnished the injured employee as required by section 4 of our Compensation Act. See Sams v. Komas & Dorros, 2 Cal. Ind. Acc. Com. 203; Schofield v. Contractors Mutual Liability Ins. Co., 1 Mass. Ind. Acc. Bd. 95; Johnson v. Pacific Surety Co., 1 Cal. Ind. Acc. Com. (Part 2) 560; Stockwell v. E. M. Waymire, 1 Cal. Ind. Acc. Com. (Part 2) 225; Shirt v. Calico Printers' Association (Eng.) 78 L. J. K. B. 528, (1909) 2 K. B. 51, 100 L. T. 740, 25 T. L. R. 451, 53 Sol. Jo. 430, 2 B. 343, c. a.; Dunnigan v. Cavan, (1911) S. C. 579, 48 S. L. R. 459, 4 B. 386; Beadle v. Milton & Others, (1903) 114 L. T. 550, 5 W. C. C. 55; Harrison v. Ford, (1915) Eng. Ct. of Appeal, 8 B. W. C. C. 429; Bradbury's Workmens' Compensation, 3d Ed. (1917) pages 407–410; Dawbarn on Employers' Liability (4th Ed. 1911) pp. 104–111; Beverley's Workmen's Compensation Cases, § 20, pp. 103–105; Dawbarn's Workmen's Compensation Appeals 1910–1912, § 1, and 1912–13, § 1.

But it is urged by petitioners that the commission erroneously overruled its motion to quash the depositions of certain witnesses taken at

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Coffeyville, Kan., and considered the testimony therein contained in making its findings of fact to the prejudice of petitioner's rights.

[2] Under article 3, § 12, of the act, the commission is authorized to cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for depositions in civil actions in courts of record, and counsel for petitioners say that sufficient notice was not given of the taking of said depositions of the witnesses at Coffeyville, as provided by section 5079, Revised Laws 1910. In order for us to sustain this contention, we would have to take judicial notice of the schedule time of the departure of the trains from the place where the notice was served and their arrival at the place designated in the notice for the taking of said depositions. This we cannot do. Coverdale v. Boatman, 193 Pac. —, decided September 14, 1920, not yet officially reported.

The award of the commission is affirmed.

Kane, Pitchford, Johnson, McNeill, Higgins, and Bailey, JJ., concur.

UTAH COPPER CO. v. INDUSTRIAL COMMISSION OF UTAH et al. (No. 3474.)

(Supreme Court of Utah, October 22, 1920.)

193 Pacific Reporter 24

1. MASTER AND SERVANT—PETITION SUFFICIENT TO SUPPORT AWARD TO DEPENDENTS WITHIN WORKMEN'S COMPENSATION ACT.

A petition by an employe's widow in her own right as guardian of her minor children, dependents within Workmen's Compensation Act (Comp. Laws 1917, §3140), stating the death of her husband by accident arising out of and in the course of his employment, the daily wage, and the names, ages and relationship of the dependents, is sufficient to support an award by the Industrial Commission.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

2. MASTER AND SERVANT—INDUSTRIAL COMMISSION MAY EXERCISE POWERS INCIDENT TO THOSE GRANTED BY WORKMEN'S COMPENSATION ACT.

Though courts cannot by construction legislate and give to the Industrial Commission powers not granted by the Workmen's Compensation Act, grant of a specific power in furtherance of the legislative purpose apparent from the entire act will authorize the use and exercise of such incident powers as are necessary to accomplish the object sought by the legislation.

(For other cases, see Master and Servant, Dec. Dig. § 397.)

3. MASTER AND SERVANT—INDUSTRIAL COMMISSION'S JURISDICTION OVER SELF-INSURERS IMPLIED BY WORKMEN'S COMPENSATION ACT.

Though there is no express provision in the Workmen's Compensation Act giving the Industrial Commission jurisdiction over self-insurers the right to exercise such jurisdiction and to make an award against such an insurer is clearly implied as necessary and incident to the exercise of the other powers granted, and complies with the duty imposed by the other provisions of the act.

(For other cases, see Master and Servant, Dec. Dig. § 397.)

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5. MASTER AND SERVANT— FARMER REPAIRING CANAL FOR MINING COMPANY HELD AN "EMPLOYEE," NOT ONE IN CASUAL EMPLOYMENT, WITHIN WORKMEN'S COMPENSATION ACT.

A farmer employed by a copper mining company on a canal conducting water used for irrigation and watering stock, and also for the usual and regular business of mining and milling the company's ores, held an employee," within the Workmen's Compensation Act (Comp. Laws 1917, § 3111), and not a mere "casual employee."

(For other cases, see Master and Servant, Dec. Dig. § 362.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

7. MASTER AND SERVANT—INDUSTRIAL COMMISSION MAY DELEGATE TO DEPUTY POWER UNDER WORKKMEN'S COMPENSATION ACT TO TAKE TESTIMONY.

Under the Workmen's Compensation Act (Comp. Laws 1917, §§ 3079, 3100, 3130, 3148, 3149), the Industrial Commission has authority to delegate to a deputy, as a referee, power to take testimony in support of or against the applicant of one asking relief before the commission; the power to take testimony necessarily carrying authority to administer oaths.

(For other cases, see Master and Servant, Dec. Dig. § 415.)

Appeal from District Court, Salt Lake County; C. C. Evans, Judge.

Proceedings by Julia C. Rushton for compensation for the death of Louis J. Rushton, the employee, opposed by the Utah Copper Company, the employer. Compensation was awarded by the Industrial Commission, the award affirmed by the district court, and the employer appeals. Judgment upholding award affirmed.

Dickson, Ellis, Lucas & Adamson, of Salt Lake City, for appellant.

Dan B. Shields, Atty. Gen., and James H. Wolfe, Oliver C. Dalby, Herbert Van Dam, Jr., and Delbert M. Draper, Asst. Attys. Gen., for respondents.

GIDEON, J. Louis J. Rushton, a resident of Salt Lake county, died on January 2, 1919, as the result of an accidental injury, received while in the employ of appellant. He left as his dependents his widow and nine minor children, the oldest being 13 years of age. He also left one unborn child. The nature of the work and the facts concerning the employment of the deceased will be discussed during the course of this opinion. By so discussing, the application of the facts to the conclusions reached will be more readily understood.

The widow, Julia C. Rushton, in her own right and as guardian of the minor children, petitioned the Industrial Commission for compensation for the death of her husband. The company answered her petition. Subsequently, on May 6, 1919, the commission made an award. An appeal was taken by the company to the district court of Salt Lake county. That court affirmed the award, and the company, by appeal, now brings the entire record to this court for review.

Numerous errors are assigned and relied on by appellant as grounds for a reversal of the award made by the commission. We shall attempt, in the course of the opinion, to review the objections thus made.

It is conceded by appellant that in the light of the authorities the underlying principles of the Workmen's Compensation act (Comp. Laws 1917, §§ 3061–3165) do not conflict with any constitutional rights. N. Y.

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Cent. R. R. Co. v. White, 243 U. S. 199, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; Hawkins v. Bleakly, 243 U. S. 210, 37 Sup. Ct. 255, 61 L. Ed. 678, Ann. Cas. 1917D, 637; Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642; Arizona Employers' Liability Cases, 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. 1058, 6 A. L. R. 1537; Reteuna v. Ind. Com., 185 Pac. 535. It cannot be fairly claimed that the provisions of the act are in conflict with natural justice. The objections against upholding the award in question therefore relate principally to the jurisdiction of the commission over the parties and the subject-matter and the procedure by which it is claimed such jurisdiction was acquired.

It is claimed that in the application or administration of certain provisions of the act in controversy the Constituton of the state has been violated, and that the effect of the award in this proceeding amounts to taking property without due process of law. The question, or questions, therefore, presented for determination must be decided upon whether or not jurisdiction is given the commission under the facts in this particular case, to make any award, and if that be granted whether the commission has followed the procedure prescribed by the act, and whether that procedure in any way conflicts with the state Constitution.

In addition to the claim made that the employment of deceased was such that the commission had no jurisdiction over the case, it is further urged by appellant (and such may be designated the dominant objection) in support of its numerous assignments of error that the award, based as it must be, upon the proceedings leading up to the same, does not relieve appellant from any future liability to the minor heirs of the deceased should it be determined in proceedings instituted by such heirs, or by one representing them, that the death was caused by the negligence of the appellant company.

Counsel for appellant has prefaced his very able and extensive printed argument by reminding the court that the Industrial Commission is a mere creature of statute, and exercises only ministerial and administrative duties, and has no judicial power; also that the commission does not have exclusive or final authority to determine what matters come within its jurisdiction, and that such is a judicial question, which the courts must finally determine; that for that purpose courts should and will review the evidence and findings to determine the jurisdiction of the commission in any particular case. This court has held that the Industrial Commission is an administrative body, and also that the court will review the record, at least to the extent of determining whether there is any evidence to support the commission's findings. Industrial Com. v. Evans, 174 Pac. 825; Garfield Smelting Co. v. Industrial Commission, 178 Pac. 57.

Error is assigned on the alleged ground that the petition filed with the Industrial Commission by the widow and guardian is insufficient to support an award. In other words, it is urged that the petition does not state facts sufficient to entitle petitioner to any relief against appellant. On the other hand, it is contended by the Attorney General that any application that will set the machinery of the commission in motion is sufficient.

Assuming, without so holding, that the commission was without jurisdiction to grant petitioner any relief or to make an award unless the petition contains sufficient facts to support an award, it remains, nevertheless to be determined whether the petition in this case is sufficient to support the award made.

[1] It appears from the application filed with the commission that the deceased, Louis J. Rushton, was killed by an accident arising out of and in the course of his employment by the appellant here, defendant in the

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proceedings before the commission; that the petitioner is the widow of the deceased and the guardian by judicial appointment of his minor children. The daily wage received by the deceased at the time of the injury resulting in death is also stated. The petition contains the names of the minor children and their ages. The widow and minor children are, by the provisions of Comp. Laws Utah 1917, § 3140, presumed to be dependents of the deceased. We have here, then, an application or petititon stating the death by accident, the employment by appellant, the daily wage, and the names, ages, and relationship of the dependents. The necessary elements to entitle the appellant to an award, hence the necessary facts to give the commission jurisdiction to make the award, are found in the petition.

We remark that doubtless the blank forms used by the commission could easily be changed so as to include such additional information as would relieve the petition from the criticism made by appellant.

[2] The appellant is what is known as a self-insurer. It is therefore insisted that the commission has no jurisdiction to make an award against it as such self-insurer. It is argued in support of this contention that the commission, being purely an administrative body, has only such power and authority as have been conferred upon it by express grant or as arise by implication as necessary and incidental to the full exercise of the powers expressly granted, and that courts will not, by construction, authorize the exercise of additional powers. It is doubtless true that courts cannot, by construction, legislate and give to the commission powers not granted by the act, but it is equally well settled that the grant of a specific power in furtherance of the purpose of the Legislature, such purpose being apparent from the entire act, will authorize the use and exercise of such incidental powers as are necessary to accomplish the object sought by the legislation.

The recent history of the enactment of the law in question justifies the court in saying that the recognized and known intent of the Legislature was to secure compensation to injured employees, or to their dependents in case of death, whether such injury or death resulted from the negligence of the employer or was purely accidental. Also, it was the intent to secure such compensation without delay and without the expense and annoyance of a suit at law. An administrative body, to wit, the commission, was created primarily to enable injured employees or dependents of such employees when death ensues to obtain such relief without delay, and without having to resort to the uncertainties and expense of litigation.

Comp. Laws Utah, 1917, § 3114, provides the method of securing such compensation. Three methods are enumerated: (1) By insuring in the state insurance fund; (2) by insuring in a stock or mutual association authorized to transact the business of workmen's compensation insurance in this state; and (3) by self-insurance upon "furnishing to the commission satisfactory proof of financial ability to pay direct the compensation in the amount and manner and when due as provided for in this title."

By section 3115 the employer insuring in a stock or mutual association is required to file with the commission, in the form prescribed by it, notice of his insurance, together with the contract or policy of insurance. Section 3116 provides that the policy of insurance shall cover the liability of the employer for compensation, whether issued by the commission or by a stock company, and also contain a provision setting forth the right of the employee to enforce in his own name the liability of the insurance carrier in whole or in part for the payment of such compensation by filing a separate claim, or by at any time making the insurance carrier a party to the original claim. Section 3117 provides tht every policy shall

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contain a provision that notice to or knowledge of the injury on the part of the employer shall be notice to or knowledge on the part of the insurance carrier; that jurisdiction of the employer for the purpose of this title shall be jurisdiction of the insurance carrier, and that the insurance carrier shall in all things be bound and subject to the awards, findings and decisions awarded against the employer for the payment of compensation under the provisions of this title. Section 3138 enumerates the rate, time, and schedule of partial disability. Section 3140 prescribes the benefits in case of death, and designates the amounts and persons to whom the benefits shall be paid. Section 3141 gives the commission authority to determine the apportionment of the benefits among the dependents in such manner as it may deem just and equitable. Section 3143 provides that if it is established that an injured employee was of such age and experience that under natural conditions his earnings would be expected to increase, evidence may be considered in arriving at his average weekly wage. Section 3144 provides that the powers and jurisdiction of the commission over such case shall be continuing, and it may from time to time make such modifications or changes with respect to former findings and orders as in its opinion may be justified. Section 3145 provides that the commission may, under special circumstances when it deems it advisable, commute periodical benefits to one or more lump sum payments.

It will thus be seen that the commission not only has the power, but it is charged with the duty, of determining the dependency, as well as the amount of weekly payments in case of partial dependency, the length of time that the payments shall continue, and the amount of the same, not to exceed the maximum fixed by statute.

[3] While it may be true that no express provision is found in the act giving the commission jurisdiction over self-insurers, the right to exercise such jurisdiction, in our judgment, is clearly implied as necessary and incident to the exercise of the other powers granted and compliance with the duty imposed by the other provisions of the act. To hold otherwise would be to run contrary to the entire spirit and purpose of the law.

[4] Society is interested in seeing that industries bear the expense of caring for those injured while working in such industries, as well as in seeing that the dependents of workmen losing their lives in such industries shall be protected and given at least some of the comforts of which they are deprived by the death of the provider. The Legislature wisely gave to the commission some discretion as to the time of payment and the application of the same to the support of the different dependents. It is a matter of common knowledge and human experience that in a great many cases it would be unreasonable waste to pay the entire amount of an award in a lump sum, and it would be criminal neglect to fail to see to it that the award, when paid, is used for the support of the minor children, left defenseless by the death of the father. The mother, often without business experience or any knowledge of financial affairs, would too frequently become the victim of unscrupulous, or, possibly, too optimistic promoters, and in a few short months the money awarded for the protection of the children of the deceased would if released from the control of the commission exist only in beautifully lithographed mining stock, or, possibly, stock in some wonderful and rich rubber plantation in a Central or South America republic. To defend against such losses the commission retains control of the award, and may direct its distribution among the dependents in such manner as it may deem just and equitable.

To hold that the commission is without jurisdiction to make an award against a self-insurer would be to make the law discriminatory, and would leave the injured employee of a self-insurer, or his dependents in case of death, largely at the mercy of the employer. In the event

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of failure to agree between the employer and the employee no relief could be had without resort to litigation. On the other hand in the case of an emyloyer insured by or through the state, the commission undoubtedly has the power to fix the amount and direct payment, and the same is true in case of an employer insured by a stock or mutual association. It would likewise be discriminatory against the insurer himself, and might subject him to litigation in the event that the injured employees or dependents were disposed to exact a greater amount than they would be entitled to under the act, from which annoyance or litigation the insurer in the state fund or by a stock or mutual insurance company would be relieved.

The answer of appellant to the Attorney General's query as to what the parties could do if they failed to agree is that the courts are open and are bound to protect any right that the dependents or partial dependents may have. Avoiding litigation is among the prime objects sought and intended to be accomplish by the enactment. The commission was created largely for that very purpose. The privilege of permitting any employer to become a self-insurer was not given for the benefit of the employee, but, on the contrary, was given for the employer's benefit. To hold that the commission is without authority to grant an award in the case of a self-insurer would, to a very large extent, defeat the very purpose sought to be accomplished by the enactment of the law. This the courts should not do unless no other result is consistent with the provisions of the entire act. By holding that the commission has authority to award compensation against a self-insurer, this court is creating no new agency, nor is it granting to such agency any power or authority not reasonably arising by necessary inplication in the exercise of the power granted.

In paragraphs 4 and 5 of the syllabus to the case of Gilbert v. Craddock, 67 Kan. 346, 72 Pac. 869, it is said:

"A necessary implication does not shut out every other possible or imaginary conclusion, but is such a one as, under all the circumstances, a reasonable view impels us to take, the contrary of which would be improbable and absurd.

"In drawing such implication, courts may read the entire act, as well as past acts in pari materia; take into consideration the purposes and scope of the act, the inconveniences, inconsistencies, and absurdities of a contrary view, and the general policy and character of our institutions."

In Brown v. Clark, 102 Tex. at page 333, 116 S. W. at page 364 (24 L. R. A. [N. S.] 670), the court said:

"It is elementary that the grant of a specific power or the imposition of a definite duty upon any person or court confers by implication the authority to do whatever may be necessary in order to execute the power conferred or to perform the duty imposed, and the implied power is as much a part of the statute as if it were written into the body of the act itself."

The members of this court are all of one mind that the commission is clothed with authority to make an award against a self insurer, and that the objection cannot be maintained.

It is also contended that the deceased was not in the employ of the appellant company at the time of the accident, but was an independent contractor. There is nothing in the evidence to warrant any such conclusion or contention.

[5] It is further insisted that the commission was without jurisdiction to make an award in this case, for the reason that the employment of deceased was both casual and not in the usual business of appellant. Comp. Laws Utah 1917, § 3111, so far as material here, reads:

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"The term 'employee,' 'workman,' and 'operative,' as used in this title, shall be construed to mean: (1) * * * (2) Every person * * * in the service of any person, firm, or corporation, employing four or more workmen * * * regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work for hire under the laws of the state, but not including any person whose employment is but casual, or not in the usual course of trade, business, profession, or occupation of his employer."

Since the date of the accident involved in this case the foregoing section has been so amended that the question here discussed is not likely to be before the courts again.

It is undisputed that the chief occupation of deceased was that of a farmer. He owned land located under the canal in question, and resided there with his family, and had done so for more than 3 years. He worked on the farm during the summer months. The canal is owned by a corporation known as the Salt Lake & Utah Canal Company. The water flowing through the canal is used for irrigation and for watering stock. It is also undisputed that appellant obtained water from this canal, during both the irrigation and nonirrigation seasons, and that the water was used in the operation of its business of minning and milling ores. The water thus acquired or procured was necessary in conducting and carrying on its usual and regular business. The Copper Company, appellant, had an employee by the name of Larson, known as the "canal boss," regularly and continuously engaged in looking after the repair of the canal, keeping it free from debris and seeking that the canal was not permitted to overflow its banks, all of which might result from an excessive amount of water flowing through the canal, or, during the winter months, from ice interfering with the flow of the water. It was the custom, when repairs were required, for men to be employed from any place they could be obtained to make such repairs. Ordinarily it was the farmers residing near the canal who were employed. The deceased had been employed for a short period at one time some months prior to the date of the accident to assist in doing some work upon the canal. At the time of the accident it appears that it was advisable to strengthen the banks of the canal to prevent an overflow, and the matter was, by the "canal boss," submitted to the superintendent of appellant company, who instructed that the necessary help be procured and the repairs made. Accordingly, on December 30th, the deceased was employed. He worked that day and the following day. On January 1st, while so employed, he received an injury which resulted in his death. The commission, in its decision, makes the folowing finding, whch, in our judgment, is supported by the evidence.

"It appears from the evidence that Louis J. Rushton was employed with a number of other men to make repairs along the banks of the Salt Lake & Utah Canal, where, because of the formation of ice, the water was overflowing the banks. This canal furnished the water used by the defendant company in its business of smelting. Water, it appears, is a very important factor in the business. Indeed, it would seem that the plant could not operate without it—an adequate supply of water— and it appears from the evidence that for about 6 years last past the canal has carried water during the nonirrigating season for practically no other purpose than to serve the needs of this company, and the company regularly employed men to keep the canal open, and while it was an unusal occurrence that men had to be employed to repair the banks of the canal, and it appears that Louis J. Rushton was employed on one of these occasions, the commission is unable to find that his employment was not in the usual course of trade, business, profession, or occupation of his

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employer, but, on the other hand, is persualed and does find that what he was doing was so intimately connected as an incident and factor in its business to make it necessary to rule against the defendant on this ground.

As indicated, we are satisfied that the evidence fully justifies the commission's conclusion that obtaining water from this canal was essential and necessary for the operation of the mining and milling business of appellant.

Any one employed in constructing or repairing a ditch or other means of conveying water used in the business of the appellant is just as definitely employed and engaged in the usual occupation or business of the employer as is a machinist engaged in assembling or repairing a machine operated in taking ore from the company's mines. The canal in question was under the control of the appellant company. True, it was owned by another corporation, and was utilized to convey water to farmers for irrigation and domestic purposes. Appellant seems to have been in control of and charged with the duty of keeping the canal free from obstructions, and seeing to its repair when ever necessary, so that the same would convey water to be used by the appellant. It must therefore, in our judgment, necessarily. follow that one employed as was the deceased in making repairs on that canal was engaged in an employment necessary in conducting the uusual business of the company.

Appellant further maintains that admitting that the employment was in the usual course of the business of the employer, nevertheless it was but casual employment, and for that reason it is not within the jurisdiction of the commision to make an award. The authorities are not uniform in defining what constitutes casual employment under acts similar to our Workmen's Compensation Act. As indicated, there was no regularity of employment or assurance of employment at any time or at all. It was only when the exigencies of the situation required extra workmen in addition to the regular employees of appellant company that the deceased or other engaged in repairing the canal at this or other times were employed. At the time of the employment of the deceased nothing was said as to the length of time that such employment would continue. It was understood that as soon as the necessary repairs were made upon the canal such employment would cease. These facts are not in dispute. It this court should follow the conclusions reached by the Supreme Courts of Massachusetts and Illinois, and, possibly. Pennsylvania, the applicant must be denied relief in this case. In re Gaynor, 217 Mass. 86, 104 N. E. 339. L. R. A. 1916 A, 363; In re Cheever, 219 Mass. 244, 106 N. E. 861; Aurora Brewing Co. v. Ind. Board, 277 Ill. 142. 115 N. E. 207; C. G. W. R. R. v. Industrial Com., 284 Ill. 574, 120 N. E. 508.

The intent of the legislation in question was to create a new or additional burden upon the industries of this state not heretofore borne by such industries, and to establish a system whereby the industries should bear the cost of providing for those injured while engaged in such industries or the dependents of those sustaining injuries resulting in death. Such being the object sought, it is, in our judgment, more in consonance with that purpose to conclude that it was not the intention of the Legislature to exclude from the operation of the act one engaged in work necesarily required in the usual prosecution of such industries, and that the duration of such employment or the infrequency of the same ought not to control the courts in determining whether the employment was casual or otherwise. If the employment was essential and was required in the prosecution of the regular business of the industry, the industry, in order to carry out and effectuate the purpose of the act, should pay for any injuries sustained. The statutes of this state require the courts to give to legislative enactments a liberal construction with a view to effectuate the purpose sought by the Legislature.

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It may be claimed, and it is claimed by counsel for appellant, that to hold that the deceased in this case was not a casual employee is in effect to nulify the provisions of the statute. Let us suppose that some truck or automobile belonging to this appellant had been wrecked upon the public roads of Salt Lake county near the home of the deceased; that the deceased had been employed by the company to remove that demolished machine and throw it upon the scrap heap; that when he had done so his employment would cease. That would be a case of casual employment, and just such employment, in our judgment, as the Legislature had in mind when it enacted this law. No one can say that to scrap a broken down truck or automobile is in the usual course of the businesss or trade of this appellant. In this case, as has been definitely indicated, the deceased was engaged in no such exceptional or unusual employment.

In Holmen Creamery Ass'n v. Industrial Com., 167 Wis. 470, 167 N. W. 808, the Supreme Court of Wisconsin gives sanction to the principle that the casualness of the employment rests, not upon the infrequency of the employment or the duration thereof, but that the nature of the employment must determine whether the same was casual or otherwise. The facts involved in that case are not in dispute. They are given by the court in the following language:

"Wallum was hired by the manager of the Creamery Association to make some repairs on the creamery, consisting of mason work and plastering inside and outside of the building. He started to work about 10 o'clock in the afternoon of the same day. He had previously worked for the creamery association off and on, and had built part of the building, but had never steadily employed by it. He was always hired especially whenever he did repair work for it, and was paid by the hour or day. It was understood that when these repairs were completed his employment terminated, and that if he rendered further services it would be under a new employment."

The question presented for determination by that court does not differ in principle from one presented by this record. The court, in discussing the question here under consideration as applicable to the facts in that case, said:

"It is quite evident that the term 'employment' used in the quoted section refers to the nature or kind of service rendered by the employee rather than the nature of his contract of hiring. The true test, therefore, is whether the service rendered or the work done by the employee is of a casual nature."

We have seen that the work in which the deceased was engaged at the time of the accident was work required in the actual operation of mining and milling in which business the appellant is engaged. The constant use of water, it seems to be conceded, was essential to that industry. We therefore conclude that the deceased was not, at the time of the injury, a casual employee within the meaning of the term as used in the act.

[6, 7] The testimoney upon which the award was made in this matter was taken before a referee. Appellant's counsel objected to any hearing by the referee, and based such objection upon the ground that the commission has no power or authority to delegate to a referee to hear testimony in support of the application, and further, that if it be admitted that the commission has authority to appoint a referee the referee appointed in this case had no power to administer an oath. Counsel supplemented his objections by a motion to stay the proceedings, and requested that the application be heard before the commission or some member therof.

The fact that the commission is an administrative and ministerial body, and that no express power is given to name a referee, are again urged, among other reasons, why such power could not be delegated.

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That a referee had been regularly appointed by the commission seems to be conceded, at least no question is raised in that regard. The subpœna or notice served upon the appellant of the time and place of hearing stated that at such time "the commission would bear and dispose of the application" in the manner provided by law. In the investigation of any matter before the commission it is not bound by the common law or staatutory rules of procedure, "but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this title." Comp. Laws Utah, 1917, § 3149. The commission is authorized to and charged with the duty by other sections of hearing and determining compensation cases. "The commission shall have full power and authority to hear and determine all questions within its jurisdiction, pretaining to the payment of compensation and benefits, and its decision thereon shall be final. * * *" Sections 3130, 3148, "Each of the commissioners and the secretary of the commission, for the purposes mentioned in this title shall have power to administer oaths, etc. Section 3079.

Comp. Laws Utah 1917, § 3100, is as follows:

"The comission may act through proper deputies and may delegate to such deputies such powers as it deems necessary or convenient. Among the powers which may be so delegated shall be the power to enter into contracts of insurance, insuring employers against liability for compensation as herein provided and insuring to employees the compensation fixed by this title; also the power to make agreements for the settlement of claims against said fund for compensation for injuries in accordance with the provisions of this title; also the power to determine to whom and through whom payments of such compensation shall be made; and also the power to contract with physicians, surgeons, and hospitals for medical and surgical treatment and care and nursing of injuried persons entitled to compensation from said fund."

The Attorney General, on behalf of the commission, insists that the foregoing section is conclusive upon the question of the commission's authority to name deputies and to delegate to such deputies such powers as it (the commission) deems necessary or convenient. On the other hand, it is the claim of appellant that the general grant contained in the first sentence of the foregoing section is restricted or limited to the powers enumerated in the remaining part of that section; that in the interpretation of statutes it is a rule of construction that words granting general powers are limited to powers enumerated if such enumeration immediately follows the general grant and the powers enumerated related to the same subject. This rule of interpretation is one that is recognized by all writers on stautory construction, and is applied by the courts unless its application would result in defeating the manifest intent of the Legislature or from the language used it is apparent that it was not intended by the Legislature that the general powers delegated should be restricted. The rule invoked is, after all, merely a rule of construction. That rule is, like all rules of construction, controlled by the intent of the Legislature, if that intent can be rationally determined from the language used, considered in connection with the other provisions of the act, where the same is found. The language here used indicates that the powers enumerated are not exclusive. After the general words or grant the statute says, "Among the powers which may be so delegated shall be those enumerated. One of the definitions of the word "among," found in the Century Dictionary is: "In the number of; out, or out of." We have a right to conclude, therefore, that the special powers enumerated were not intended to be restricted, but that the commission is authorized to delegate to deputies other powers not inconsistent with or prohibited by other provisions of the act. The forego-

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ing conclusion is strengthened by the general objects sought to be accomplished by this legislation, namely, to secure relief to injured employee's, or their dependents in the event of death, without unnecessary delay, and to do so with the least possible inconvenience and expense either to the applicant or to the state consistent with justice. Much of the mining industry of this state is located in the southern counties. To compel the attendance of witnesses from that part of the state, or for the commission as a body to visit such industries for the purpose of taking testimony, would cause inconveniences and incur expenses not contemplated by the Legislature, but which were on the contrary, sought to be avoided. The authority to make the investigation "in such manner as in its (the commission's) judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this title" in no way interferes with or relieves the commission of its duty to her and determine all matters relating to compensation. The referee does not, and cannot, make any award or make any binding order respecting an award. That is a matter left to the determination of the commission itself, when the testimony taken is submitted to and considered by the members of the commission. Taking testimony by a referee is only one manner of investigating and ascertaining the facts involved in any particular proceeding.

It is also sugested that it has been the uniform custom of the commission in this state, and the custom in other states, to delegate to a referee the authority to take testimony in matters of this kind and to report the same to the commission, and that "it would seriously cripple the functions of the commission if such could not be done." Be that as it may, we are of the opinion, and so hold, that the commission is given authority to delegate to a deputy, designated herein as a referee, the power to take testimony in support of or against the application of any one asking relief before the commission. The power to take testimony necessarily carries with it the authority to administer oaths.

[8] It is further claimed by appellant that the minor heirs, and particularly the unborn child of the deceased, are not bound by the proceedings before the commission, and that as a result the award made must fail, for the reason that if permitted to stand it might expose the appellant company to a double liability, and would result in taking property without due process of law, and deny to appellant the equal protection of the law, in violation of the federal and the state Constitutions.

Section 5 article 16 of our state Constitution reads as follows:

"The right of action to recover damages for injuries resulting in death, shall never be abrogated. and the amount recoverable shall not be subject to any statutory limitation."

By the provision of Comp. Laws Utah 1917, § 3127, it is provided that for injuries resulting in death the dependents of the deceased are given the right, within such time as by the commission shall prescribe, to elect between bringing suit at law against such employer to recover damages for such death or accept the benefits allowed dependents of deceased employee's under the act. It is also provided that if the dependents elect to take under the act they will not be entitled to sue the employer at law to recover damages. It is not questioned by appellant that the right of an election of remedies given to the dependents of any one whose injury results in death, and for whose death the right of action is guaranteed by the constitution, contravenes or is in conflict with any constitutional right. The consitutionality of such provision however, is set at rest by the Supreme Court of the United States in the Arizona Employers' Liability Cases, 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. 1058, 6 A. L.R. 1537.

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It is, however, contended that the guardian attempting to make the election in this case was not authorized or empowered to make a binding election on behalf of the minors, and that the court authorizing the election was without authority to make such order. It appears in the record that Julia C. Rushton, the mother of the minor children, filed a petition in the district court of Salt Lake county, where said family resided, in which the necessary jurisidictional allegations were contained, to authorize the appointment of a guardian both of the persons and the estates of the minors, and it also appears that relatives of the minors residing in said county joined in the petition, and asked that the mother be appointed guardian. The order granting the petition and naming the guardian recited that proof had been made that notice had been given according to the law to the relatives of the minors residing in Salt Lake county and to the person in whose care said minors were . It would seem, therefore, that proceedings for the appointment of a guardian were in every way regular, and that the court had jurisdiction of the parties at the time of making the appointment. It is, however, further objected that the proceedings before the district court, wherein the mother was named guardian of the minor children, were "entirely ex parte, and that the Utah Copper Company was in no way a party thereto." Conceding such to be the fact as shown by the record, it is pertinent to inquire, In that way was the appellant injured. In what way has any of its rights been invaded? The right of election of remedies given to dependents of a deceased by section 3127, supra, is personal to such dependents, and the employer is in no way concerned in such election, except to the extent that he has a right to insist that the election be made by some one with legal authority to bind the minors for whom the election is made, and release the employer from any further liability.

It also appearsr that subsquent to the order naming the mother guardian of the estates and persons of the minors a petition was filed in the said district court, asking permission to elect to take compensation for the minors for the death of their father under the Workmen's Compensation Act. Accordingly, upon a hearing of that petition, an order was made, authorizing the guardian to make such election and to take such compensation as might be awarded by the Industrial Commission.

The guardian having proceeded to make the election by filing her petition with the commission, it remains to be determined whether the court authorizing the guardian to make such election exceeded its authority in that regard.

It is claimed by appellant that the right given to the heirs by the Constitution to bring an action against any one negligently causing death cannot be waived by a guardian either under an order of court or otherwise, and that the court has no power to authorize such waiver. Comp. Laws Utah 1917, § 7832, in defining the duties and authority of guardians, says:

"Every guardian must settle all accounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approbation of the court compound for the same and give discharges to the debtor, on receiving a fair and just dividend of his estate and effects; and he must appear for and represent his ward in all legal suits and proceedings, unless another person be appointed for that purpose."

The right to recover damages for the death of any one guaranteed by the Constitution is founded upon the neglect or failure of duty upon the part of the employer or individual causing the injury resulting in death. Whatever amount a minor might recover would be a debt due to him, probably not in the usually accepted sense of the term "debt," but in legal effect the same. It would seem from the statute above quoted that the guardian may, with the approbation of the court, com-

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pound such debt and discharge the debtor. In that section of the statute alone the court is empowered, upon a proper showing and it appearing that the best interests of the minor require the acceptance of an award made under the Workmen's Compensation Act, to authorize its acceptance. It has never been questioned in this state since statehood, nor in the territorial days, that the probate courts, or rather, the district courts since statehood, in the administration of the Probate Code, did not have authority and power to authorize the legal representatives of deceased persons to compromise or settle for a stated sum with the employer or other persons responsible for the negligence which caused the death of the persons whose estate is being administered. District courts, in the administration of the Probate Code, have uniformly assumed to exercise such right. Much is said in the appellant's brief concerning the powers of probate courts, and it is urged that such courts, being of limited jurisdiction, can have only such powers as are expressly given to them. There is no such a court as a probate court in this state. Probate courts, as they existed in territorial days, ceased to be at the date of the admission of Utah into the Union. The jurisdiction over and the administration of the Probate code was by the Constitution transferred and given to the district courts. District courts are constitutional courts of general jurisdiction, and in the administration of the Probate Code are authorized to exercise such general or inherent powers as attach to courts of general jurisidiction in the administration of the affairs within their jurisdiction. Not only, in our judgment, is the district court given authority by the Probate Code to direct and authorize an election of remedies, as it did in this case, but if no such power existed by the provision of the Code, and the district Court having jurisdiction of the persons and estates of minors is convinced that it is for the best interest of such minors that an election be made to take the award provided for by the Workmen's Compensation Act, the court has the authority to make such order.

It is also contended by appellant that by the decision of this court in the case of Garfield Smelting Co. v. Industrial Commission, 178 Pac. 57, it has been determined that before there can be an election of remedies on the part of a minor in case of death there must first be a legal and judicial determination of the question of whether the death was caused through the negligence of the employer by some "proper judicial proceedings in some manner known to the law." Both parties rely upon that opinion, and extensive quotations are made in the briefs in support of the positions urged. Respecting the right to bring an action for the death of an adult, that case holds that the Legislature is without authority to deprive the parties entitled to bring such acion of such right. Also that a minor being sui juris, cannot waive the right. It is also determined that the Legislature cannot delegate to a parent, or to a mother, in this case, as such, the power to waive the right to bring an action. In other words, that some legal proceeding must be had to give to the party making the election, or exercising the waiver, power to bind the minor. The opinion in the Smelter Case nowhere attempts to define or point out the proceedings necessary to obtain for the minor the right to elect or waive, nor does it hold that it must first be determined that the death was not caused by the negligence of the employer. Indeed, if the death were not caused by the negligence of the employer, no need of election of waiver exists. No right of action exists unless some one is at fault, and such fault contributed to the injury resulting in death. The compensation provided for in the Workmen's Compensation Act is in no way dependent upon the negligence of the employer. It is a definite, fixed sum, which the statute provides shall be paid under certain relationships existing between the employer and the employee. The right of de-

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pendents to receive the award provided for in the act rests upon the election of such dependents to waive the right of action given by the constitution. The rights of both dependents and employer are reciprocal. Any payment made under an award of the commission would, of necessity, reduce to that extent any liability which might attach by reason of the negligence causing the death. When it is made to appear to a court having jurisdiction of the person and estate of the minor that the interests of the minor would be best subserved by accepting the compensation allowed under the act, it is difficult to conceive why the power does not exist to authorize an acceptance of the same and to release the employer or waive the minor's right to bring a suit at law. Evidently the court in this case, when it made the order, was satisfied that such were the facts, and so long as the order remains in force, and no objection is made by any one in interest why it should not be enforced, it does not lie in the mouth of the employer to object or complain so long as the court had jurisdiction to make the order.

It appears in the record that at the date of the death of the father there was an unborn child. That condition existed when the original petition was filed in the district court for the appointment of a guardian for the nine living children. It also existed at the date the petition was filed with the Commission and at the date set for hearing that petition. It being made to appear to the referee at that time there was an unborn child, under objection of counsel for the copper company the hearing was postponed, and it seems that a petition, or supplemental petition, asking for appointment of a guardian for the unborn child, was then filed in the district court. Upon a hearing on that petition an order was made naming Julia C. Rushton, the mother, as guardian of the person and estate of such child. Thereupon an order was made that she as guardian, might elect to take compensation for the child under the Workmen's Compensation Act. It is strenuously insisted by counsel for appellant that the court could not lawfully make such an order; that the child was not in existence in a legal sense; that is was not a dependent under the terms of the act until after its birth, nor was it an heir under the general laws of the state until such time.

Comp. Laws Utah 1917, § 3140, provides that a posthumous child shall be included and considered as a dependent. Section 6340 of the same compilation, relating to wills and succession, declares an unborn child to be an heir, and section 6426 provides that "posthumous children are considered as living at the death of their parents." Under section 7799, being a part of the Probate Code, under the head of "Guardianship appears the following:

"A guardian of the person or estate, or of both, of a child born, or likely to be born, may be appointed by will or by deed, to take effect upon the death of the parent appointing; such appointment may be made by the father, with the written consent of the mother; or by either parent, if the other be dead or incapable of consent."

That statutory provision recognizes the general principle of appointing by will or deed a guardian for an unborn child. The right to do so therefore exists in this state. It affirmatively appears in the petition filed in the district court that no guardian had been appointed by will or deed for either the living minors or the unborn child. The statutory provisions, making a posthumous child an heir and also a dependent, of necessity, carry with them the inference that such child, upon birth, comes into or acquires certain property rights. While such rights may be indefinite and inchoate during the period between the death of the father and the birth of the child, nevertheless, they are rights that the courts should have, and must have, authority and power to preserve and protect, Let us suppose, for example, that a man dies leaving an estate

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valued at less than $10,000. He leaves a wife and an unborn child. That child may be born at any time within nine months after the death of the father. Under the probate laws of this state, that estate can be administered and distributed within four months. As we have seen, an unborn child is considered and treated as living after the death of the father. Can it be contended by any one that a court is without authority, through its officers, to in some way protect that child's inheritance, keep the property intact, and do whatever is necessary for the delivery of the property to the child or its guardian upon its birth We think not. To determine otherwise would be to hold that the statute gives an unborn child certain property rights, and considers the child as living, yet leaves no machinery of law by which such rights can be protected or preserved. Such authority must exist somewhere, and it can exist nowhere else than in a court having jurisdiction of the estate. Futhermore the authority of a court to name a guardian for an unborn child independent of a statute like ours is recognized. The Supreme Court of Georgia, in an early case, Morrow v. Scott, 7 Ga. 537, says:

"We are of the opinion, both upon principle and authority, that a child in ventre sa mere, at the time of the death of the intestate's ancestor, who is born within the usual period of gestation thereafter, is entitled to a distributive share of such deceased intestate's estate. Blackstone states the rule to be that 'An infant in ventre sa mere, or in the mother's womb, is supposed in law to be born, for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards, by such limitation, as if it were then actually born; and in this point, the Civil Law agrees with ours.' 1 B. L. Com 130, 1 Roper on Legacies, 53."

The same principle is recognized by the Supreme Court of Alabama in Nelson v. Iverson, 24 Ala. 9, 60 Am. Dec. 442. At page 448 of the last-mentioned volume (at page 20 of 24 Ala.) the court says:

"It seems now to be the settled law that an infant in esse from the time of its conception for the purpose of taking any estate for its benefit, provided it be afterwards born alive, and after such a period of fetal existence that its continuance in life might be reasonably expected."

The right of an heir to recover damages for the wrongful death of an adult is, after all, but a property right. It may, in a certain limited sense, be considered as a personal right, but, nevertheless, the result to be obtained by such an action is property equivalent to the loss sustained. The right of the unborn child to maintain an action for the death of the father in this case after its birth, or the right to take under the Workmen's Compensation Act, has for its object one and only one purpose. That purpose is compensation for the death of the individual caused by industry. If it be admitted as it seems it must be under the statute, that a guardian may be appointed to protect the property of an unborn child, it would indeed be a strange anomaly if in event that litigation ensued involving the right to that property the guardian would have no authority to represent the person of the unborn child so that it might appear in court and defend its rights. It is a little difficult to conceive just what voluntary election an infant child just born would have the intelligence to make, or in what its wishes or desires could or would be consulted to any greater extent than a child within its mother's womb. It could only act, and would only act, in either case through officers appointed by the court to preserve and protect the estate or interests of such child. Any reason that might exist why a guardian could not be appointed to care for the estate of an unborn child would exist to the same extent why a guardian could not be authorized and appointed to

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act for an infant without intelligence sufficient to make an election and without power or ability to understand what was being done for or against its interests. A statute of this state having recognized the right or the authority to appoint a guardian for an unborn child either by will or deed, it seems, under Comp. Laws Utah 1917, § 7809, that when it appears necessary or convenient the court may name a guardian for the same purposes for which one might have been appointed by will or deed.

We conclude, therefore, that the court was in the exercise of its rightful authority, under the circumstances appearing in this record, when it named a guardian for the unborn child, and that such guardian, when authorized by an order of court, was empowered to elect to take the award that could be made for it under the Workmen's Compensation Act.

It is well to keep in mind that the amount of compensation in cases of total dependence, such as this, is a definite, fixed sum. It is a certain per cent. of the weekly wage at the date of the injury. It is not controlled by the number of dependents. Neither is it within the discretion of the commission. The addition of an unborn child by subsequent birth neither adds to nor subtracts from the amount of the award. No definite pro rata of the award is paid to or due to any particular dependent. That is a matter with the discretion of the commission under authority of section 3141, supra. Under the provisions of that section, of the commission concludes that the payment of any part of the award should be withheld until the birth of the unborn child, it would seem that such power is given to it under that section. If the exigencies of the family be such that it is deemed advisable that part of the award be paid so as to be used in paying the expenses of the birth of the child, power evidently exists under the section last above mentioned in the commission to so order.

The Attorney General has at some length in his brief discussed the right of the commission to take jurisdiction and determine an award upon the application or petition of a part of the dependents only, regardless of the election of the others who might be entitled to bring an action for the death of an adult under Comp Laws Utah, 1917, § 6505. Having held that an unborn child may be represented by a guardian, and it appearing that such child was represented by a guardian in this proceeding and, further, that such guardian under an order of court elected to take the award provided in the act, it is not necessary to pass upon that question in the case before us. Conceding merit in the argument of the Attorney General, we prefer to express no opinion on that question, as it will be time enough to determine the same when it is necessary for a decision of the matter before the court.

The judgment of the district court upholding the award is affirmed. Interest will be allowed against the appellant on the monthly payments awarded by the commission from the dates upon which they were payable under the award to the date of payment. Appellant will also be required to pay the costs on this appeal.

Corfman, C. J., and Frick, Weber, and Thurman, J. J., concur.

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MADDOX v. INDUSTRIAL INSURANCE COMMISSION OF WASHINGTON (No. 16044.)

(Supreme Court of Washington. November 17, 1920.)

193 Pacific Reporter, 231.

1. MASTER AND SERVANT—EVIDENCE ADMISSIBLE UNDER COMPLAINT ON APPEAL UNDER COMPENSATION ACT.

On compensation claimant's informal and summary appeal under Rem. Code 1915, § 6604—20, from a decision of the Industrial Insurance Commission, evidence that he was suffering from a particular disorder caused by the injury so as to entitle him to a higher award is not objectionable merely on the theory that the fact is not alleged in the complaint on file.

(For other cases, see Master and Servant, Dec. Dig. 417[5].)

2. MASTER AND SERVANT—DISMISSAL OF COMPENSATION CLAIMANT'S APPEAL PRECLUDES SECOND ACTION UNDER APPEAL NOTICE.

A compensation claimant appealing to the superior court pursuant to Rem. Code 1915, § 6604—20, who takes a voluntary nonsuit, on objection to the introduction of evidence under the complaint, the cause being dismissed without prejudice, cannot thereafter bring a second action under the original notice of appeal, because the dismissal was a dismissal of his appeal from the award, which was also affirmed by the dismissal.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

Department 2.

Appeal from Superior Court, Pierce County; John D. Fletcher, Judge.

Proceeding under the Workmen's Compensation Act by John F. Maddox, employee, who was allowed compensation by the Industrial Insurance Commission of the State of Washington. Claimant gave notice of appeal to the superior court, filed a complaint therein, the cause was dismissed without prejudice, and claimant thereafter assuming to be proceeding under the same notice of appeal, filed a summons and complaint in a new cause, and from judgment of dismissal therof, he appeals. Affirmed.

P. L. Pendleton, of Tacoma, for appellant.

Lindsay L. Thompson, of Olympia, and Frank P. Christensen, of Friday Harbor, for respondent.

TOLMAN, J. In January, 1918, appellant was injured while engaged in an extrahazardous occupation, and thereafter filed a claim for compensation, under the Workmen's Compensation Act (Rem. Code 1915, §§ 6604— 1 to 6604—32). wtih the respondent commisssion. On October 23, 1918, the commission classified the case as one of permanent partial disability and allowed the appellant the compensation provided by law therefor. Thereafter the cause was reopened, again considered, and on October 21, 1919, a final order was made to the effect that the original classification was correct. Three days later appellant gave notice of appeal from such final order to the superior court of Pierce county, and filed a complaint therein, the cause being docketed as No. 45079. This cause came on for trial in the superior court on February 10, 1920. In his opening statement counsel for appellant represented that appellant was, and prior to the final order of the commission had been, suffering from traumatic neurasthenia, which entitled him to a

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higher award than that which had been made, whereupon counsel for the commission object to the statement and to the introduction of any evidence thereunder upon the ground that the complaint in the cause did not allege that appellant was suffering from any such disorder. So far as there appears, prior to any ruling on such objection and without asking leave to amend, appellant asked for a voluntary nonsuit without prejudice, and the court, in pursuance of such request, entered an order dismissing the cause without prejudice.

Thereafter, assuming to be still proceeding under the notice of appeal from the final order of the commission, which was served on October 24, 1919, appellant on March 10, 1920, filed a summons and complaint in a new cause ,which was docketed as No. 45669, and in due course the commission answered thereto, setting up, among other defenses, that by the voluntary dismissal of the former cause appellant had in fact and in law dismissed his appeal from the final order of the commission, and that no other appeal having eben taken within 20 days after the making of the final order by the commission, or at all, and, the time for appeal having expired, the court was without jurisidction to entertain the action. The cause came on for trial, and respondent objected to the introduction of any evidence for the reasons set fourth in its answer, and, the objection being sustained, the action was dismissed, from which result this appeal is prosecuted.

[1, 2] The statute under which appellant assumes to act, and the only statute providing for appeals from an award by the commission in such cases, is Rem. Code, § 6604—20, which so far as is here applicable, reads as follows:

"Any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department affecting his interest under this act may have the same reviewed by a proceeding for that purpose, in the nature of an appeal, initiated in the superior court of the county of his residence. * * * The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. No such appeal shall be entertained unless notice of appeal shall have been served by mail or personally upon some member of the commission within twenty days following the rendition of the decision appealed from and communication thereof to the person affected thereby. * * * "

It will be noted that the statute expressly provides that the proceedings on the appeal shall be informal and summary, and if any written pleadings are contemplated, which is at best doubtful, the court should be extremely liberal in construing them, in permitting the introduction of testimony thereunder, and in the granting of leave to amend at any stage of the proceedings, to the end that "full opportunity to be heard shall be had before judgment is pronounced," as the statute expressly commands.

It follows that in the first hearing before the court the objection made on behalf of the commision was ill founded, and should, and no doubt would, have been overruled by the court had appellant waited for such ruling, but, acting upon his own judgment as to the force of objection, counsel for appellant voluntarily dismissed the action without prejudiice. Was such a dismissal a dismissal of his appeal? We think this question must be answered in the affirmative, because the appeal was the only thing which was pending. Appellant had no cause of action of which the court had original jurisdiction State ex rel. Davis- Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; State v. Mountain Timber Co., 75 Wash. 581, 135 Pac. 645 L. R. A. 1917D, 10. The commission had exclusive jurisdiction, and appellant had only the right of appeal from its order. Having exercised that right, the only thing pending in the superior court was the appeal. The only thing which

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was there to be dismissed was the appellant's request for a dismissal could apply to the appeal only. That the order was made without prejudice could reserve only the right to prosecute a subsequent appeal had there been such taken within the 20 days provided by statute. Appellant's sole and only appeal having been dismissed, and the superior court having no original jurisdiction in such cases, there was nothing before the court in this case to which its jurisdiction could attach. Moreover, the dismissal of the appeal, although voluntary, amounts to an affirmance of the judgment appealed from if no subsequent appeal is pending. Post v. City of Spokane, 28 Wash. 701, 69 Pac. 371, 1104; Kawabev. Continental Life Ins. Co., 99 Wash. 214, 169 Pac. 329.

The judgment appealed from is affirmed.

Holcomb, C. J., and Mount, Mitchell, and Main, J. J., concur.

CAYLL et al. v. INDUSTRIAL COMMISSION et al.

(Supreme Court of Wisconsin. November 16, 1920.)

179 Northwestern Reporter 771

1. MASTER AND SERVANT—INJURY TO WORKMAN TRANSFERRED BY EMPLOYER TO SPECIAL EMPLOYER HELD COMPENSABLE BY LATTER; "EMPLOYEE."

Where an excavation contractor's employee consented to be transferred to the service of a gas company laying pipe in the ditches dug by the contractor, and was injured while working for the gas company and under its sole control, the gas company, and not the contractor, was liable for compensation under St. 1915, §§ 2394—3. 2394—4. subd. 2 2394—7; he being an "employee" of the gas company under an implied contract of employment, within the common-law rule, though he continued to work for the contractor one hour a day, and was continued on his pay roll.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions see Words and Phrases, First and Second Series, Employee.)

2. MASTER AND SERVANT—FINDING OF INDUSTRIAL COMMISSION ON UNDISPUTED EVIDENCE NOT CONCLUSIVE.

A finding of Industrial Commission. on the question of relationship sustained by a workman to parties to whom he was transferred, is not conclusive on the reviewing court, where the evidence is undisputed; the question in such case being one of law.

(For other cases, see Master and Servant, Dec. Dig. § 417[6].)

Appeal From Circuit Court, Dane County; E. Ray Stevens, Judge.

Proceedings under the Workmen's Compensation Act by Thomas Massino, opposed by Frank Cayll and the Waukesha Gas & Electric Company, employers, and the Marayland Casualty Company, insurer. The Industrial Commission made an award for claimant against employer Frank Cayll and such insurer and they brought an action to set aside the award. From judgment that employer Waukesha Gas & Electric Company be substituted as the party liable to pay compensation, said Company appeals. Affirmed.

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Action to set aside an award of the Industrial Commission under the Workmen's Compensation Act, Sections 2394—1—2394—31, Statutes.

One Thomas Massino was engaged in carrying sewer pipe at the time of the injury in question, on June 3, 1917. The pipe was coated with tar, and as he threw a section of it off from his shoulder it stuck to his jacket, nearly threw him and thus caused a recurrence of an umbilical hernia.

Massino had been in the general employ of respondent Cayll, an excavation contractor, who held a contract to do ditch digging and back filling for construction work of the appellant Waukesha Gas & Electric Co. The appellant company was itself laying the pipe in the ditches so dug by respondent. The appellant company was short of men, and unable to keep up with the progress made by respondent Cayll. Because of this the company asked Cayll for the "loan" of some men to help on their part of the work. Cayll assented, and asked Massino if he wanted to work for the company. Massino consented, and went to work, carrying and laying pipe for the company. As to this work he was under the control and direction of the company. As the company operated on a 9-hour day and Cayll on 10, Massino continued to work for Cayll one hour a day in order not to lose pay. The company Cayll for the time spent on its work, and Cayll carried Massino on his pay roll as theretofore. It was after this arrangement had continued for some weeks, and while thus performing the work of the appellant company, that Massino was injured.

There is no proof in the record that Massino has made any claim under the Workmen's Compensation Act, either against Cayll or the company. There is an uncontrovertred statement in Cayll's petition to the Industrial Commission that he made claim upon both.

Cayll and his compensation liability insurer commenced a proceeding before the Industrial Commission of Wisconsin, setting forth the situation, alleging that Massino was not employed by Cayll at the time of injury, and praying that they be dismissed from any claim under the act. The respondent Waukesha Gas & Electric Company answered that Massino was not employed by it, but was an employee of Cayll, being under his direction and control and paid by him.

A hearing was held by the commission, which thereafter made its findings of fact and award. The commission found the main facts above stated, or they appeared uncontroverted upon the testimony, and that Massino, did "not seem to have understood that he was an employee of the Gas & Electric Company, but assumed that he was still working for Cayll"; that the injury came as a hazard of the company's business, had no connection whatsoever with the business of Cayll, and that the "loan" of Massino was made as a pure acommodation by Cayll, without monetary consideration to him. The commission concluded that the moral obligation to pay was upon the company. The commission further found that the relationship of Cayll and the company was such that Massino had no cause to inquire who he was working for, the work proceeding at one time and place; that he still seemed to recognize Cayll as his "real boss"; and that no one disabused him of the notion.

For these reasons the commission concluded that it could not find as a fact that Massino was not working for Cayll under contract of hire, and that, in so far as Massino was concerned, Cayll and his insurer must see that he is indemnified. The award followed, ordering Cayll and his insurer to pay the prescribed amounts of compensation. There was no direct finding that Massino was in the service of Cayll at the time of the injury.

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Action was commenced in the circuit court of Dane county by Cayll and his insurer to set aside the findings, order, and award of the commission. The complaint set up the usual objections made in such cases, and further, that the injury came as a hazard of the company's business, having no connection with the business of Cayll. and that Massino was under the working directions and orders of the company.

The circuit court held that Massino at the time of the injury was in the employ of the Waukesha Gas & Electric Company, and ordered that the company be substituted in the award as the party liable to pay the compensation. Judgment was entered accordingly, and from the judgment this appeal is taken by the Waukesha Gas & Electric Company.

M. A. Jacobson, of Waukesha, for appellant.

J. J. Blaine, Atty. Gen, andd W. W. Gilman, Asst. Atty. Gen., for defendants.

Walter F. Mayer and James E Coleman, both of Milwaukee, for respondents.

JONES, J. (after stating the facts as above). This case comes before us in quite an unusual manner. Although it involves the rights of a laborer under the Workmen's Compensation Act the employee takes to active part in this appeal. The contest is between two parties, who both deny liability an each allege the other was the employer of the servant, Massino, and liable for any compensation which may be due him. It is alleged in the petition of Cayll, respondent, that Massino has claimed that both are liable, although, so far as the record shows, he has filed no formal claim against either. On the main question litigated there was very little conflict in the evidence, although very different inferences were drawn therefrom.

The statute, as in force at the time of the injury, prescribed that liability shall exist against an employer for any personal injury accidentally sustained by his employee where the following conditions occur (inter alia):

"(2) Where, at the time of the accident, the employee is performing service growing out of and incidental to his employment." Section 2394—3 Statutes 1915.

The following in part, were defined as constituted employers as above used:

"(2) Every person, firm and private corporation (including any public service corporation), who has any person in service under any contract of hire, express or implied, oral or written * * * " Sec. 2394—4, Statutes 1915.

The term "employee," as used in the act. was construed to mean (in part):

"(2) Every person in the service of another under any contract of hire, express or implied , oral or written, * * * but not including any person whose employment is but casual or is not in the usual course of the trade, business, profession, or occupation of his employer." Section 2394—7, Statutes 1915.

In finding that Cayll must indemnify Massino, the Industrial Commission relied very much on the facts that he was hired and paid by the respondent, and that he believed that the respondent was his employer. In finding that the appellant company must pay the indemnity, the trial judge relied on the facts that Massino was injured while engaged in performing labor for the gas company which had no connection with the business of Cayll; that when the injury happened he was doing his work

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under the immediate direction and control of the foreman of the gas company; and that, although he may have supposed that Cayll was his "boss," he had also stated that he was working for the gas company.

Under the undisputed facts there might well be doubts in the mind of Massino whether Cayll or the gas company was his employer, and we do not consider that his opinion on that subject should have such significance in arriving at a decision as to his rights.

[1] In determining whether Massino was an employee of the gas company there are other facts to be considered which we regard of greater importance. Although in the employ of Cayll, he consented to be transferred to the service of the gas company. The injury occurred as part of the hazards of the business of that company, during work over which Cayll had no control, and while Massino was solely under the direction to the appellant. While there was no express contract between Massino and the gas company, there was, withhin the meaning of the act, an implied contract. Subdivision (2) § 2394—7 Statutes 1915. While in some respects the employee was subject to the controrl of the appellant Cayll, the situation was such that the gas company was the proprietor of the work being carried on, and could at all times determine how the work should be done, and whether it should stop or continue.

It was well settled at common law that where an employee with his own consent was loaned to a special employer he became the servant of such employer. The English Workmen's Compensation Act changed this rule and provided:

"Where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service * * * the latter shall, for the purposes of this act, be deemed to continue to be the employer of the workman whilst he is working for that other person." St. 6-Edw. VII, c. 58, § 13.

This act was considered by the committee of our Legislature which framed the Workmen's Compensation Act, and it was brought to the attention of the Legislature. It is fair to assume that the Legislature by failing to adopt this section intended that the common-law rule would continue so far as applicable to such a transfer of service as is here involved.

Very able and elaborate briefs have been filed on this appeal by counsel on both sides, citing many cases bearing upon this interesting question, without commenting upon them, we cite a few of the many decisions which in our opinion sustain the view that when a workman is transferred with his own consent, as in this case, by an employer to a special employer the latter may become liable to pay indemnity when he is in the exclusive control and management of the work in which the injury is received. Scribner's Case, 231 Mass. 132, 120 N. E. 350, 3 A. L. R. 1178; Coughlan v. Cambridge, 166 Mass. 268, 277, 44 N. E. 218; Shepard v. Jacobs, 204 Mass. 110, 90 N. E. 392, 26 L. R. A. (N. S.) 442, 134 Am. St. Rep. 648; Kuckaruk v. McQueen, 221 N. Y. 607. 117 N. E. 1073; Dale v. Hual Construction Co., 175 App. Div. 284, 161 N. Y. Supp. 540; Westover v. Hoover, 88 Neb. 201, 129 N. W. 285. See Standard Oil Co. v. Anderson, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480.

The Industrial Commission expressed the view that the gas company was under a moral obligation to indemnify Massino, but no legal grounds left bound to hold that the indemnity should be paid by Cayll. The trail judge held that both legally and morally the obligation rested upon the gas company. In this view we concur.

It is suggested in the brief of the Attorney General that Massino had the right to look to either employer, and New York cases were cited to support that position. It is our view that there might be such a state of facts that both the general and the special employer would be

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liable. In view of the findings of the commission in this case and the terms of the compensation act, however, we find it unnecessary to decide this question in the present proceeding. We reserve our decision upon this point until it is necessarily presented.

The finding of the commission, approved by the trial court. as to the fact of disability and the amount of the award, is sustained by the evidence.

[2] The point was made that the finding of the commission that Cayll was liable instead of the gas company is conclusive. We deem it a sufficient answer that there was practically no conflict in the evidence, and that the relationship sustained by Massino to the other parties was a question of law on the undisputed evidence and the findings of the commission. Moreover, the comission made no direct finding that the workman was in the emplioy of Cayll, or of any fact inconsistent with this opinion.

Judgment affirmed.

Kerwin and Eschweiler, J. J., took no part.

FRANK MARTIN-LASKIN CO. et al. v. INDUSTRIAL COMMISSION OF WISCONSIN et al.

(Supreme Court of Wisconsin. November 16, 1920.)

179 Northwestern Reporter 740

1. MASTER AND SERVANT—COMPENSATION ACT LIBERALLY CONSTRUED.

Workmen's Compensation Act is to be liberally construed.

For other cases, see Master and Servant, Dec. Dig. § 348.)

2. MASTER AND SERVANT—NOTICE CONTEMPLATED BY COMPENSATION ACT.

Where the employer has notice within 30 days that an accident has happened, and that some injury has resulted to an employee by reason thereof, he has the knowledge that it was intended by St. 1919, § 2394—11, should be brought home to him by the service of written notice which should describe the nature of the injury as fairly as possible under the circumstances existing at the time the notice is given.

For other cases, see Master and Servant,, Dec. Dig. § 398.)

3. MASTER AND SERVANT—NOTICE TO FOREMAN NOT "NOTICE" TO EMPLOYER WITHIN COMPENSATION ACT.

A foreman's knowledge of an employee's injury is not notice to the employer within Sts. § 2394—11, requiring notice of injury to be served on the employer; and where the employer is a corporation, this requirement can be satisfied only by service on a managing officer.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

(For other definitions, see Words and Phrases, First and Second Series, Notice.)

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4. MASTER AND SERVANT—FINDING AS TO EFFECT OF DEFECTIVE NOTICE ESSENTIAL TO AWARD OF COMPENSATION.

Under Workmen's Compensation Act (St. 1919, § 2394—11) failure to give the employer personal notice of an injury, though known to a foreman, will bar recovery unless the commission finds as a fact that there was no intention to mislead employer, and he was not in fact misled by failure to give the notice.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Proceedings under Workmen's Compensation Act by Frank Goetsch for compensation for injuries, opposed by the Frank Martin-Laskin Company, employer, and the Hartford Accident & Indemnity Company, insurer who brought an action to review an award of Industrial Commission for claimant. From a judgment affirming the award, plaintiffs appeal. Reversed and remanded, with directions.

On June 16, 1917, Frank Goetsch was employed as a carpenter by the plaintiff Frank Martin-Laskin Company. While in removing shoring from the ceiling of a room a board fell and struck him on the head. There was a nail in the end of the board, which penetrated his scalp and caused blood to flow. He felt dizzy and sat down for ten minutes or so and the n went on with his work. The accident happened about 10:30 in the forenoon. The Foreman under whom Goetsch was working was present immediately after the accident and saw the wound inflicted on Goetsch's head. He worked until noon, lunched on the job, and worked a part of the afternoon. He returned to work Monday or Tuesday. He was laid off Tuesday night, rested at home for a week, and went to work at a railway roundhouse. He worked there a week, and was then laid off, because he could not move around, as he said. He had done no work since, and it is conceded that he is now incapacitated. During the time he rested before going to work at the roundhouse he consulted his family physician and has been under his treatment ever since.

Several doctors testified at the hearing before the Industrial Commission concerning the nature of his disease, respecting which there was considerable disagreement among them. Dr. Charles H. Lemon, who examined Goetsch on behalf of the insurance carrier, diagnosed his condition as resulting from a mild venous hemorrhage of the brain, a slow hemorrhage occurring on one hemisphere of the brain, and testified that the proper treatment thereof was a trephining operation, which, if performed in this case within six weeks of the injury, would unquestionably have proven sucessful. The Industrial Commission was of the opinion that Dr. Lemon's diagnosis was correct.

No notice of the accident of the injury, as required by section 2394—11, was served on the employer. The Industrial Commission held, however that the employer had actual notice of the accident and injury by reason of the presence of the foreman at the time of the accident, found all other facts necessary to entitle the claimant to compensation, and made an award in his favor.

Van Dyke, Shaw, Muskat & Van Dyke, of Milwaukee, for appellants.

J. J. Blaine, Atty. Gen., W. W. Gilman, Asst. Atty Gen., and Widule & Mensing, of Milwaukee, for respondents.

OWEN, J. (after stating the facts as above), Section 2394—11, Stats., provides:

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"No claim to recover compensation under sections 2394—3 to 2394—31, inclusive, shall be maintained unless within thirty days after the occurrence of the accident which is claimed to have caused the injury or death, notice in writing, stating the name and address of the person injured, the time and place where the accident occurrred, and the nature of the injury, and signed by the person injured or by some one on his behalf, or in case of his death, by a dependent or some one on his behalf, shall be served upon the employer, either by delivering to and leaving with him a copy of such notice, or by mailing to him by registered mail a copy thereof in a sealed and postpaid envelope addressed to him at last-known place of business or residence.. Such mailing shall constitute complete service: * * * And provided, further, that the failure to give any such notice, or any defect of inaccuracy therein, shall not be a bar to recovery * * * if it is found as a fact in the proceedings for collection of the claim that there was no intention to mislead the employer, and that he was not in fact mislead thereby."

The questions here presented arise from the fact that no written notice of the injury was served upon the employer as required by the provisions of the section of the statutes above set forth. The Industrial Commission found that the employer had actual notice by reason of the presence of the foreman at the time of the accident. The correctness of this conclusion is assailed by appellant on two grounds: First, that under section 2394—11 notice to the foreman was notice to the employer; and, second, that even though notice to the foreman be notice to the employer, yet under the circumstances of this case, the foreman did not have knowledge of the facts which the statute contemplates shall be brought home to the employer by service of the required written notice; the latter proposition being that, while the foreman knew of the happening of the accident, he had no knowledge concerning the nature of the injury resulting therefrom.

[1] The statute requires that the written notice shall state the nature of the injury. From what the foreman was able to observe the injury appeared to be nothing more than a slight wound of the scalp. The serious or compensable injury developed after the employee had been discharged from his employment, the result being that neither the employer nor the foreman had knowledge of the fact that compensable injury had resulted from the accident. By requiring the notice to state the nature of the injury the Legislature undoubtedly had some purpose in mind, and the contention that its purpose was to bring home to the employer the fact that compensable injury under the act had resulted from accident is by no means frivolous. The act deals with injuries resulting in loss to the employee. It is not concerned with injuries of a trifling nature resulting in no disability to the employee. There is much force to the contention that unless compensable injury resulted from the accident there is no point in giving the notice. However, the notice must be given within 30 days, and it may be given at any time within the 30 days. It may be given the day after the happening of the accident and meet the statutory requirements. It is matter of common knowledge that serious consequences develop from injuries which appear to be of a slight and trifling nature. To give the statute the construction contended for would mean that, where the serious consequences had not sufficiently developed to indicate a compensable injury within 30 days so that an injury entitled the employee to compensation could be stated in the notice, the employee would have no claim for compensation. We are reluctant to give the statute such a construction. There is no reason to believe that the Legislature intended to provide compensation only for those injuries which developed within a period of 30 days. The statute should be lib-

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erally construed to attain the accomplishment of its beneficent purposes. Sadowski v. Thomas Furnace Co., 157 Wis. 443, 449, 146 N. W. 770; Kiel v. Industrial Commission, 163 Wis. 441, 445, 158 N. W. 68.

[2] We are therefore of the opinion that, where the employer has notice that an accident has happened and that some injury, no matter how trifling, has resulted to an employee by reason thereof, he has the knowledge that it was intended should be brought home to him by the service of the written notice. Of course, it must be understood that the nature of the injury should be described as fairly as possible under the facts and circumstances existing at the time the notice is given.

[3, 4] We are of the opinion that under the provisions of our statute notice to the foreman does not constitute notice to the employer. The statute expressly requires the notice to be served on the employer. It "shall be served * * * either by delivering to and leaving with him a copy of such notice, or by mailing to him by registered mail a copy thereof in a sealed and postpaid envelope addressed to him at his last-known place of business or residence." Where the employer is a corporation, this requirement can be satisfied only by serving on a managing officer of the corporation. Under the provisions of this statute there is no room for saying that the knowledge of the foreman is imputed to the employer. The common-law principles of negligence which make the knowledge of the foreman the knowledge of the employer have no application here. The Legislature has seen fit to require notice of the accident and the injury to be given to the employer personally. A notice served on the foreman does not comply with the requirements of the statute. Apparently the object of the statue is to bring home to the employer personal knowledge of the accident and injury. Knowledge of a foreman is not knowledge of the employer within the contemplation of this statute, and does not ake the place of the notice unless it be shown that the knowledge of the foreman was communicated to the employer. This does not appear. Under the statute quoted this will bar a recovery unless the commission find as a fact that there was no intention to mislead the employer, and that he was not in fact mislead by failure to give the notice. This question was not passed upon by the commission, and it will be necessary to remand the case to the commission for the purpose of making a finding thereon.

Judgment reversed, and caused remanded to the court, with directions to set aside the award and to remand the record to the Industrial Commission with instructions to make a finding upon the question of whether there was any intention to mislead and if the employer was in fact misled by failure to give the notice. No costs to be taxed.

Kerwin and Eschweiler, J. J., took no part.

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MANTEUFEL v. INDUSTRIAL COMMISSION et al.

(Supreme Court of Wisconsin. November 16, 1920.)

179 Northwestern Reporter 761

MASTER AND SERVANT—EMPLOYER PAYING FUNERAL EXPENSES NOT ESTOPPED FROM ALLEGING WANT OF STATUTORY NOTICE; "COMPENSATION."

An employer by paying funeral expenses under St. 1915, § 2394—9, subd. 4, to an administrator on the supposition that deceased employee left no dependents, is not estopped from pleading want of notice required by section 2394—11, barring right to compensation if no notice is given and no "payment of compensation" made within two years from the date of the accident.

(For other cases. see Master and Servant, Dec. Dig. § 398)

(For other definitions, see Words and Phrases, First and Second Series, Compensation.)

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Proceedings under the Workmen's Compensation Act by Louise Manteufel for compensation for the death of William Mullner, opposed by W. T. Jenkins, employer, and the Ætna Life Insurance Company, insurer. Action by claimant to review order of Industrial Commission denying compensation, and from judgment vacating such order and remanding the record to the Industrial Commission for further proceedings, the Industrial Commission, the employer, and the insurer appeal. Reversed, with directions.

Workman's compensation. One William Mullner, brother-in-law of the plaintiff, while in the employ of the defendant W. T. Jenkins, on the 16th day of March, 1916, met with an accidental injury, resulting in his death the same day. He was engaged in performing service growing out of and incidental to his employment, and both his employer and the employee were subject to the Wisconsin Compensation Act. Acting upon the supposition that there were no surviving dependents, the employer, on the 5th day of April, 1916, issued a check for $100, payable to the estate of William Muellner, on account of funeral expenses. The check was cashed on the 25th day of September, 1916. On the 10th day of March, 1919, the plaintiff filed an application for compensation against the defendant W. T. Jenkins, setting forth the injuries sustained by William Muellner, the fact of his employment, and claiming the right to compensation. Upon the hearing it appeared that William Muellner was 72 years of age; that the applicant was his sister-in-law, being the sister of his deceased wife; that at the time of the injury the applicant was living in the same household with him and had been so living for many years, both before and subsequent to the death of his wife, which occurred several years prior to the death of William Muellner; that no compensation was paid to the deceased by the employer subsequent to his injury: that the applicant herein was paid nothing by the employer for death benefit; that no written notice, in accordance with the provisions of section 2394—11, Wis. Stats., was served on the employer, or on the insurance carrier, by William Muellner, or by any one on his behalf, or by his dependent, or by any one in behalf of the dependent, and the Industrial Commission held that the claim of the applicant was whol-

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ly barred by reason of such failure to give notice, and an order was entered accordingly. The applicant before the Industrial Commission, the plaintiff here, brought an action in the circuit court for Dane county to review the order of the commission. The circuit court of Dane county held that the payment of funeral expenses constituted a payment of compensation, and therefore a waiver of that provision of the statutes requiring notice, and entered judgment vacating the order of the commission and remanding the record to the Industrial Commission for further proceedings upon the merits. From such judgment the defendants appeal.

J. J. Blaine, Atty. Gen., W. W. Gilman, Asst. Atty. Gen., and Quarles, Spence & Quarles, of Milwaukee (Arthur B. Doe, of Milwaukee, of counsel), for appellants.

Fawcett & Dutcher, of Milwaukee (L. W. Slensby, of counsel), for respondent.

ROSENBERRY, J. (after stating the facts as above.) The question presented by this record is: Did the payment by the employer of funeral expenses of $100 within 30 days of the happening of the accident constitute payment of compensation under sections 2394—3 to 2394—31, inclusive, Wis. Stats. 1915 being the Workmens Compensation Act? Section 2394—9 subdivision 4. Stats. 1915, provides;

"If the deceased employee leaves no person dependent upon him for support, and the accident proximately causes death, the death benefit shall consist of the reasonable expense of his burial, not exceeding on hundred dollars."

By section 2394—11, Wis. Stats. 1915, it is provided:

"No claim to recover compensation * * * unless, within thirty days after the occurrence of the accident * * * notice in writing, * * * in case of his death, [signed] * * * by a dependent * * * shall be served," etc. If no such notice is given and no payment of compensation made, within two years from the date of the accident, the right to compensation therefor shall be wholly barred."

It is to be noted that under subdivision 4 of section 2394—9, the funeral expenses are to be paid by the employer if the deceased employee leaves no person dependent upon him for support. If the deceased employee leaves such a dependent, then the employer is not liable under this clause of the statute; in other words a payment of the funeral expenses is not a payment of any sum to which a dependent of a deceased employee is entitled. To hold that the payment of $100, under such circumstances, on account of funeral expenses, is a payment on account of compensation to which it could not, under any circumstances, be applied, seems to us to be inconsistent. No doubt the idea which the Legislature had in mind was that, where an employer, by payment of a part of his liability, had recognized the existence of such liability, he was thereafter to be estopped from pleading want of statutory notice. Here the payment was certainly not made in recognition of any liability existing to dependents, but only because it appeared that there were no dependents, and, while provision for the payment of funeral expenses is included within that section which provides for compensation, looking at the substance rather than the form of things we think it was the legislative intent that a payment which recognizes a liability, not a payment which is made to extinguish a liability, was the compensation referred to under fact that the deceased was an employee, that the employer and employee

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were subject to the act, and that accidental injuries were to be compensated in accordance with its terms, but it did not recognize liability for compensation to any dependent in any amount. The payment of funeral expenses, under this clause, to an administrator, is not the pay ment of compensation due to a dependent, and does not therefore estop the employer from claiming the benefit of the statute requiring a notice to be given by the dependent. The trial court was therefore in error in vacating the order of the commission.

The judgment appealed from is reversed, with costs, with directions to enter a judgment affirming the order of the commission holding that the claim of the plaintiff is barred.

Eshweiler, J., took no part.

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MILWAUKEE WESTERN FUEL CO. v. INDUSTRIAL COMMISSION et al.

(Supreme Court of Wisconsin. November 16, 1920.)

179 Northwestern Reporter 763

1. MASTER AND SERVANT—JURISDICTION TO REVIEW COMPENSATION AWARD DEPENDENT ON JOINDER OF ADVERSE PARTY.

The court obtain no jurisdiction to review an award of the Industrial Commission under the Workmen's Compensation Act, unless an action is commenced for that purpose within 20 days after the award in which the adverse party, namely, the person in whose favor an award is made, shall be made a defendant.

(For other cases, see Master and Servant, Dec. Dig. § 417[3½])

2. MASTER AND SERVANT—ALIEN ENEMY, BENEFICIARY OF COMPENSATION AWARD, NOT NECESSARY "ADVERSE PARTY" TO REVIEW.

Where an award under the Workmen's Compensation Act for the death of an alien enemy made payable to the Alien Property Custodian, under Federal Trading with the Enemy Act, § 7, subd. c. (U. S. Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d), a nonresident infant dependent of the deceased, though a proper party, was not the adverse party required to be made party to the employer's action to review the award in which the alien property custodian was made defendant.

(For other cases, see Master and Servant, Dec. Dig. § 417[3½])

(For other definitions, see Words and Phrases, First and Second Series, Adverse Party.)

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Action by the Milwaukee Western Fuel Company against the Industrial Commission of Wisconsin and others to set aside an award of the Industrial Commisson under. the Workmen's Compensaton Act (Laws 1911, c. 50) against plaintiff from a judgment dismissing the action and an order denying plaintiff's motion to bring in another party, it appeals. Reversed and remanded for further proceeding.

This action was brought to set aside an award of the Industrial Commission, wherein it was determined that on July 14, 1918 (while we were at war with Austro-Hungary), Stojan Ziroz suffered a fatal accident while in the employ of the plaintiff; that he left surviving him a minor son residing in Austria; that the minor son was living with deceased, and solely wholly dependent upon him for support; that the minor son was entitled to the sum $2,843.02; that this sum should be paid by plaintiff to the Alien Property Custodian, and be held by him and administered by him as provided by law.

The Industrial Commission, Francis P. Garvin, Custodian of Alien Property, and Lazo Ziroz (the minor son), were named parties to the action. A copy of the summons and complaint was served on Dr. Hershman, as representative of the royal consulate of Sweden and sole legal representative of Lazro Ziroz, but no personal service was made on Lazo Ziros, and no service was made on him by publication. The sheriff returned that Lazo Ziroz could not be found.

The case was heard before the court. The Industrial Commission and the Alien Property Custodian defended the action on the grounds

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that the court was without jurisdiction because Lazo Ziroz was not served with the summons and complaint nor by publication. The trial court held that Lazo Ziroz was an adverse party, and service must be made upon him, and that, there having been no such service, the court is without jurisdiction. Plaintiff then made motion for an order permitting an amendment of the summons and complaint by making Dr. Herschman, as represntative of the Royal Consulate of Sweeden and the sole legal representative of Lazo Ziroz, a party to the action. An affidavit was offered showing that Dr. Herschman had been served with the summons and complaint, was served with notice of trial, and signed a stipulation in the action continuing the case in circuit court, and that he thus appeared in the action. The plaintiffs motion was denied, on the ground that the court had no power to permit an amendment bringing in new parties more than 20 days after the order or award complained of.

Plaintiff appeals from the judgment of the court dismissing the action for want of jurisdiction, also from an order denying plaintiff's motion to make Dr. Herschman a party to the action.

Fawsett & Smart, of Milwaukee, for appellant.

J. J. Blaine, Atty. Gen. W. W. Gilman, Asst. Atty. Gen.. andd William H. Timlin, Jr., of Milwaukee (Timlin & Dean, of Milwaukee, of counsel), for respondents.

SIEBECKER, C. J. (after stating the facts above). [1] The trial court properly held that it is the settled law of this state that the court obtains no jurisdiction to review an award of the Industrial Commission unless an action is commenced for that purpose within 20 days after the date of the award "in which action the adverse party shall also be made defendant" (Gough v. Industrial Commission, 165 Wis. 632, 162 N. W. 434) and that the adverse party is "the one in whose favor the award is made" Hammond-Chandler Co. v. Industrial Commission, 163 Wis. 596, 159 N. W. 292.

[2] The question presented is: Did the court err in holding that Lazo Ziroz is a necessary adverse party, and that he must be served with the summons to obtain jurisdiction of the action? That Lazo Ziroz if served would be a proper party may be conceded. The inquiry remains: Is he an adverse party who must be served with process to acquire jurisdiction? As above stated the award is made payable to the Alien Property Custodian under the Federal Trading with the Enemy Act, and the executive orders made pursuant to the authority conferred by Congress. Chapter 106, 40 Statutes at Large, p. 411 (U. S. Comp. St. 1918, Comp. St. Ann, Supp. 1919, §§ 3115½a-3115½j). Section 7 (c) of this act (U. S. Comp. St. 1918, Comp. St. Ann, Supp. 1919, §§§ 3115½d) provides:

"If the President shall so require, any money or other property owing to or belonging to or held for, by, on account of, or on behalf of, or for the benefit of any enemy or ally of enemy, not holding a license granted by the President hereunder, which the President after investigation shall determine in so owing or so belongs to or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian."

The record discloses that the President through the Alien Property Custodian, has determined that the award in question be required to be paid to the Alien Property Custodian. There is no controversey respecting the propriety of this requirement upon the ground that Ziroz was an ally of an enemy, and that the demand was effectively made. It is provided by executive order of February 26, 1917, that such demand "shall forthwith vest in the Alien Property Custodian such right, title and interest

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and estate in and to and possession of the money or other property demanded and such power of authority thereover as may be included within the demand, and the Alien Property Custodian may thereupon proceed to administer such money and other property in accordance with the provision of the 'Trading with the Enemy Act," under the orders, rules, and regulations authorized to be made. The effect of the act and executive orders is to vest title in the Custodian. Youghiogheny & Ohio Coal Co. v. Lasevich, 176 N. W. 855. The necessary consequence is that Lazo Ziroz retains no right or power over the award, and the Alien Property Custodian has title thereto to the exclusion of Ziroz. Under these conditions he cannot be considered the adverse party within the contemplation of the statutes, and hence he is not a necessary party to the action to test the legality of the award in court. The Alien Property Custodian is in law the adverse party for the purposes of this action, as the person in whose favor the award is made. Service and appearance of the Alien Property Custodian gave the court jurisdiction of the parties and the subject of the action. The court having acquired jurisdiction, and the necessary parties appearing in the action, plaintiff is entitled to proceed to litigate the issues that may be presented. This makes it unnecessary to discuss other questions in the case. The application to amend the summons and complaint to make Dr. Herschman a defendant in his capacity of representative of the Royal Consulate of Sweden becomes immaterial.

The judgment appealed from is reversed, and the cause remanded for further proceeding.

Kerwin and Eschweiler, J. J., took no part.

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THORNTON et al. v. DUFFY et al., INDUSTRIAL COMMISSION OF OHIO. (No. 76)

(United States Supreme Court. Argued November 8, 1920. Decided December 20, 1920.)

41 Supreme Court Reporter 137

2. MASTER AND SERVANT—STATUTE WITHDRAWING EMPLOYER'S PRIVILEGE OF INSURING IN PRIVATE COMPANY HELD VALID.

Under the Workmen's Compensation Law of Ohio (Page & A. Gen. Code Supp. §§ 1465— 41a to 1465—106), which originally permitted employers to pay compensation to their employees themselves, instead of contributing to the state insurance fund, but section 22 (section 1465—69) of which, as construed by the state Supreme Court, permitted the commission to withdraw that privilege, the amendment (Page & A. Gen. Code Supp. § 1465—69) by Act March 20, 1917 (107 Ohio Laws, p 159) § 1, so as to require the commission to withdraw that privilege from an employer who insured himself against liability for compensation to his employees, did not deprive an employer who had already made a contract for such insurance of his property, contrary to Const. U. S. Amend. 14, or impair his contract, contrary to Const. U. S. art 1, §10.

(For other cases, Master and Servant Dec. Dig. § 347.)

Justice McReynolds dissenting

In Error to the Supreme Court of the State of Ohio.

Suit by Frank C. Thornton against Thomas J. Duffy and another, composing the Industrial Commission of Ohio, in which the Cleveland Stamping & Tool Company filed an answer and cross-petition. A judgment sustaining demurrers to the petition and to the answer and cross-petition was affirmed by the Supreme Court of Ohio (99 Ohio St. 120, 124 N. E. 54), and the plaintiff and cross-petitioner bring error. Affirmed.

Messrs. Judson Harmon, of Cincinnati, Ohio, and Arthur I. Vorys, of Columbus, Ohio, for plaintiffs in error.

Messrs. Timothy S. Hogan and B. W. Gearhart, both of Columbus, Ohio, for defendants in error.

McKenna, J. delivered the opinion of the Court.

This suit was brought by the plaintiff in error, Thornton, against defendants in error, hereinafter called defendants, composing the Industrial Commission of Ohio. The Cleveland Stamping & Tool Company filed an answer and cross-petition. From a judgment sustaining demurrers to the petition of Thorton, and to the answer and cross-petition of the Cleveland Stamping & Tool Company, there was an appeal to the Court of appeals, and thence by proceeding in error to the Supreme Court of the state, by which court the judgment was affirmed. These writs of error are prosecuted by Thornton and the Cleveland Company.

Thornton's petition and the pleadings of the Cleveland Company are substantially the same. We used, for convenience, Thornton's petition, and state its allegations narratively as follows: He is a manufacturer at Cleveland, Ohio, employing more than 40 men. The Industrial Commission determined, as required by the act of the General Assembly of the state, passed February 26, 1913, and comprised in sections 1465—

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41a to 1465—106, General Code of Ohio, that he was of sufficient financial ability to render certain the payment of compensation to injured employers, the benefits provided by that act. He, on the——— day of January, 1914, elected to accept the act and proceed under it, has since complied with its provisions, has abided by the rules of the commission and all that is required of him by the act.

January, 1914, he made a written contract with the Ætna Insurance Company of Hartford Conn., a duly licensed company, wherein that company agreed to pay to his injured employees the compensations required by the act of the assembly for injuries or upon death, and agreed to indemnify him against the liabilities and requirements of the act.

December 1, 1917, the commission adopted a resolution which recited the act of the Assembly of the state of February 16, 1917, amending section 1465—101, General Code of Ohio, and an act of the General Assembly passed March 20, 1917, amending section 1465—69, General Code of the State, and an act passed March 21, 1917, and resolved and declared that no employers should be permitted to pay or furnish directly to injured employes, or the dependents of killed employees, the compensation and benefits provided for in sections 1465—41a to 1465—106, General Code of Ohio, if such employers by contract or otherwise, shall provide for the insurance of the payment by them of such compensation and benefits, or shall indemnify themselves against loss sustained by the direct payment thereof. The commission revoked its previous findings and authorizations, the revocation to stand as of January 10, 1918, and directed notices of the revocation and the resolution of the commission to be given to all employers, including Thornton, and these notices will be sent unless restained.

The resolution of the commission, the revocation of its previous action, and the notices which it threatens to send, are based upon the sole ground that it is its duty so to do under the laws of the state indicated above.

The contract of Thornton with the Ætna Company is a valid, subsisting contract, and he has a right to continue it until it be canceled, and that the sending of the notices as above stated, and the revocation of the findings of fact that the commission had made and its refusal to certify to Thornton its findings of fact, as provided for in section 1465— 69, will cause him irreparable injury and damage, for which he has no adequate remedy at law. Further, that there are more than 675 employers situated as Thornton is, and that, therefore, the questions involved are of common and general interest, and as it is impractical to bring them all into court, he sues for the benefit of all.

The laws invoked by the commission do not justify its action, and if it be determined that they do, then they, and the acts of the commission under them, are in contravention of the Fourteenth Amendment of the Constitution, of the United States, and of article 1, § 10 of that Constitution, and also of the Constitution of the state of Ohio.

An injunction, temporary and permanent, against the action of the commission, was prayed, and a temporary restraining order granted, but it was subsequently dissolved, and, as we have said, a demurrer was sustained to the petition and judgment entered dismissing the suit. It, as we have also said, was affirmed by the Supreme Court of the state.

The various acts of legislation of the state were sustained by the courts of the state and hence their validity under the constitution of the state is removed from the controversy, and our inquiry is confined to the effect upon them of the Constitution of the United States.

In support of the contention that the Constitution of the United States makes the legislation and the action under it illegal, it is said that insurance against loss is the right of everybody, and specifically it is the right of employers to indemnify themselves against their liability to

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employees, and that the right is so fixed and inherent as to be an attribute of liberty removed from the interference of the state.

The provisions of the legislation are necessary elements in the consideration of the contention: (1) The Constitution of Ohio authorizes Workmen's Compensation Laws. Explicity it provides for the passage of laws establishing a state fund to be created by compulsory contributions thereto by employers, the fund to be administered by the state. The constitutionality of a law passed under that authorization was sustained by this court in Jeffery Manufacturing Co. v. Blagg, 235 U. S. 571, 35 Sup. Ct. 167, 59 L. Ed. 364, against the charge that its classifications were arbitrary and unreasonable. And Workmen's Compensation Laws of other states have been declared inoffensive to the Fourteenth Amendment of the Constitution of the United States. New York Central Railroad Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642. (2) The law that was passed provided that every employer (there were exceptions not necessary to mention) in the month of January, 1914, and semiannually thereafter, should pay into the state insurance fund the amount of premium determined and fixed by the state liability board of awards for the particular employment or occupation of the employer. It was however, also provided (we quote from the opinion of the Supreme Court):

"That certain employers under certain conditions might elect to pay individually, or from a benefit fund, department or association, compensation to workmen and their dependents for death, or injury received in the course of their employment."

This was an alternative granted, and its conditions were fulfilled, it was contended, and that upon the faith of the fulfillment of it and in indemnity against contingencies, plaintiff entered into a contract of insurance wth the Ætna Company. It was further contended that the alternative and the insurance against its requirements became property, and inviolable; became contracts with immunity from impairment. To the contention the Supreme Court replied that the alternative of contribution to the state fund of dealing with the employees directly was a privilege that need not have been granted and that, therefore, to effect the purpose of the Constitution and law, could be withdrawn, that the right to withdraw the privilege depended not merely upon the police power of the state, "but rather directly upon the constitutional grant of power," and that, besides, the right was reserved in that provision of section 22 of the original act which gave to the commission power to " 'at any time change or modify its findings of fact * * * if in its judgment such action is necessary or desirable to secure or assure a strict compliance with all of the provisions of this act. * * * " And it was said that the experience of four years demonstrated the necessity or desirability of a change and that, therefore, it was made.

The meaning thus ascribed to section 22 we must accept. It expressed a continuing condition upon the concession to employers to deal directly with their employers and the Industrial Commission by the power reserved could terminate the concession at any time.

There was besides, subsequent and empowering legislation in the amendment of March 20, 1917, as the Supreme Court pointed out. That act specifically limits the privilege of electing between directly dealing with empoyees and contribution to the state fund to those employers "who do not desire to insure the payment thereof or indemnify themselves against loss sustained by direct payment thereof." The court hence decided that it became the duty of the commission to change or modify its findings. And it was also decided that the act was not

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only clearly within the power of the state, but was "in furtherance of the purpose and intention of the Constitution and the law, to create and maintain one insurance fund, to be administered by the state."

[1-3] We repeat, we must accept the decision of the court as the declaration of the legislation and the requirement of the Constitution of the state, as much a part of both as if expressed in them (Douglass v. County of Pike, 101 U. S. 677, 25 L. Ed. 968), and we are unable to yield to the contention that the legislation or the requirement transcends the power of the state, or in any way violates the constitution of the United States. The law expressed the constitutional and legislative policy of the state to be that the compensation to workmen for injuries received in their employment was a matter of public concern, and should not be left to the individual employer or employee, or be dependent upon or influenced by the hazards of controversy of litigation, or inequality of conditions. There was an attempt at the accommodation of the new policy to old conditions in the concession to employers to deal directly with their employers, but there was precaution against failure in the provision of section 22 giving discretion to the commission to withdraw the concession. After a few years' experience, that discretion was turned into a duty, and by the amendment of March 20, 1917, the concession was taken away from those employers who indemnified themselves by insurance. This was considered necessary to execute the policy of the state, and we are unable to yield to the contention that property rights or contract rights had accrued against it. To assert that the first steps of a policy make it immutable, is to assert that imperfections and errors in legislation become constitutional rights. This is a narrow conception of sovereignty. It is, however, not new and we have heretofore been invoked to pronounce judgment upon it Complying, we said that an exercise of public policy cannot be resisted because of conduct or contracts done or made upon the faith of former exercises of it upon the ground that its later exercises deprive of property or invalidate those contracts. Louisville & Nashville Railroad Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R.A. (N. S.) 671.

We are not disposed to extend the discussion. Indeed, we think the case is in narrow compass. We are not called upon to controvert the right to insure against contingent losses of liabilities, or to minimize the value of insurance to business activities and enterprises, or discuss the general power or want of power of the state over it. We are only called upon to consider its relation to and possible effect upon the policy of a workmen's compensation law and we can readily see that it may be as it is said the experience of Ohio demonstrated, inimical to that policy to permit the erection of an interest or a power that may be exerted against it or its subsidiary provisions. This was the view of the Supreme Court of the state and by it the court justifies the power conferred upon and exercised by the commission. See Mountain Timber Co. v. Washington, supra.

Judgment affirmed.

The CHIEF JUSTICE, concurring.

To compel an employer to insure his employee against loss from injury sustained in the course of the employment without reference to the negligence of the employee and at the same time to prohibit the employer from insuring himself against the burden thus imposed, it seems to me, if originally considered, would be a typical illustration of the taking of property without due process and a violation of the equal protection of the law.

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But in view of the decision in Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642, sustaining the constitutionality of a law of the state of Washington which necessarily excluded the possibility of the insurance by the employer of the burden in favor of his employees, which the statute in that case imposed, I do not think I am at liberty to consider the subject as an original question, but, am constrained to accept and apply the ruling in that case made, and for that reason I concur in the judgment now announced.

Mr. Justice McReynolds dissents.

EMPLOYER'S MUT. INS. CO. et al. v. MORGULSKI et al. (No. 9872.)

(Supreme Court of Colorado. November 8, 1920.)

193 Pacific Reporter 725

1. MASTER AND SERVANT—SUPREME COURT CANNOT REVERSE COMMISSION'S FINDINGS ON WEIGHT OF EVIDENCE IN COMPENSATION CASE.

The Supreme Court, on appeal from the district court's judgment, cannot reverse the finding of the State Industrial Commission on the weight of evidence.

(For other cases see Master and Servant, Dec. Dig. § 418[6].)

Department 2.

Error to District Court, City and County of Denver; Julian H. Moore, Judge.

Proceedings under the Workmen's Compensation Act by Lillian A. Morgulski, as widow of Joe Morgulski, employee, opposed by the Oakdale Coal Company, employer, and the Employer's Mutual Insurance Company and Lloyd's of London, insurance carriers. An award by the industrial Commission was affirmed by the district court of the city and county of Denver, and the employer and insurance carriers bring error. Affirmed.

Frank C. West, of Denver, for plaintiff in error Employer's Mut. Ins. Co.

H. A. Hicks, of Denver, for plaintiff in error Lloyd's of London.

C. M. McCutchen, of Denver, for defendant in error Morgulski.

Victor E. Keyes, Atty. Gen., and John S. Fine, Asst. Atty. Gen., for defendant in error Industrial Commission.

DENISON, J. There seem to be two questions which arise upon this record:

(1) Was Lillian A. Morgulski the wife of Joe Morgulski whose death benefits she claims?

(2) If she was, was she dependent on him for support?

She testifies and its is undisputed that he desired to marry her and she him. She further testifies that her father objected while her mother approved. They became engaged, and on July 4, 1918, they agreed that they would live together as man and wife and would marry by ceremony as soon as they could get the father's consent. whch they hoped to obtain, since his only objection was her youth. Pursuant to this

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agreement they told her mother that they were married, and proceeded to have intercourse, occupying at various times, the same room in the house of her father and mother, without the knowledge of the father, but with the knowledge of the mother, keeping their so-called marriage secret because of the father's objections.

It is impossible to determine from the testimony whether the deceased lived at the father's house or merely visited the claimant there at night. Her testimony and that of her mother is consistent with the claim that he merely visited her there, occupying the same room with her, but not taking his meals there, and not contributing to the support of the family, except a few dollars, which were by her given to her mother. It is also consistent (except, perhaps, for the alleged fact that their relations were secret from the father) with the theory that he remained there weeks and perhaps months at a time, practically as a member of the family.

Morgulski told one of his employers that he was married to the claimant. He also, when entering the employment of the Oakdale Company, August 12, 1918, signed an application which stated that he was married, and that his wife's name was Lillian Morgulski, and gave her name at the address of her mother as the person to whom information should be given in case of accident to him. The mother testified that her daughter and Morgulski told her that they were married, but wished to keep it secret from the father.

[1] We cannot reverse the findng of the commission on the weight of evidence, and therefore do not review it further.

The plaintiffs in error, however, insist that a mere contract of marriage, that is, an agreement to be then, there and thenceforth man and wife, does not constitute marriage without cohabitation, and that such cohabitation must be, not merely sexual intercourse on visits or more or less length, yet temporary, but actual dwelling together in the usual manner of married people, dwelling as one court has expressed it, "with the habit and repute of marriage"; that in the present case there was no such cohabitation, and therefore the claimant was not the wife of the deceased.

[2] The flaw in this reasoning is in the minor premise. The evidence does not wholly fail to show a cohabitation as to marriage, though it is most unsatisfactory so far as the testimony and conduct of the claimant and her mother are concerned, but the added documentary evidence that deceased regarded claimant as wife and direct information to her in case of accident to him must be regarded as giving character to such cohabitation as they had; and therefore, though the company's claim as to the kind of cohabitation, requisite in such a case to constitute marriage, be correct, we cannot say that the finding of the commission was unjustified.

This case must be distinguiushed from those where the sole or principal evidence of the contract of marriage is cohabitation, and from those where such contract is denied by one of the parties thereto, as in Peery v. Peery, 27 Colo. App. 533, 150 Pac. 329, and from those in which the testimony of one of the parties to the contract is the only direct evidence therof.

As to the support, there is, we think, sufficient evidence that she was dependent on him, so that the finding must stand.

Judgment should be affirmed.

Teller and Bailey, JJ. (sitting for Garrigues, C. J., and Scott, J.), concur.

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MILLER v. DIAMOND ICE & COAL CO.

(Superior Court of Delaware. New Castle. Dec. 17, 1920.)

111 Atlantic Reporter, 745.

1. MASTER AND SERVANT — BOARD REHEARING COMPENSATION CASE MAY CONSIDER EVIDENCE TAKEN BOTH BEFORE AND AFTER REMAND.

In proceedings under Workmen's Compensation Law of 1917, before the Industrial Accident Board for review of a compensation agreement, the board on rehearing following the appellate court's remand for irregularities in the proceedings may consider the evidence adduced after the remanding order in connection with the evidence previously taken and the compensation agreement.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

2. MASTER AND SERVANT—EVIDENCE HELD TO SHOW COMPENSATION CLAIMANT'S FAILURE TO REASONABLY FOLLOW PHYSICIAN'S DIRECTIONS.

In proceedings under Workmen's Compensation Law of 1917 for review of a compensation agreement, evidence *held* to prove that employee either willfully, or because of pain, neglected and refused to reasonably follow instructions of physicians, and that if he had followed instructions the impairment of his arm would not have existed.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

3. MASTER AND SERVANT — COMPENSATION AWARD REASONABLY WARRANTED BY EVIDENCE FINAL.

Award of Industrial Accident Board will be neither reversed nor increased on appeal, where there is evidence to reasonably warrant it.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Industrial Accident Board.

Proceedings under the Delaware Workmen's Compensation Law of 1917 (29 Delaware Laws, 763, c. 233) before the Industrial Accident Board by John Miller, claimant, for review of compensation agreement, No. 7902, on the ground of subsequent increased incapacities for work, against the Diamond Ice & Coal Company, the employer. The Industrail Accident Board found that the disability of the claimant had terminated on a date mentioned in the award and that thereafter he was not entitled to compensation. Claimant appealed. The appeal coming on to be heard, the Court remanded the record to the Board for a rehearing. On rehearing the Board made an award in favor of the claimant. Claimant appeals. Award affirmed.

Boyce and Rice, JJ., sitting.

Robert Adair, of Wilmington, for appellant.
Aaron Finger, of Wilmington, for appellee.

On May 29, 1919, the claimant sustained an accident in the course of his employment with the employer. On June 14, 1919, the parties entered into an agreement to the effect that the injured employee should receive compensation at the rate of $12.00 per week, based on an average weekly wage of $24.00, at the time of his injury, payable from and including May 30, 1919, until terminated in accordance with the act. On December 3, 1919, the injured employee filed a petition with the Board

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for review of the compensation agreement on the ground that his incapacity for work had subsequently increased, and prayed for a hearing to determine the matter in accordance with the facts and the law. After the hearing on the petition for review of the compensation agreement, the Board, on January 16, 1920, determined that the disability had terminated on December 18, 1919, but awarded compensation to the claimant from and including November 28, 1919, to and including December 18, 1919, at the rate of $12.00 per week, being for a total sum of $36.00. The claimant appealed but because of irregularities in the proceedings, the record was remanded for a rehearing. After the rehearing, the Board on May 11, 1920, found, in substance, that the injury of the claimant had not been reasonably treated, and that if the injury had been reasonably treated (29 Del. Laws, 789c, § 3193ss) the earning power of the claimant on and after November 28, 1919, would have been impaired ten per cent., thus reducing his earning power from $24.00 per week to $21.60 per week, and made an order that the employer pay compensation to the claimant under the provisions of subsection (b) of section 103 of the Act at the rate of one dollar and twenty cents per week, said amount being fifty per centum of the difference between the wages received by the claimant before the injury and his earning power thereafter, had the injury been reasonably treated, and that the compensation so awarded should be payable from and including May 11, 1920, until the termination of claimant's partial disability for work, not, however, beyond two hundred and eighty-five weeks subsequent to May 29, 1919.

The injury to the claimant was caused by his being struck on the left arm by a bucket used in unloading coal, and the arm was broken at the elbow. Subsequently, the head of the radius was amputated, impairing to some extent the motion of extension and flexion of the arm. The claimant was thereafter directed by the attending physician and surgeon to exercise the arm and do light labor which the employer had offered to him to prevent contraction of the muscles and stiffening of the arm from lack of use. The claimant did both for a while, but because of pain neglected to follow the instructions given to him and discontinued doing the light work assigned to him by his employer. The testimony of several physicians is in agreement that the exercise and light work recommended would have been beneficial to the arm. The case is before the Court on appeal from the award made after the rehearing ordered by the Court.

The grounds of the appeal are, in substance: (1) Because the board based its conclusions and findings not upon the evidence taken subsequently to the remanding order, but in conjunction therewith and considered all the evidence previously taken together with the compensation agreement, and all records of the Board relating to the matter in issue. (2) Because the evidence did not warrant the finding that the claimant was directed by his attending physician and surgeon to take certain exercises and treatments for improving the impaired condition of his arm, and he did not follow those directions; also because the Board found that the claimant refused to do light work suitable to his capacity, and because the Board found that the claimant was not reasonably treated, and allowed him compensation only for such loss of earning power as would have been sustained by the claimant had the injured arm been reasonably treated. (3) Because the Board found from their observations of the claimant, and their knowledge acquired of the work he had been doing since the accident that his earning power, even considering his present condition, is not impaired beyond thirty- three and one-third per cent., and if the injury had been reasonably treated, his earning power would not have been impaired beyond ten per cent.; and because the Board also found that the injury was not reasonably treated and that had it been reasonably treated the earning power of the claimant would have been impaired ten per cent., thereby reducing his earning

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power from twenty-four dollars per week to twenty-one dollars and sixty cents per week. It was alleged that such findings by the Board are against the law and also the evidence, and that the impairment as shown by the evidence is permanent and disabling to the extent of not less than thirty-three and one-third per cent.; that his earning capacity since the accident has not been in excess of twelve dollars per week and that his employment has been uncertain and irregular, thereby reducing his earning capacity to a sum much less than twelve dollars per week on an average. It was also alleged that the claimant was treated for his injury by the physician at the hospital and by those designated by the appellee's insurance company; and that the complainant did nothing whatever to hinder or prevent proper treatment of his injury by said physician.

PER CURIAM. [1, 2] The Industrial Accident Board very properly considered the evidence adduced before them after the remanding order by the Court in connection with the evidence previously taken and the compensation agreement between the parties. The claimant's injury to his left arm at the elbow and the general character thereof are well shown by the claimant and the several physicians who testified before the Board. There doubtless exists an impairment in the rotary motion of claimant's arm but to what degree it is difficult to determine from the evidence. The claimant was advised by his physician to exercise his arm and to do light work such as his employer had for him at a weekly wage of twelve dollars. The physicians agreed that the exercise and labor recommended when done and performed caused the claimant pain as testified to by him, but that such exercise and work were necessary not only to prevent further impairment of the arm, but to aid in recovery from the effects of the injury, and the physicians practically agreed that if the claimant had followed the directions given to him, his arm would not be in its present stiffened condition, but he would have acquired almost the natural use of his arm. It is manifest from the evidence that the claimant either wilfully or because of pain neglected and refused to reasonably follow the instructions given to him. It is difficult to determine with accuracy just what degree of impairment there would now exist in claimant's arm as the result of his injury, if he had had the arm seasonably and reasonably treated, and if he had not neglected or refused to reasonably follow the instructions given to him in aid of recovery in the use of his arm.

[3] The Court after careful examination and consideration of the record cannot say that the evidence and all surrounding circumstances do not reasonably warrant the award made by the Industrial Accident Board, and this being so, the award should neither be reversed nor increased. The award of the Board is therefore, affirmed, but the costs of the appeal are awarded and taxed against the appellees.

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JACKSON COAL CO. v. INDUSTRIAL COMMISSION ET AL. (13380.)

(Supreme Court of Illinois. Oct. 23, 1920. Rehearing Denied Dec. 10, 1920.)

128 Northeastern Reporter. 813.

1. MASTER AND SERVANT — COMPENSATION CLAIMANT'S EXAMINATION AT HEARING PERMISSIBLE.

If making examination of the injured employee, pursuant to Workmen's Compensation Act, § 12, at the time of hearing before the Industrial Commission, in any manner places the employee at a disadvantage, on showing of such fact to the commission, it would be proper and its duty to continue the hearing to a reasonable time, to allow the employee properly to present his case.

(For other cases, see Master and Servant, Dec. Dig. § 399.)

2. MASTER AND SERVANT — COMPENSATION CLAIMANT SUBJECT TO EXAMINATION, THOUGH EMPLOYER DENIES LIABILITY.

Workmen's Compensation Act, § 12, providing for physical examination of the injured employee on request of the employer, requires the employee to submit to examination, where the employer is denying right to compensation, as well as where he acknowledges liability and makes payments, applying in fact to all cases where the employee is entitled to receive disability payments.

(For other cases, see Master and Servant, Dec. Dig. § 399.)

3. MASTER AND SERVANT—COMPENSATION AWARD, WITHOUT FINDINGS, IMPROPER PRACTICE.

As a matter of good practice, it would be better if the Industrial Commission would find specifically the nature and effect of the injury for which its award of compensation to the injured employee is made, rather than find simply that an award is made of a certain amount for a certain period under a certain provision of the statute.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

4. MASTER AND SERVANT — COMPENSATION AWARD SUPPORTED BY SUFFICIENT FINDINGS.

Award of compensation by the Industrial Commission, consisting of $10.67 a week for 35 weeks, for the period of temporary total incapacity and the further sum of $10.67 per week for 270 weeks, as provided in Compensation Act, § 8, par. (e), as amended, etc., *held* supported by sufficient findings in the award, referring to the paragraphs of the section under which it was made.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Error to Circuit Court, Jackson County; W. N. Butler, Judge.

Proceeding for compensation under the Workmen's Compensation Act by W. B. Graham, employee, opposed by the Jackson Coal Company, employer, wherein compensation was awarded by the Industrial Commission, the award confirmed by the circuit court, and the employer brings error. Reversed and remanded, with directions.

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Martin & Glenn, of Murphysboro (Lawrence A. Glenn, of Murphysboro, of counsel), for plaintiff in error.

A. W. Kerr, of Springfield, and Fred H. Kruger, of Belleville, for defendant in error.

FARMER, J. W. B. Graham, an employee of plaintiff in error, the Jackson Coal Company, was injured in its mine on July 7, 1917, by the accidental explosion of powder in a keg. He filed a claim for compensation, and on a hearing before an arbitrator an award was made him, which on review by the Industrial Commission was approved and confirmed. The award was for $10.67 per week for 35 weeks, for the period of temporary total incapacity, the further sum of $10.67 per week—"for a period of 270 weeks, as provided in paragraph (e) of section 8 of said act as amended, for the reason that the injuries sustained caused 90 per cent. of the loss of the use of both hands, and the further sum of $10.67 per week for a period of 45 weeks, as provided in paragraph (c) of section 8, for the reason that the injury sustained caused disfigurement to head and face."

The circuit court confirmed the award, and this court granted the petition of plaintiff in error for a writ of error to review the award and the judgment of the circuit court.

At the hearing before the Industrial Commission plaintiff in error requested that Graham, the employee, submit to a physical examination by a physician, who was present for that purpose at the instance of plaintiff in error. The examination was objected to by counsel for the claimant, the objection was sustained by the industrial Commission, and the examination was not permitted to be made. Plaintiff in error contends that by reason of Graham's refusal to submit to an examination, as requested by plaintiff in error, his right to compensation was suspended until he consented to such examination, and that the findings of the arbitrator and Industrial Commission are insufficient to support the award.

Section 12 of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, § 137) provides that an employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself for examination to a duly qualified medical practitioner or surgeon selected and paid by the employer, at a time and place reasonably convenient for the employee, as soon as practicable after the injury, also one weak after the first examination, and thereafter at intervals not oftener than once every four weeks, for the purpose of determining the nature, extent, and probable duration of the injury, and ascertaining the amount of compensation due the employee from time to time according to the provisions of the act. If the employee refuses to submit to such examination, his right to compensation payments shall be suspended until such examination shall have been made.

[1] Defendant in error contends the request of plaintiff in error that the employee submit to an examination was not made in good faith, because not made until the case was called for hearing before the Industrial Commission. The only limitation placed on the time for the request for the examination is that it must be a time reasonably convenient for the employee. It is not contended the time requested was not reasonably convenient for the employee, nor does it appear that the request was made for any other purpose than to ascertain the nature, extent, and probable duration of the injury. If making the examination at the time of the hearing before the Industrial Commission in any manner placed the employee at a disadvantage, on making that appear to the commission, it would be proper and its duty to continue the hearing to a reasonable time, to allow the employee to properly present his case. That section of the statute was not intended to af-

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ford the employer opportunity to harass or oppress the employee by unnecessary examinations, and reasonable safeguards are provided, so that we think the apprehension of counsel as to what might occur is not well founded.

[2] It is also contended the statute does not require the employee to submit to a physical examination where the employer is denying that the employe is entitled to receive compensation. This construction, we think, is not warranted. The statute requires an employee "entitled to receivership disability payments" to submit, at the request of the employer, to a physical examination. It is not restricted to cases where the employer acknowledges his liability and makes compensation payments. It applies to all cases where the employee is entitled to receive disability payments, and whether he is entitled to them is not dependent on whether the employer acknowledges liability by making the payments. That the provisions of section 12 must be complied with by the employee to entitle him to the benefits of the act was decided in Hafer Washed Coal Co. v. Industrial Com. 293 Ill. 245, 127 N. E.. 752.

The Industrial Commission erred in denying the request of plaintiff in error that Graham, the employee, submit to a physical examination.

[3, 4] As a matter of good practice, we think it would be better if the Industrial Commission would find specifically the nature and effect of the injury for which an award is made, rather than a finding simply that an award is made of a certain amount for a certain period under a certain provision of the statute. While we are of opinion the objection that the findings in the award are insufficient to support it would not require a reversal of the judgment, the particular paragraphs of the section under which the award was made being referred to in the finding, we would be better satisfied if the findings stated in express terms whether the injury produced partial or total, permanent or temporary, disability or disfigurement. The finding held insufficient to support the award in Illinois Midland Coal Co. v. Industrial Board, 277 Ill. 333, 115 N. E. 527, was entirely different from the finding of the commission in this case.

For the error in not requiring the employee to submit to a physical examination the judgment of the circuit court is reversed, the award set aside, and the cause remanded to the circuit court, with directions to remand it to the Industrial Commission for further proceedings in harmony with this opinion.

Reversed and remanded, with directions.

JACKSON COAL CO. v. INDUSTRIAL COMMISSION et al. (No. 13381.).

(Supreme Court of Illinois. October 23, 1920. Rehearing Denied December 10, 1920.)

128 Northeastern Reporter 815

Error of Circuit Court, Jackson County; W. N. Butler, Judge.

Proceeding under the Workmen's Compensation Act by Cornelius Hurst, employee, opposed by the Jackson Coal Company, employer, wherein compensation was awarded by the Industrial Commission, the award affirmed by the circuit court, and the employer brings error.

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Martin & Glenn, of Murphysboro (Lawrence A. Glenn, of Murphysboro, of counsel), for plaintiff in error.

A. W. Kerr, of Springfield, and Fred H. Kruger, of Belleville, for defendant in error.

CARTER, J. Cornelius Hurst, a coal digger, on July 17, 1917, was injured by the same powder explosion in plaintiff in error's mine as was W. B. Graham. The opinion in Jackson Coal Co. v. Industrial Com., 128 N. E. 813 (No. 13380), covers the identical questions raised in this case. The two cases were brought here in the same manner, and the same briefs have been filed in both cases; therefore the conclusions reached in the opinion in that case must control here.

For the reasons stated in that opinion, the Judgment of the circuit court is reversed, the award set aside, and the cause remanded to the circuit court, with directions to remand it to the Industrial Commission for further proceedings in harmony with the views set forth in that opinion.

Reversed and remanded, with directions.

VULCAN DETINNING CO. v. INDUSTRIAL COMMISSION et al. (No. 13460.).

(Supreme Court of Illinois. October 23, 1920. Rehearing Denied December 14, 1920.)

128 Northeastern Reporter 917

1. MASTER AND SERVANT—AMENDED COMPENSATION ACT AS TO REVIEW ON WRIT OF ERROR INAPPLICABLE TO PENDING PROCEEDINGS.

Under the general rule that a retrospective effect will not be given a statute unless such intention clearly appears, and Hurd's Rev. St. 1917, c. 131, § 4, providing that repeals shall not affect rights accrued before the new law takes effect, the amendment of the Workmen's Compensation Act in 1919(Laws 1919 p. 548), so as to authorize review of the record of the circuit court only by petition to the Supreme Court for permission to sue out a writ of error, does not deprive the Supreme Court of jurisdiction to review a record of an order of the circuit court certifying the cause as one proper to be so reviewed, which was entered before the amendment took effect.

(For other cases, see Master and Servant, Dec. Dig. § 418[3½].)

2. MASTER AND SERVANT—COMPENSATION AWARD MUST BE BASED ON EVIDENCE.

A claimant under the Workmen's Compensation Act must show, by competent testimony, that the injury occurred in connection with the employment, and must furnish evidence from which such inference can be logically drawn.

(For other cases, see Master and Servant, Dec. Dig. 405[4].)

3. MASTER AND SERVANT—EVIDENCE HELD TO WARRANT FINDING OF INJURY AUTHORIZING COMPENSATION.

Evidence that a servant went to a toilet where he had a right to go during working hours, and was later found dead in the vault, under circumstances affording an inference that he was killed by falling into the

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vault, without evidence that he was suffering from disease which might have caused the sudden death, *held* to sustain a finding that his death was caused in connection with his employment, so as to authorize an award under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

4. MASTER SERVANT—REVIEWING COURT BOUND BY FINDING ON EVIDENCE IN COMPENSATION CASE.

In reviewing an award under the Workmen's Compensation Act the court cannot weigh the evidence, and in the absence of fraud is bound by the decision of the Industrial Commission, if there is any legal evidence to support it.

(For other cases, see Master and Sercant, Dec. Dig. § 417[7].)

Error to Circuit Court, La Salle County: Edgar Eldredge, Judge.

Proceedings under the Workmen's Compensation Act by Johanna Opremchak against the Vulcan Detinning Company to recover compensation for the death of petitioner's husband. An award of compensation by the industrial commission was set aside by the circut court, and claimant brings certiorari. Reversed and finding of commission affirmed.

Robert E. Larkin, of Streator, for plaintiff in error.

Fisher, Boyden, Kales & Bell, of Chicago, and Boys, Osborn & Griggs, of Streator (J. F. Dammann, Jr. of Chicago, of counsel), for defendant in error.

CARTER, J. This was a proceeding under the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, §§ 126-152i) brought by plaintiff in error to recover for the death of her husband by reason of an alleged accident arising out of, and in the course of, his employment by the Vulcan Dentinning Company, July 10, 1918. The arbitrator and the Industrial Commission awarded compensation. The circuit court of La Salle county entered an order setting aside the award and the decision of the commission, and on June 26, 1919, entered an order certifying the cause was one proper to be reviewed by this court, and the case was brought here by writ of error to the June term, 1920.

[1] We are met at the outset by the question whether or not this court has jurisdiction to consider this proceeding under the reasoning in the case of City of Chicago v. Industrial Com. 292 Ill., 409, 127 N. E. 46; whether this case after July 1, 1919, can be brought here by writ of error in any way except by application direct to this court. It s obvious that, if the reasoning of the decision just cited is the law, this court is without jurisidiction to review this record by writ of error on the certificate of the trial judge entered before July 1, and brought by writ of error to this court to the June term, 1920. The Workmen's Compehsation Act, as stated in this last opinion, was amended in 1919 (Laws 1919, p. 548), so that the only way to review the record of the circuit court under the amended act was by a petition to this court to be permitted to sue out a writ of error. There is nothing in the amendatory act of 1919 that stated that the act was to be retroactive. As a general rule a statute is to operate in the future only, and is not to be construed so as to affect past transactions. A retrospective effect will not be given it unless it clearly appears that such was the intention of the Legislature. If it is left doubtful as to what was the real design, the statute must be so construed as to have a prospective effect only. Thompson v. Alexander, 11 Ill. 54: In re Tuller, 79 Ill. 99, 22 Am. Rep. 164.

Section 4 of the Illinois law on statutes reads;

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"No new law shall be construed to repeal a former law, whether such former law, is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claimed arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may by the consent of the party affected. be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act." Hurd's Stat. 1917, p. 2846.

This court in construing this section has held that unless contrary to the manifest intention of the Legislature an act revising another shall not apply retrospectively to pending claims or actions. Merlo v. Johnston City Coal Co. 258 Ill. 328, 101, N. E, 525. Under the reasoning of that opinion and the cases there cited, it must be held that, properly construed, section 4 should be so construed, in connection with the amendment of the Workmen's Compensation Act in 1919, that the provisions of the old act as to the right of review in this court by writ of error must apply, and that this court would have jurisdiction in this proceeding to review the proceedings of the circuit court on the writ of error here under consideration. This conclusion necessarily follows under the reasoning of Merlo v. Johnston City Coal Co., supra, and the cases there cited, particularly People v. Zito. 237 Ill. 434, 86 N. E. 1041. See. also, Western Electric Co. v. Industrial Com., 285 Ill. 279, 120 N. E. 774. This court in the opinion in City of Chicago v. Industrial Com., supra. did not refer to in any way or consider the provisions of section 4 of the law on statutes, and what is said in that opinion in any way conflicting with the conclusion here reached on the question of jurisidiction in this proceeding is hereby expressly overruled.

This leaves for consideration the question whether under the evidence the plaintiff in error is entitled, under the Workmen's Compensation Act, to recover for the death of her husband. He was working for the Vulcan Detinning Company at the time of his death. That company was engaged in the business of reclaiming tin and steel from tin scrap, the reclaimed tin being smelted into block tin, and the steel being baled and disposed of to steel foundaries. The work of the deceased consisted of feeding scrap with a fork to the steel hammer. The factory is located about two miles from Streator, in La Salle county, employs about 90 men, and occupies about 25 acres of ground, fenced in. The employes, except the office force, were furnished for toilet purposes with a frame building about 12 feet long and 6 feet wide, with a trench running through it and tile in the bottom of the trench for water to pass through. The trench was inclosed on every side, and instead of ordinary toilet seats for the men to sit on there was a four by four timber, with rounded edges, along and over the brick trench, and located about 18 inches from the back wall of the building, and about 2 feet from the floor, there being a wooden partition built vertically between the floor and the bottom of this timber. There was an ordinary board floor in the toilet in front of the rail or timber. Provision was made for water to run through the trench, but the trench was sometimes stopped up and had to he flushed out now and then. Opremachak had been working for the company about 14 years. The evidence tended to show that he sometime drank to excess, and on such occasions did not come to work, but there was no evidence of intoxication on the morning of his death.

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During the week previous he had been sick, compaining of a backache, and was away for several days from his work. He came back Friday evening, which was the next day after the Fourth of July, and remained steadily at work until the 10th. On that morning he left home and went to work at the usual time, walking to the plant, a mile and a half or more. The grounds were supposed to be open for the employees any time after 6 o'clock. He was seen by one of his fellow workmen at the plant some time near 6:30, and he left his dinner pail and jacket near his place of work, and that was the last seen of him alive. In the course of the forenoon he was missed, and inquiries were made and a search instituted. He was found about noon in the east end of the trench or vault of the toilet, lying lengthwise, with his head three or four inches from the east wall, and with his feet to the west, partly submerged in the vault contents. His hands were crossed over his chest. His pantaloons were down around his knees, and in such shape as to indicate that he had gone to the toilet to attend to the needs of nature. The building had to be removed to get the deceased, and the body was taken from the trench with grappling hooks. There was a bruise on his right arm and bruises on the legs below the knees, such as might have been made by the hooks, but there were no cuts or open wounds on the body. There was very little water running through the contents of the vault or trench at the time of Opremchak's death. The evidence tends to show that in the process of preparing scrap in the foundry for use alkali was used in the water for cleaning, and some of the water from the factory so used flowed into the trench in the toilet, but there is evidence tending to show there was no gas, sulphur, or acid found in the contents of the vault at the time the body was removed. The trench was about 18 inches in width, but there is no clear evidence that he was seriously injured by the fall, although it is possible that some of the bruises on his body were made by his fall into the trench. He had apparently been dead for some hours when the body was discovered in the trench, and the toilet had been used by some of the employees after the body was there without their seeing it. The deceased had a right to go to the toilet any necessary time during his service for the Vulcan Detinning Company, and there can be no question but that his death occurred during his employment. The only question is whether it arose out of his employment.

[2] This eourt has frequently stated that the burden rests upon claimant to show by competent testimony not only the fact of the injury, but that it occurred in connection with the employment; that the claimant must "furnish evidence from which the inference can be logically drawn that the injury arose out of, and in the course of, his employment"; that it must rest upon something more than mere guess or conjecture, but that the proof of such facts "may be established by circumstantial as well as by direct evidence; and the greater or less probability, leading on the whole to a satisfactory conclusion, is all that can reasonably be required to establish controverted facts." Hydrox Chemical Co. v. Industrial Com, 291 Ill. 579, 126 N. E. 564, and cases there cited. "Liability cannot rest upon imagination, speculation, or conjecture, upon a choice between two views equally compatible with the evidence but must be based upon facts established by evidence fairly tending to prove them." Peterson & Co. v. Industrial Board. 281 Ill. 326, 117 N. E. 1033; Wisconsin Steel Co. v. Industrial Com., 288 Ill. 206, 123 N. E. 295. While the burden rests upon the claimant to furnish evidence from which an inference can logically be drawn that the injury arose out of and in the course of the employment, such evidence may be circumstantial. Ohio Building Vault Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 149. It is impossible to lay down any rule as to the degree of proof which is sufficient to justify an inference being drawn, but

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the evidence must be such as would induce a reasonable man to draw such inference. Where the known facts are not equally consistent, where there is ground for comparing and balancing probabilities at their respective values, and where the more probable conclusion is that for which the applicant contends the arbitrator is justified in drawing such inference. Peoria Railway Terminal Co. v. Industrial Board, 279 Ill. 352, 116 N. E. 651. What is evidence of a fact and what is merely guessing at the fact cannot be defined by any formula that one can invent. What is wanted is to weigh the probabilities, to see if there be proved facts sufficient to enable one to have some ground for comparing and balancing the probabilities and their respective values, one against the other. Owners of Ship Swansea Vale v. Rice, 4 B. W. C. C. 298.

[3] There can be no question but that the death of Opremchak occured while he was in the toilet. There is no evidence in the record tending to show that he had heart trouble or any other chronic disease that would result in his sudden death. There is no question from the record but that the construction of the toilet seat was such that one might easily fall backward from it into the trench, which would not have been possible with a toilet seat as ordinarily constructed. We understand that this toilet has been rebuilt according to modern methods since the death of the applicant's husband. The evidence shows that he had been in fairly good health, although there is some evidence that he had been poorly for a few days the week previous to the accident.

[4] The evidence shows that the feet of deceased were entirely covered by the human waste in the vault when he was found, and there is some evidence tending to show that this matter covered the body up his chin, and that some of it was even upon his chin, and one witness testified he thought Opremchak was filled up with it, and while there is some evidence that his body below the shoulders was not entirely covered with the material in the vault, it has been repeatedly held that the courts cannot weigh the evidence; that, in the absence of fraud, the courts are bound by the decision of the Industrial Commission, if there is any legal evidence to support it, Bailey v. Industrial Com. 286 Ill. 623, 122 N. E. 107; Munn v. Industrial Board, 274 Ill. 70, 113 N. E. 110; Mueller Construction Co. v. Industrial Board, 283 Ill. 148, 118 N. E. 1028, L. R. A. 1918F, 891, Ann. Cas. 1918E. 808; Chicago Steel Foundry Co. v. Industrial Com., 286 Ill. 554, 122 N. E. 550.

The testimony shows that Opremchak was a strong man physically, about 49 years old; that it took him about 30 minutes to walk from his home to the factory on the day of his death; that he was sober; and that, while he had been suffering from backache a few days before, he did not call a doctor and went back to work and worked every day until his death, and that he was a steady worker. There is no evidence tending to show that he was an habitual drunkard, or any justification for the conclusion that he fell into the vault while under the influence of liquor, and it would be pure guess or conjecture to say that he fell because of heart trouble or other chronic disease. A workman employed in unloading coal from a ship, who was required in the course of his duty to stand by the open hatchway through which the coal was being brought up from the hold, was seized with an epileptic fit while at work and fell into the hold and was seriously injured. The court held that regard must be had to the proximate, cause of the accident resulting in the injury, which was to be found in the necessary proximity of the workman to the hatchway, and that it was the fall, and not the fit, which occasioned the accident, which was effective, and so the proximate, cause of the injury. Wilkes v. Dowell & Co. (1905) 92 L. T. R. 677; Peoria Railway Terminal Co. v. Industrial Board, supra. Even if the fall were occasioned by heart trouble or other chronic disease, under the reasoning of the decision just cited that would not necessarily prevent the fall

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from being the proximate cause of the death of Opremchak, unless the proof was clear and conclusive that he was dead at the time of the fall. While the facts in this case might give rise to conflicting inferences, there is certainly ground here for comparing probabilities at their respective values, and in so comparing them is not the conclusion from the known facts that Opremchak came to his death by the fall into the vault more probable than that he died because of heart trouble or some other sudden bodily affliction, and were not the arbitrator and Industrial Commission justified in drawing the conclusion that the greater probability in this case leads, on the whole, to the conclusion that the deceased met his death by suddenly falling into the vault during the course of his employment?

The coroner's verdict was introduced on the trial before the Industrial Commission, but it is conceded, and the Industrial Commission stated in its finding, that it was not properly in evidence, but that there was evidence outside the coroner's verdict that the death was accidental and arose out of and in the course of the employment.

[5] Later,, after the body had been buried, an autopsy was requested by a representative of the insurance company and refused by the widow on the advice of her counsel, it is argued, on the ground, as suggested by counsel, that the autopsy, after the undertaker's preparation of the body for burial, could not show clearly the cause of the death. We are of the opinion that such refusal, under the circumstances found in this record, should not necessarily be treated as an admission or a legal presumption one way or the other, as to the cause of the death.

The judgment of the circuit court will be reversed, and the decision of the Industrail Commission will be affirmed.

Judgment reversed, and finding of commission confirmed.

CUDAHY PACKING CO. v. ZAFIROPOULOS. (No. 10840.)

(Appellate Court of Indiana. Dec. 8, 1920.)

129 Northeastern Reporter, 32.

1. MASTER AND SERVANT — DEFENSE NOT IN ISSUE IN COMPENSATION CASE BECAUSE NOT PLEADED.

In view of rule 10 of the Industrial Board, providing if defendant employer relies on the special defense that the injury or death of the employee was due to his willful misconduct, etc., such special defense must be pleaded by affirmative answer five days before date set for final hearing, question whether employee's injury resulted from fact that he was without the employer's knowledge or consent taken to a hospital where because of neglect and incompetent attention his injuries were enhanced, resulting in permanent disability, was not in issue where not pleaded.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

2. MASTER AND SERVANT—INDUSTRIAL BOARD'S FINDING SUPPORTED BY EVIDENCE IN COMPENSATION CASE NOT REVIEWABLE.

Where there is evidence to support the finding of the Industrial Board that the accident resulting in the employee's injuries arose out of and in the course of his employment, the finding will not be disturbed on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Batman, J., dissenting.

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Appeal from Industrial Board.

Proceedings for compensation under the Workmen's Compensation Act by Harry Zafiropoulos, the employee, against the Cudahy Packing Company, the employer. Compensation was awarded by the Industrial Board, and the employer appeals. Award affirmed.

R. B. Webster, of Chicago, Ill., and Riley, Hembroff, Dyer & Reed, of East Chicago, Ind., for appellant.

Hodges & Ridgley and James H. McNeff, all of Gary, for appellee.

REMY, C. J. The findings of the Industrial Board which are material to a proper determination of the questions presented on appeal are: On December 23, 1918, appellee was in the employment of appellant company at an average weekly wage of $25.55, and on said day, by reason of an accident arising out of and in the course of his employment, received personal injuries as follows: Fractures of the skull, right clavicle, right jaw, and right femur. That appellant had actual knowledge of said injuries on the day they were received, and on said day sent appellee to St. Margaret's Hospital in the city of Hammond, and provided an attending surgeon. That as a result of his injuries appellee was wholly unconscious from the time he received the injuries until after January 10, 1919. That on December 25, 1918, appellee's brother caused the plaintiff to be removed by ambulance from said hospital to the San Antonio Hospital in the city of Gary. That said removal was made without appellant's knowledge or consent. That appellant first learned of the removal on December 30, 1918, at which time appellant also learned that appellee was wholly unconscious and was not receiving proper medical and surgical attention. That on four or five occasions appellant's representative visited San Antonio Hospital, and saw appellee's condition, both before and after he returned to consciousness. That appellant did not at any time furnish appellee with proper medical and surgical treatment of his injuries after it found him in San Antonio Hospital, although appellee, after he became conscious, was willing to accept the services of an attending physician or surgeon provided by appellant. That as a result of his said injuries appellee is permanently and totally disabled. That ever since September 1, 1919, a rule of the Industrial Board has been in full force and effect, as follows:

"If the defendant rely upon the special defense that the injury or death of the employee was due to the willful misconduct of the employee, including international self-inflicted injury, intoxication, wilful failure or refusal to use a safety appliance, willful failure or refusal to perform a duty required by statute, or any other defense of confession and avoidance, such special defense must be pleaded by an affirmative answer at least five days before the date set for the final hearing."

Appellant did not at any time file any special answer to appellee's claim for compensation in which it pleaded any affirmative defense. Appellee was awarded compensation at the rate of $13.25 per week for a period of 500 weeks, beginning on December 31, 1918.

The errors assigned and presented are that the award is contrary to law and is not sustained by sufficient evidence.

[1] It is contended by appellant that, as shown by the board's finding, appellee's injury resulted from the fact that he was, without appellant's knowledge or consent, taken to the hospital at Gary, where because of neglect and incompetent medical and surgical attention his injuries were enhanced, resulting in his permanent disability. In view of rule 10 above set out, and which the board specially found to have been in force at the time, the question was not in issue because not pleaded. See Northern Indiana Gas & Electric Co. v. Pietzvak, 118 N. E. 133.

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[2] There is evidence to support the finding of the Industrial Board that the accident resulting in appellee's injuries arose out of and in the course of his employment, and under such circumstances the finding will not be disturbed on appeal. American Hominy Co. v. Davis, 126 N. E. 703.

The award is affirmed.

Batman, J., dissents.

IN RE STONER. (No. 10966.)

(Appellate Court of Indiana, Division No. 2. Dec. 10, 1920.)

128 Northeastern Reporter, 938.

MASTER AND SERVANT — "YOUNG PERSON" NOT AN "EMPLOYEE" WITHIN COMPENSATION ACT.

Where an employer of a minor fails to procure affidavit of age as required by Burns' Ann. St. 1914, § 8022, in case of a "young person," defined by section 8038 as a person between the ages of 14 and 18 years, a young person so engaged is not lawfully employed and therefore is not an "employee" entitled to recover for injuries under Workmen's Compensation Act, providing that the term "employee" shall include every person including a minor lawfully in the service of another.

(For other cases, see Master and Servant. Dec. Dig. § 366.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

Certified questions from Industrial Board.

Proceedings under the Workmen's Compensation Act by Robert Stoner for compensation against the American Zinc Products Company, employer, and the London Guarantee & Accident Company, insurer. On questions certified by the Industrial Board. Questions answered in the negative, and the Workmen's Compensation Act declared inapplicable.

James & Allee, of Greencastle, for appellee.

NICHOLS, J. On the facts hereinafter stated, the Industrial Board of Indiana certifies for our decision and determination the questions of law hereinafter stated.

Robert Stoner was born November 5, 1902. That on and prior to the 4th day of June, 1920, he was a resident of the city of Greencastle, in Putnam county, Ind. That on and prior to the 4th day of June, 1920, the American Zinc Products Company was engaged in the manufacturing business in the city of Greencastle, Ind., and was engaged in the business of manufacturing zinc plates and sheets. That some time prior to June 4, 1920, the said Robert Stoner entered the service of the American Zinc Products Company in its factory at Greencastle, Ind., and was working in its manufacturing business at said place under a contract of hire, and during the period of his services with said defendant earned an average weekly wage of $21. That on the 4th day of June, 1920, while engaged in the discharge of the duties of his services with the American Zinc Products Company, the said Robert Stoner received a personal injury by an accident arising out of and in the course of the discharge of his services of said company, resulting in the loss by separation of more than two phalanges of the second, third, and fourth fingers of the left hand

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and of not more than two phalanges of the first finger of the left hand, That the American Zinc Products Company had actual knowledge of said injury at the time that it occurred, and provided the said Robert Stoner with an attending physician and the necessary surgical services and supplies for the treatment of his injury. That at the time that the said Robert Stoner entered the services of the American Zinc Products Company his parents were living in the city of Greencastle, Ind., and the said Robert Stoner was living with them. That at the time the said Robert Stoner entered the service of the American Zinc Products Company, the said company did not by any agent foreman, representative, or other person connected with its manufacturing establishment require and place on file in the office of said company an affidavit made by either of the parents of said Robert Stoner stating his age,, and the date and place of his birth. That no such affidavit was made by either of said parents at the time that the said Robert Stoner entered the service of the American Zinc Products Company and at no time thereafter. That the American Zinc Products Company did not have any such affidavit on file at the time that the said Robert Stoner received his injury or at any other time while he was in its service. That the American Zinc Products Company did not procure and have on file at the time that the said Robert Stoner entered its service, or at the time of his injury, or at any other time during his service, an age certificate issued by the executive school officer of the school city of Greencastle, or by any other representative of such school city authorized to issue the same. That at the time the said Robert Stoner received his injury, the London Guarantee & Accident Company was the compensation insurance carrier of the American Zinc Products Company.

It is admitted by the American Zinc Products Company and the London Guarantee & Accident Company that Robert Stoner is entitled to an award of compensation of $11.55 per week for a period of 105 weeks, if, under the law, he was an employee of the American Zinc Products Company at the time of his injury.

That Robert Stoner has presented a claim for compensation on account of said injury, and contends that he was lawfully in the employment of the American Zinc Products Company at the time of his injury. The American Zinc Products Company admits his contention and insists that an award of compensation at the rate of $11.55 per week for 105 weeks should be made, while the London Guarantee & Accident Company contends that Robert Stoner was not lawfully in the service of the American Zinc Products Company at the time of his injury, and for that reason is not entitled to an award of compensation.

This contention is based upon the proposition that under a provision of section 8038, Burns' R. S. 1914, the said Robert Stoner was a "young person" at the time he entered the services of the American Zinc Products Company and at the time of his injury, and that, being a "young person," under the provisions of said section, he was not lawfully in the service of the American Zinc Products Company by reason of a provision in section 8022, Burns' R. S. 1914, in the words following, to wit:

"And it shall be unlawful for any proprietor, agent, foreman or other person connected with a manufacturing or mercantile establishment, mine, quarry, laundry, renovating works, bakery or printing office to hire or employ any young person to work therein without there is first provided and placed on file in the office an affidavit made by the parent or guardian, stating the age, date and place of birth of said young person; if such young person have no parent or guardian, then such affidavit shall be made by the young person, which affidavit shall be kept on file by the employer, and said register and affidavit shall be produced for inspection on demand made by the inspector, appointed under this act."

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Upon the foregoing facts the Industrial Board respectfully submits the folowing questions of law for our determination:

First. Would a finding that Robert Stoner was an employee of the American Zinc Products Company within the meaning of the Workmen's Compensation Act, at the time of his injury, be sustained by sufficient evidence?

Second. Would such a finding be according to law?

Third. Would an award of compensation to Robert Stoner upon the foregoing facts be sustained by sufficient evidence?

Fourth. Would such an award be according to law?

Section 8038, supra, expressly defines the words 'young person" to mean a person of the age of 14 years and under the age of 18 years. Applying this definition to words "young person" used in the provision quoted from section 8022, supra, both sections being part of the same act, it is apparent that the claimant herein, being 17 years of age, and therefore between the ages of 14 and 18 years, was not lawfully employed, and therefore not an employee within the meaning of the Workmen's Compensation Act, which provides that-

" 'Employee' shall include every person including a minor, lawfully in the services of another under any contract of hire. * * * " Acts 1919. p. 175. § 76.

This question was decided by the Supreme Court in the case of New Albany Box & Basket Co. v. Davidson, 125 N. E. 905, in which case the minor sought to recover at common law, and, after quoting the definition of a young person as above, the court held that the minor, who was 15 years of age, was illegally employed, and not being embraced within the provisions of the Workmen's Compensation Act, his action was properly brought. two of the cases cited in that case, to wit, Roszek v. Bauerle & Stark Co. 282 Ill. 557, 118 N. E. 991, L. R. A. 1918F, 207, and Messmer v. Industrial Board, 282 Ill. 562, 118 N. E. 993, were decided against the minor who sought to recover under the Workmen's Compensation Act. Other decisions against the attempted recovery under the Compensation Act are Moll v. Industrial Commission, 288 Ill. 347, 123 N. E. 562 and Hillestad v. Industrial Commission, 80 Wash. 426, 141 Pac. 913, Ann. Cas. 1916B, 789. In addition to the cases cited in New Albany Box & Basket Co. v. Davidson, supra, we cite in harmony therewith Lesko v. Liondale Bleach Dye & Paint Works, 93 N. J. Law, 4, 107 Atl. 275; Acklin Stamping Co. v. Kutz, 98 Ohio, 61, 120 N. E. 229; Gutman v. Anderson, 142 Minn. 141, 171 N. W. 303; Taglinette v. Sydney Worsted Co. (R. I.) 105 Atl. 641; Secklich v. Harris Emery Co., 184 Iowa, 1025, 169 N. W. 325; Krucgkowski v. Polonia Pub. Co., 203 Mich. 211, 168 N. W. 932; Waterman Lumber Co. v. Beatty (Tex. Civ. App.) 204 S. W. 448.

The employe's remedy in this case is not under the provisions of the Workmen's Compensation Act. We answer each of the questions propounded to us in the negative.

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CHANCE v. RELIANCE COAL & MINING CO. (No. 22988.)

(Supreme Court of Kansas. December 11, 1920.)

193 Pacific Reporter 889

(Syllabus by the Court.)

1. MASTER AND SERVANT —INJURY TO MINER. RIDING OUT OF PIT ON QUITTING WORK, HELD ONE "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

A workman, engaged in mining coal in a strip pit, quit his ordinary work at the end of the day. and with other employees rode upon an engine towards the other end of the pit, with a view of ascending to the surface as was the custom in the mine and while on his way the engine on which he was riding collided with cars which had been insecurely placed upon a switch line, and suffered an injury, *held,* that the accident arose out of and in the course of his employment. and that he is entitled to compensation for the injury under the provisions of the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT—ERROR IN COMPUTING COMPENSATION AWARD MAY BE CORRECTED ON APPEAL.

An error in computation of the award made may be corrected and modified upon appeal without reversing the judgment.

(For other cases, see Master and Servant Dec. Dic. § 412.)

3. MASTER AND SERVANT—PERFORMANCE OF SOME WORK HELD NOT TO IMPAIR FINDING OF PARTIAL PERMANENT DISABILITY.

The fact that the injured workman has performed some labor since he was injured is *held,* under the evidence, to be no ground for overthrowing the finding of the court that the injury had resulted in partial permanent disability."

(For other cases, see Master and Servant, Dec. Dig. § 385[11].)

Appeal from District Court, Crawford County.

Proceeding by John Chance against the Reliance Coal & Mining Company for compensation under the Workmen's Compensation Act. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Wm. L. Wood, of Kansas City, and A. B. Keller, Geo. R. Malcom, and John P.Curran, all of Pittsburg, for appellant.

James E. Callery and Phil H. Callery, both of Pittsburg, for appellee.

JOHNSTON, C. J. This is an appeal from a judgment awarding compensation to the plaintiff for an accidental injury sustained by him while he was employed as a miner by the defendant.

[1] The principal contention of the defendant is that the accident to plaintiff did not arise out of and in the course of his employment. There is little room for contention on this point. Plaintiff was employed to work in coal mine designated as a strip pit, which was an excavation about three-fourths of a mile in length, and varying from 20 to 30 feet in depth. He was helping operate a coal loader near the

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coal face at one end of the pit, and when the loader shut down for the day he and others mounted a dinkey engine that was used to pull loads to the tipple at the other end of the pit, where the coal was hoisted to the surface. On the way some empty cars that were insecurely placed on a switch track ran down the grade and collided with the engine on which plaintiff was riding in such a way as to cut off the heel of his left foot.

It is insisted by defendant that plaintiff had quit his work and was on his way home, using a means of travel of his own selection, and was not at the time performing any service growing out of or incidental to his employment. While he had ceased work at the coal loader, he was still in the pit, the place of employment, and still under the direction and control of the defendant. It cannot be said he was outside of his employment, when he was passing from one part of the pit to the other, riding on the engine, a common means of transportation in going to the tipple, an appliance of the defendant for the purpose of ascendinng above ground. It was the usual custom of the miners "to ride out upon the the last trip" upon the dinkey engines, and this was done with the acquiescence of the defendant. The injury which occurred on the trip was a result which was or should have been in contemplation of the defendant and which grew out of and was reasonably incident to plaintiff's employment.

"It has been said that an injury which occurs while an employee is doing what he might reasonably do at the time and place is one which arises 'out of and in the course of the employment.' " L. R. A. 1916A, 232

This case is not to be likened to one where an employee is on the way going to or from the place of employment, where he can choose his own route and act independently of his employer. Bevard v. Coal Co., 101 Kan. 207, 165 Pac. 657; Mazeffe v. Railway Co., 106 Kan. 796, 189 Pac. 917. It falls rather within the rule of Sedlock v. Mining Co., 98 Kan. 680, 159 Pac. 9 L. R. A. 1917B, 372. There a coal miner left his work at the coal face, laid aside his tools, changed his clothes, and proceeded towards the shaft, with the intention of ascending to the top of the mine. About 200 feet from the room where he had been at work, and about one half mile from the shaft, he came in contact with a piece of slate which was hanging from the roof of the mine, destroying one of his eyes. Against the contention that he was at the time outside of his employment, it was held that he was still in the mine and under obligation to observe the rules prescribed by the employer, and that it was incumbent on the employer to provide him, not only a safe place to work in the mine but also a safe passageway out of it, as well as the means to carry him safely to the top of the mine. His duties to the employer, it was held, had not ended when he laid aside his pick and other tools, nor until he had left the mine. It was said:

The workman was in the mine, under the direction and entitled to the protection of the defendant at the time of the accident. Each owed duties to the other, and the relation of master and servant still existed between them, when the injury was sustained, although the workman was not actually using the pick and shovel at the time."

The facts in that case are quite similar to those of the instant case, and the rule there applied is closely applicable here. See the cases therein cited and also Monson v. Battelle, 102 Kan. 208, 170 Pac. 801; Stuart v. Kansas City, 102 Kan. 307, 171 Pac. 913; White v. Stockyards Co., 104 Kan. 90, 177 Pac. 522; Benson v. Railway Co., 104 Kan. 198, 178 Pac. 747; Thomas v. Manufacturing Co., 104 Kan. 432, 179 Pac. 372, 6 A. L. R. 1145, Under the authorities it is clear that within the meaning of the Workmen's Compensation Law (Laws 1911, c 218, amended by Laws 1913, c. 216) the injury of the plaintiff arose out of and in the course of his employment.

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[2] There is a further contention that the award of compensation was excessive. It is apparent that an error in computation was made by which the plaintiff was given $99 more than he was entitled to receive under the rule of the statute. The case was tried by the court without a jury, and it is mainifest that the error is not one that requires a new trial. The judgment is reduced from $2,268 to $2,169, and interest should be reckoned on the latter amount from the day of judgment.

[3] It is also contended that the court was not warranted in allowing plaintiff compensation for partial permanent disability. There is sufficient evidence to sustain the finding of the court in that respect. The fact that plaintiff was able to and did perform some labor, part of the time, of the same character as he had previously done does not impair the validity of the finding of partial permanent disability. Gailey v. Manufacturing Co., 98 Kan. 53, 157 Pac. 431; Dennis v. Cafferty, 99 Kan. 810, 163 Pac. 461.

The judgment, as modified, is affirmed.

All the Justices concurring.

FOLEY v. HINES, Director General of Railroads (PORTLAND TERMINAL CO.)

(Supreme Judicial Court of Maine, December 8, 1920.)

111 Atlantic Reporter 715

5. MASTER AND SERVANT—COMMON LAW DEFENSES NOT ALLOWED BY WORKMEN'S COMPENSATION ACT.

An injured railroad employee not within the federal Employer's Liability Act (U. S. Comp. St. §§ 8657-8665), has a right of action at common law, aided by Maine Workmen's Compensation Act depriving a nonassenting employer employing more than five workmen of the defenses of contributory negligence, negligence of fellow servant, and assumption of risk.

(For other cases, see Master and Servant, Dec. Dig. 356)

Exceptions from Supreme Judicial Court, Cumberland County, at Law.

Action by Matthew Foley against Walker D. Hines, Director General of railroads (Portland Terminal Company). Verdict for plaintiff, and defendant brings exceptions and moves to set aside the verdict. Motion and exceptions overruled.

Argued before Cornish, C J., and Spear, Hanson, Morrill, and Wilson, JJ.

Richard E. Harvey and William H. Looney, both of Portland, for plaintiff.

Charles B. Carter, of Lewiston, for defendant.

Cornish, C. J. On August 14, 1918, the plaintiff, an employee of the Portland Terminal Company, sustained injuries while at work "trimming coal" in the hold of a vessel at the company's wharf in the

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city of Portland. The jury rendered a verdict in his favor in the sum of $9,120.75, and the case is before the law court on defendant's exception to the refusal of the presiding justice to direct a verdict for the defendant and on a general motion to set aside the verdict. The reasons assigned for asking for a directed verdict are two: First, because the plaintiff has failed to show actionable negligence on the part of the defendant; and, second, because he came within the provision of the federal Employers' Liability Act, and the defense could therefore avail itself of the plaintiff's assumption of risk, which it claimed had been fully proven.

The writ contains several counts at common law, and also one invoking the provisions of the state Workman's Compensation Act (R. S. c. 50). The legal rights of the p arties as modified by that act will be considered later.

1. Federal Employer's Liability Act.

[1] The first inquiry that naturally arises is whether this case falls within the provisions of the federal Employers' Liability Act of April 22, 1908 (U. S. Com. Stat. vol. 8, §§ 8657-8665). If it does, then the plaintiff's assumption of risk and contributory negligence in reduction of damages are open to the defendant, unless the injury was caused through the violation of some statute enacted to promote the safety of employees. No such statutory violation being claimed here, those defenses would be available. Seaboard Air Line v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C. 1, Ann. Cas. 1915 B, 475; Jacobs v. Southern Railway Co., 241 U. S. 229, 36 Sup. 588, 60 L. Ed. 970; Chicago, etc., R. R. Co. v. Ward, 252 U. S. 18, 40 Sup. Ct, 275, 64 L, Ed. —.

[2] The essential words of section 8657 are these:

"Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * *"

Two facts must coexist in order to bring a case within this provision: First, the injury must be sustained while the carrier is engaged in interstate commerce; and, second, the employee must, at the very moment of the accident, be employed in, and the particular service rendered must be a part of such commerce. Mere employment by an interstate carrier is not sufficient to meet the second requirement, and, on the other hand, the employee need not be regularly and continuously engaged in interstate work. The same workman on different days or on different hours of the same day may be engaged in interstate and intrastate work, and he may pass from one to the other frequently, so that at one period he may be within and at another he may be without the scope of the act. N. Y. Central R. R. v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298.

The facts in the case that must furnish the answer to this first inquiry are uncontroverted.

The defendant is a company which owns and operates certain railroad property formerly owned by the Maine Central Railroad Company and Boston & Maine Railroad, situated in Portland, Westbrook, South Portland, and that vicinity. It also owns wharf property on the shore front in Portland harbor, with all the necessary fixtures and appliances for discharging coal from vessels or barges. On the day of the accident the company's employees, among whom was the plaintiff, were engaged in discharging a cargo that had come by the steamer Louise from Baltimore, Md., the consignor being the Consolidation Coal Company, and the consignee the Maine Central Railroad Company. The steamer docked on Wednesday morning, August 14, and finished discharging on Friday morning, August 16. Foley was injured on Thursday August 15. The Terminal Company had nothing to do with the buckets carrying the coal from the hold of the steamer into

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railroad cars on the wharf and part onto the pile located on the wharf. The Maine Central Railroad Company, the consignee, took charge of the cars and distributed them where it wished. This cargo of about 2,900 tons was distributed as follows: To Deering Junction, Me., about 440 tons; Thompsons Point Me., about 945 tons; North Conway, N. H., about 86 tons; Ricker Hotel Company, Rockland Me., about 43 tons; Ricker Hotel Company, Kineo, Me., about 16 tons, while the balance ,about 1,398 tons, or nearly one-half of the entire cargo was left in a pile on the wharf. The coal shipped to Deering Junction and North Conway would be stored there, and ultimately be used by both interstate an intra-state locomotives; that shipped to Thompson's Point, for use in the locomotive and car repairs belonging to the terminal company, where both interstate and intrastate equipment was repaired; what use would be made of that shipped to the Ricker Hotel Company is not shown. but presumably by that company in connection with its hotels at Rockland and Kineo; while the large portion left in the pile on the wharf was ultimately to be used as fuel by both interstate and intrastate locomotives of the Maine Central Railroad, Boston & Maine Railroad and Portland Terminal Company, as they might have occasion to coal there.

The plaintiff was one of the crew in the hold of the steamer employed in discharging this coal at the time of the accident.

Did these conditions bring him within the provisions of the act in question? We have no hesitation in answering that question in the negative.

[3] It should be borne in mind that the fact that the plaintiff was engaged in discharging coal from a steamer which had brought it from Baltimore, Md., to Portland, Me., and therefore was in that sense engaged in interstate commerce, is entirely immaterial. That steamer was not owned by the defendant, and formed no part of its system, and the federal act applies only to "a common carrier by railroad." The Pawnee (D. C.) 205 Fed. 333.

[4] The transportation to be considered here therefore is not concerned with the past, but the future, not with the ending of a voyage, but the beginning of a shipment.

The plaintiff concedes in argument that defendant at the time of the accident was a common carrier by railroad within the meaning of the act, and was engaged in interstate commerce.

The issue is therefore narrowed to this: Was the plaintiff in doing this particular work at that time employed in such commerce? The test laid down by the Supreme Court of the United States on this point is that the employee at the time of the injury must be employed in interstate transportation or in work so closely related to it. or in an act so directly and immediately connected with it, as substantially to form a part or necessary incident thereof. N. Y. Cen. R. R. Co., v. Carr, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298; Shanks v. Delaware, etc., R. R. Co, 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797.

There is little difficulty in deciding whether the statute applies in a case of direct employment, as, for instance, to a conductor, engineer, or brakeman while actually employed in running an interstate train. The difficulty arises when we are asked to determine cases where the act or the work is connected with one of the many instrumentalities without which interstate transportation could not be carried on. In deciding cases in this board domain the courts are governed by the reasonable and firmly established principle, that in order for intrumentalities such as tracks, bridges, engines, or cars, to be regarded as engaged in interstate commerce, they must already have been devoted to such use and impressed with such interstate character. If so, the fact that they are also used for intrastate traffic does not destroy their interstate character. They

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need not be exclusively used for interstate work, but they must have been impressed with the interstate character. A vital distinction exists here, which must not be overlooked. Tracks, roadbed, bridges, buildings, are instrumentalities in the nature of fixtures. and once having been devoted to interstate commerce, they remain so during their use as such, although also used in connection with intrastate traffic. But if these instrumentalities have not as yet become impressed with an interstate character, then the mere fact that at some future time they may be or are intended to be devoted to such use does not bring them within the act. To illustrate the foregoing principles: The following cases have been held to be within the act: An employee engaged in sealing up and labeling both interstate and intrastate cars (St. Louis etc., R. R. Co. v. Seale, 229 U. S. 158, 33 S. W. 651, 57 L. Ed. 1129, Ann. Cas. 1914 C, 156); yard clerk making record of incoming and outgoing interstate an intrastate cars (Pittsburgh R. R. Co. v. Farmers Trust Co. 183 Ind. 293, 108 N. E. 108); member of construction crew operating steam shovel in removing earth from interstate tracks (Tralich v. Chicago, etc. Ry. Co. [D. C.] 217 Fed. 677); section hand sweeping snow from tracks used for both interstate and intrastate tracks (Hardick v. Wabash R. R., 181 Mo. App. 160, 168 S. W. 328); repairing telegraph lines used in directing interstate trains (Deal v. Coal, etc., Ry. Co. [D. C.] 215 Fed. 286); repairing engine used in interstate commerce (Law v. Illinios Cen. R. R. 208 Fed. 871, 126 C. C. A. 27 L. R. A. 1915C. 17; So. Pac. Co. v. Pillsbury, 170 Cal. 787,151 Pac. 277, L. R. A. 1916A. 916); section foreman inspecting track used for both (Lousiville R. R. Co. v. Kemp, 140 Ga. 659, 79 S. E. 558, So. Ry. Co. v. Puckett, 16 Ga .App. 556, 85 S. E. 809; Anest v. Columbia, etc. R. R., 89 Wash. 613, 154 Pac. 1100); coaling engine preparing to make interstate trip (Arbruster v. Chicago, etc., Ry. Co., 166 Iowa, 176, 147 N. W. 337); mechanic working on turntable while turning interstate engine (Chespeake, etc., Ry. Co. v. Koenhoff, 167 Ky. 358, 180 S. W. 523); section foreman repairing switches in yard used for making up trains of both kinds (Willever v. Delaware, etc., R. R. Co., 87 N. J. Law, 350, 94 Atl. 595); signal man operating signals controlling both kinds (Cincinnati, etc., R. R. v. Bonham, 130 Tenn. 446, 171 S. W. 79); employee carrying bolts to be used in repairing a bridge (Pederson v. Delaware, etc., R. R., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153). In the case last cited the court was careful to note the distinction between impressed and nonimpressed instrumentalities by adding:

"Of course, we are not concerned here with the construction of tracks, bridges, engines or cars which have not yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

See, also, Kinzell v. Chicago, etc., R. R., 250 U. S. 130, 39 Sup. Ct. 412, 63 L. Ed. 893.

Of cases held not to be within the statute the following may be cited: Laborer working on track intended to be used by both interstate and intrastate trains if and when completed (Chicago, etc., R. R. v. Steele, 183 Ind. 446, 108 N. E. 4); conductor operating train loading ties to be taken to a point within the state and subsequently to be used in construction, either within or without the state (Alexander v. Great Northern Ry. Co., 51 Mont. 572, 154 Pac. 914, L. R. A. 1918A, 852); employee in the construction of a tunnel intended to straighten a line but as yet unused (Raymond v. Chicago Ry. Co., 243 U. S. 43, 37 Sup. Ct. 268, 61 L. Ed. 583); unloading barrels of paint to be used in painting both interstate and intrastate cars (Salmon v. Southern Ry. Co., 133 Tenn. 230, 180 S. W. 165); Brakeman on a train carrying water to a tank

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within the state from which both inter- and intra-state engines took their supply (Missouri, K. & T. Ry. Co. v. Fesmire [Tex. Civ. App.] 150 S. W. 201).

Applying these principles and noting the clearly settled distinction, it is obvious that the coal in question at the time of the plaintiff's injury had not become an instrumentality of interstate commerce, and therefore the plaintiff was not employed in that commerce. He was at work assisting in the removal of coal in bulk from the hold to the cars of the consignee or to the general pile on the wharf. No part of it had been appropriated or segregated for interstate use. It might be used for that purpose, or it might be used for intrastate locomotives or for both. At some time in the future some other employee if engaged in coaling an interstate engine from some portion of the stock would be within the act, as in Armbruster v. Chicago, etc., Ry. Co., 166 Iowa, 176, 147 N. W. 337, before cited, but that time had not arrived and the plaintiff's work was no more directly and immediately connected with and a substantial incident of interstate commerce than that of a workman loading a railroad car at the mines. The cases so hold.

The fireman of a switch engine handling cars of coal between two intrastate points, their bulk to be broken at the point of destination and some portions afterwards used for fuel on interstate engines, was held not to be engaged in interstate commerce, in Barker v. Kansas, etc., R. R., 94 Kan. 177, 146 Pac. 359. The court used this language:

"The most that can be said is that the plaintiff was handling coal which at a later date might become a part of an instrumentality used in the transportation of interstate commerce. But this fact alone could not make him an employee engaged in interstate commerce."

Where an employee in a colliery was mining coal intended to be used in the company's locomotives moving interstate commerce, he was held not to be within the act, in Delaware, etc., R. R. Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397. So an employee engaged in removing coal from storage tracks to coal chutes, destined at some time for use in interstate hauls, was held not to be an interstate employee. Chicago, etc., R. R. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941. In the course of the opinion the court said:

"Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use. It has been held that an employee of the carrier while he is mining coal in the carrier's colliery intended to be used by it in interstate locomotives is not engaged in interstate commerce within the meaning of the federal act (Del., etc., R. R. v. Yurkonis, 238 U. S. 439), and there is no distinction in principle between the two cases."

The cases cited by the defendant are not in conflict with the rule which we apply. We will consider each of the defendant's cited cases.

In Barker v. Kansas, etc., R. R., 88 Kan. 767, 128 Pac. 1151, 43 L. R. A. (N. S.) 1121 a new trial was granted because of error in the admission of evidence. The case was retried and reported again in 94 Kan. 177, 146 Pac. 358, where the court practically reversed its former view in the case cited by the defendant, and held that the employee was not engaged in interstate commerce. This case has been cited already in this opinion among the illustrations of noninterstate employees.

In Southern Ry. Co. v. Peters, 194 Ala. 94, 69 South. 611, the plaintiff was working at a coal chute, rolling a buggy of coal for an incoming interstate locomotive, a clear case of direct and immediate connection with interstate traffic.

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In Eng v. Southern Pac. Co. (D. C.) 210 Fed. 92, plaintiff was injured while framing a new office in the defendant's freight shed, which had been used for a long time in both interstate and intrastate business. Held that this did not constitute construction of a new instrumentality of interstate commerce, but the repair of an instrumentality already impressed with that use, and hence the plaintiff was within the act, thus sharply marking the distinction we have already referred to.

In Illinois Cen. R. R. v. Porter, 207 Fed. 311, 125 C. C. A. 55, the plaintiff was injured while wheeling interestate freight from a warehouse into a car to be transported in interstate commerce, another obvious case of direct connection.

In Central R. R. v. Colasurdo, 192 Fed. 901, 113 C. C. A. 379, the plaintiff was repairing a switch in defendant's terminal yards over which both inter- and intra-state commerce was continually transported.

In Cousins v. Ill. Cen. R. R., 126 Minn. 174, 148 N. W. 59, the Supreme Court of Minnesota held that a workman, wheeling coal to heat a railroad shop in which both interstate and intrastate cars, the most being interstate, were repaired, was employed in interstate commerce, but that decision was reversed by the Supreme Court of the United States, on the authority of Delaware, etc., R. R. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 53 L. Ed. 1397, and Shanks v. Delaware, etc., R. R., 239 U. S. 556. 36 Sup. Ct. 188, 60 L. Ed. 436. L. R. A. 1916C. 797, both supra. See Illinois Cen. R. R. v. Cousins, 241 U. S. 641, 36 Sup. Ct. 446, 60 L. Ed. 1216.

In Montgomery v. So. Pacific Ry., 64 Or. 597, 131 Pac. 507, 47 L. R. A. (N. S.) 13, the plaintiff was a member of a switching crew engaged in moving an oil tank car to provide fuel for interstate engines, in switching and spotting cars loaded and to be loaded with interstate commerce, and in hauling cars to a station from which they could conveniently be taken by a regular interstate train.

Pelton v. Ill. Cen. Ry. Co. (Iowa) 153 N. W. 334. is simply a rescript per curiam, correcting on a rehearing a former opinion in the same case relating to pleading in this class of cases. and does not decide the point raised here.

In Barlow v. Lehigh Valley, 214 N. Y. 116, 107 N. E. 814, the New York court held that the engineer of a switch engine switching coal cars transported from another state, so that they can be placed on a trestle to be unloaded, and the coal to be taken indiscriminately by interstate and intrastate engines was employed in interstate commerce. This was contrary to the well-established rule, and on error to the Supreme Court of the United States this decision was reversed. Lehigh Valley R. R. Co. v. Barlow, 244 U. S. 183, 37 Sup. Ct. 515, 61 L. Ed. 1070.

Upon both reason and precedent, therefore, it is the opinion of the court that the plaintiff was not an interstate employee within the meaning of the federal statute at the time of his injury. The growing frequency of cases in this state in which this question arises affords the excuse for the prolonged discussion of the subject.

2. *Negligence of Defendant.*

[5, 6] As the federal Employers' Liability Act is not involved, the plaintiff has a right of action at common law aided by R. S. c. 50. the Workman's Compensation Act, so-called. The defendant is not an assenting employer, and employs more than five workmen, so that it is deprived of the defenses of contributory negligence, negligence of a fellow servant, and assumption of risk. This brings us to the consideration of the negligence of the defendant. The facts connected with the happening of the accident are as follows:

The plaintiff had been in the defendant's employ as a section hand for several years, working more or less about the wharves, but had never taken part in discharging a vessel. After a month's vacation in the sum-

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mer of 1918 he applied to one McDonough, the foreman of the defendant's wharves and coal unloading facilities, for a job, and was told to report on August 4, for work, "trimming coal," which he did, and he continued to work until August 15, the day of the accident. This was the mode of operation: These coal vessels have bulkheads running transversely, about 30 feet apart, from stem to stern and from the deck to the bottom and sides, so that the hold is divided into several compartments with a hatch above each. The usual method of unloading is by means of an iron bucket weighing 3,000 pounds, with opening and closing jaws, which is operated from the wharf by means of an overhead crane or yardarm. This bucket is extended by the yardarm over the vessel, is dropped through the hatchway of the compartment, digs into the coal, fills itself, is hoisted up to the yardarm, then on a trolley attached to the yardarm is run ashore to a point above waiting railroad cars or above the wharf, then opened, spilling the coal into the cars for shipment or upon the wharf pile. It is operated by two men located in a tower on the wharf, one an engineer who hoists, lowers, fills, and empties the bucket, the other, the trolley man, who runs the bucket on the trolley out to the proper position over the hatchway and back to the proper position over the cars or wharf.

As a vessel lies at the wharf with the hatches open, neither the engineer nor the trolley man can see a man in the hold working on the inshore side.

When the unloading begins, the coal is nearly level with the deck, and the bucket fills itself readily. Gradually it works its way down to the bottom in the center of the hold, with the coal on the four sides at an incline. As the yardarm runs at right angles with the keel of the vessel, it is possible for the engineer and trolley man to throw the bucket toward the offshore side and the inshore side of the hold, but they cannot thrust it either forward or aft. When the coal has been cleaned by the bucket from the center and also from the offshore and inshore sides, then men are sent down into the hold to shovel the coal from the corners and from forward and aft into the center, so that the bucket may drop down and seize it. These men are called "trimmers," and it is this kind of work that the plaintiff was performing when injured. He had been working with a crew, cleaning out a forward compartment, and when that was finished they were all sent aft to help another crew clean out hatch No. 2. Foley was the last man to leave the forward and to enter the rear compartment, and he took the only place that was left, which was in the wing on the inshore side. He was at work, as he says, trimming the coal, throwing it into the center, when the bucket came down the hatchway, swung in towards him, and grabbed him by the leg. He had heard a shout from some of the crew, had straightened up and tried to step ahead, but the pile of coal in front of him prevented him from saving himself.

The jury found negligence on the part of the defendant, and it is the opinion of the court that their verdict on this point is not so manifestly wrong as to require intervention. The plaintiff was set at work by McDonough without any instructions or warnings whatever. This is admitted by the foreman, who also testifies that the other workmen had been instructed by his predecessor. And the plaintiff had not worked sufficiently long to gain the necessary knowledge by experience. After the trimmers were sent down into the hold, the bucket was not supposed to be swung any more to either side, but to simply take the coal from the bottom directly under the hatch, to which spot the trimmers were shoveling it. Had this course been followed, the plaintiff would not have been injured. The foreman saw him at work on the inshore side, and says he thought he was in a perfectly safe position. The bucket had come straight down once and taken the coal from the center in the regu-

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lar way after the trimmers began work. The second time it was lowered it was made to swing inshore, evidently by the men in control. There was no occasion to do this. It was out of the ordinary, and that was the precise act which caused the injury. The jury could well find that it was a negligent act on the part of the operators on the wharf.

3 *Excessive Damages.*

[7] The verdict was $9,120.75. The plaintiff is 41 years old, the injury consisted of two broken bones of the ankle, the astragalus and the cuboid, with an apparent crushing just below the ankle. Effort was made to avoid amputation, but gangrene set in, and on September 3 the leg was amputated above the ankle. The plaintiff now wears an artificial limb, and his physician testifies that he is and always will be incapable of hard physical labor. Yet he knows no other kind. Lack of education prevents his filling a clerical position, and he must still rely for support upon his seriously diminished capacity as a common laborer. His wages at the time of the accident were 56 cents per hour, with 75 cents for overtime. His physical suffering was at times intense. Upon this question of damages the defendant offered no testimony. From the very nature of the case the injury spoke for itself.

After studying the evidence and the situation carefully, and considering all the elements which enter into it, it is the opinion of the court that the damages, although large, are not grossly excessive. Nadeau v. Caribou W. L. & P. Co., 118 Me. 325, 329, 108 Atl. 190.

Motion and exceptions overruled.

GLENNON'S CASE.

(Supreme Judcal Court of Massachusetts. Suffolk. Dec. 16, 1920.)

128 Northeastern Reporter. 942.

1. MASTER AND SERVANT — ACCIDENT BOARD'S FINDING ON EVIDENCE IN COMPENSATION CASE FINAL.

The finding of the Industrial Accident Board, confirmed by the superior court, that the employee's death resulted from tuberculosis, induced by injuries to his ribs, from being thrown from the seat of his employer's wagon, where he was engaged in his regular work, must stand, if there is any evidence to support it.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

2. MASTER AND SERVANT—DEATH FROM DISEASE HASTENED BY INJURY HELD TO SUPPORT FINDING OF DEATH FROM INJURY IN COURSE OF EMPLOYMENT, WITHIN COMPENSATION ACT.

Testimony that, when injured, the employee had pulmonary tuberculosis, and that the injury, while not causing the disease, hastened its progress and excited it to a fatal termination, was enough to warrant the Industrial Board's finding, against the employer's insurer, that the death resulted from a personal injury in the course of employment, within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

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Appeal from Superior Court, Suffolk County.

Proceeding under the Workmen's Compensation Act (St. 1911, c. 751, as amended by Mary Glennon for compensation for death of Patrick Glennon, the employee, opposed by the Frank Jones Brewery Company, the employer, and the London Guarantee & Accident Company, Limited, the insurer. Compensation was awarded, the award confirmed by the superior court, and the insurer appeals. Decree affirmed.

Frederick S Deitrick, of Boston, for plaintiff.
H. S. Avery, of Boston, for insurer.

PER CURIAM. [1] The finding of the Industrial Accident Board was to the effect in substance that the death of the employee resulted from pulmonary tuberculosis induced by injuries to his ribs, chest and back, received by being thrown violently to the hub of a wheel and thence to the curbstone from the seat of the employer's wagon where he was engaged in his regular work, through the striking of the wagon by an automobile. This must stand if there was any evidence to support it. Pass' Case, 232 Mass. 515, 122 N. E. 642, and cases there collected. Manifestly there was personal injury arising out of and in the course of the employment. The only question is whether there was ground for the finding that the death resulted from that injury.

[2] There was testimony tending to show that at the time of the injury the employee had pulmonary tuberculosis and that the injury while not causing this disease hastened its progress or excited it to a fatal termination. This was enough to warrant a finding against the insurer. The case is fully within the scope of Madden's Case, 222 Mass. 487, 493, 111 N. E. 379, L. R. A. 1916D, 1000; and Crowley's Case, 223 Mass. 288, 111 N. E. 786.

Decree affirmed.

BRIDGER v. LINCOLN FEED & FUEL CO. (No. 21626.)

(Supreme Court of Nebraska. Nov. 10, 1920.)

179 Northwestern Reporter, 1020.

(Syllabus by the Court.)

1. MASTER AND SERVANT—CASUAL EMPLOYEE EXCLUDED BY COMPENSATION ACT.

Under the Workmen's Compensation Act an employee whose employment is "casual" is not entitled to compensation from his employer for personal injuries. Rev. St. 1913, § 3656, subd. 4, as amended by Laws 1917, c. 85, § 4.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

2. MASTER AND SERVANT—"CASUAL" EMPLOYMENT WITHIN COMPENSATION ACT DEFINED.

The term "casual," as used in that part of the Workmen's Compensation Act precluding an employee whose employment is casual from recovering from his employer compensation for personal injuries, is defined by the act itself to mean "occasional: coming at certain times without regularity, in distinction from stated or regular," and should be so construed in applying the statute.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

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(For other definitions, see Words and Phrases, First and Second Series, Casual.)

3. MASTER AND SERVANT — WORKMAN UNLOADING COAL CARS AT IRREGULAR INTERVALS HELD A "CASUAL" EMPLOYEE WITHIN COMPENSATION ACT.

An employee unloading cars of coal for 25 cents a ton at irregular intervals under a separate employment for the unloading of each particular car *held*, on the facts stated in the opinion, to be a person whose employment was "casual," and not entitled to compensation for personal injuries.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

Appeal from District Court, Lancaster County; Clements, Judge.

Proceeding under the Workmen's Compensation Act by Jonathan A. Bridger, opposed by the Lincoln Feed & Fuel Company, to recover for personal injuries. An award of compensation was reversed on appeal to the district court, and claimant appeals. Affirmed.

R. J. Greene and Hugh C. Wilson, both of Lincoln, for appellant

Fred C. Foster, O. K. Perrin and S. M. Kier, all of Lincoln, for appellee.

ROSE, J. This is a proceeding under the Workmen's Compensation Act. Plaintiff's right hand was crushed February 24, 1920, and his third finger severed therefrom while he was unloading for defendant a car of coal for 25 cents a ton. He applied to the Compensation Commissioner for an award for his injuries, and was allowed therefor $15 a week for 20 weeks and in addition $7.50 a week for 9 weeks for medical expenses. From this award defendant appealed to the district court, where it was held that plaintiff was not entitled to compensation for his injuries. From a dismissal of the proceeding he has appealed.

The question presented by the appeal is the applicability of the Workmen's Compensation Act to plaintiff's claim.

[1] Defendant pleaded that the employment of plaintiff was "casual," and that therefore he is precluded from recovering compensation by the following statutory provisions relating to the term "employee:"

"It shall not be construed to include any person whose employment is casual, or not for the purpose of gain or profit by the employer, or which is not in the usual course of the trade, business, profession, or occupation of his employer. The term 'casual' shall be construed to mean 'occasional; coming at certain times without regularity, in distinction from stated or regular.' " Rev. St. 1913, § 3656, subd. 4, as amended by Laws 1917, c. 85, § 4.

[3] For the purposes of this inquiry "casual" must be thus construed and the facts may be stated as follows: Plaintiff began to unload a car of coal for defendant February 21, 1920, and finished the task the next day. He began to unload another car February 23, 1920, and was injured the following day before he had removed all of the coal. For these services he was paid $20 by check of defendant, being 25 cents a ton. About a week earlier plaintiff had unloaded a car of coal for defendant in the same yards. During a year's time previously he had unloaded three or four cars and received 25 cents a ton. He was entitled to his pay when he unloaded a car, and could then get it if he could find defendant's manager at the time. Plaintiff in each instance was employed to unload a particular car of coal. Between jobs he sometimes stayed around defendant's yards, and when a car of coal came in he asked for the unloading, was told the price, and performed the service, but during some of

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the intervals he had worked for others. There is competent evidence of these facts, and they are established for the purposes of the appeal by the finding of the district court in favor of defendant.

[2] Was the employment of plaintiff "casual"? The Legislature defined that word as used in the Workmen's Compensation Act. In the provision quoted it means "occasional; coming at certain times without regularity, in distinction from stated or regular." This statutory definition is plain, and plaintiff's employment by defendant was within its terms. The evidence shows clearly that plaintiff's employment was "occasional; coming at certain times without regularity, in distinction from stated or regular." The trial court so held, and the judgment is affirmed.

Dean, J., not sitting.

OSBORN v. OMAHA STRUCTURAL STEEL CO. (No. 21476.)

(Supreme Court of Nebraska. Nov. 10, 1920.)

179 Northwestern Reporter. 1022.

(Syllabus by the Court.)

MASTER AND SERVANT—UNDER COMPENSATION ACT, PERIODICAL INSTALLMENTS ARE NOT DUE FOR IMPOSITION OF PENALTY UNTIL EMPLOYER'S OBLIGATION IS DEFINITELY SETTLED.

Under the Workmen's Compensation Act periodical installments of compensation for an injury to an employee do not become due, in the sense that they carry the statutory penalties for nonpayment, until the obligation of the employer is definitely ascertained or settled in the exercise of proper diligence on his part, where there is a reasonable controversy over the extent of the injury as a basis for the number of periodical payments and the amount of each.

(For other cases, see Master and Servant, Dec. Dig. § 391½, New, vol. 7A Key-No. Series.)

Dean, J., dissenting.

Appeal from District Court, Douglas County; Wakeley, Judge

Proceeding under Workmen's Compensation Act by John F. Osborn, known as Fred Osborn, opposed by the Omaha Structural Steel Company. An award by the commissioner was upheld on appeal to the district court, and defendant appeals. Reversed with direction.

E. J. Corkin and Rosewater & Cotner, all of Omaha, for appellant.
J. E. Von Dorn, of Omaha, for appellee.

ROSE, J. This is a proceeding under the Workmen's Compensation Act. While plaintiff was earning 75 cents an hour in the employ of defendant, his right hand was drawn into a hoisting machine November 14, 1918. As a result of the accident the hand was mangled, and plaintiff lost a little finger. He applied to the compensation commissioner for an award for his injuries, and July 31, 1919, was allowed $12 a week for 34¾ weeks from the date of the injury. Defendant having made weekly payments of $12 each for 31 weeks that period was deducted from the whole period for which compensation was allowed. It was ordered further:

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"The periodical payments of compensation now due, shall be paid immediately upon receipt of this award. Failure of the defendant company to comply with the provisions of this award shall automatically subject the said defendant company to the penalty as provided in 3666, section 116, Workmen's Compensation Law of Nebraska, as amended in 1917."

From the award of the compensation commissioner plaintiff appealed to the district court, where there were findings that plaintiff was entitled to $12 a week for 119 weeks, beginning June 25, 1919, and that for failure of defendant to make such payments plaintiff was also entitled, under the statute to $6 a week from June 25, 1919, until February 28, 1920, the date of the decision. From a judgment on these findings in favor of plaintiff defendant has appealed to this court.

It is argued that the judgment is excessive, and that it is not sustained by the evidence. An examination of the record leads to the conclusion that plaintiff's earnings and his injuries were such as to justify the finding that he was entitled to recover $12 a week for 119 weeks, beginning June 25, 1919. The penalties, however, seem to have been imposed under a misinterpretation of the statute. There was a reasonable controversy as to the extent of the injury, and there is nothing to indicate that defendant did not pursue its remedies with proper diligence At the time the compensation commissioner made his award of $12 a week for 34¾ weeks, defendant had been in default on that basis for 3¾ weeks only, and was willing to comply with the award. Plaintiff, by his appeal not defendant, suspended the award until it was set aside and until the allowance for compensation was increased with penalties upon a trial in the district court. There being a reasonable controversy over the extent of plaintiff's injuries, and defendant, feeling itself aggrieved by the extended period for weekly payments, including penalties, exercised the right of appeal to this court. Under these circumstances, the statutory penalties are not impossible, except for the period of actual default outside of the legitimate course of litigation, which, in the present instance, is 3¾ weeks. Under the Workmen's Compensation Act periodical installments of compensation for an injury to an employee do not become due, in the sense that they carry the statutory penalities for nonpayment, until the obligation of the employer is definitely ascertained or settled in the exercise of proper diligence on his part, where there is a reasonable controversy over the extent of the injury as a basis for the number of periodical payments and the amount of each. Rev St. 1913, § 3666, as amended by Laws 1917, c. 85, § 9½, and Laws 1919, c. 91, § 4; Updike Grain Co. v. Swanson, 104 Neb. —, 178 N. W. 618. It follows that the judgment below is excessive to the extent of all the penalties imposed, except for the period of 3¾ weeks. The proceeding is therefore remanded, with a direction to the district court, on the record already made, to reform the judgment to comply with those views.

Reversed, with directions.

Day, J., not sitting.

DEAN, J. (dissenting). The penalty that is discussed in the opinion of the majority was imposed by the Legislature to make it reasonably certain that the payments contemplated by the law would not be delayed, and the act thereby nullified. In other words, the penalty was imposed to protect the injured employee from an employer's "bad guess" with respect to the meaning of the law. Parson v. Murphy, 101 Neb. 542. 163 N. W. 847, L. R. A. 1918F. 479, 16 N. C. C. A. 174. If the statue as construed by the opinion of the majority is to become the settled law of the state, it

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is perfectly plain that the "waiting time penalty" feature of the act will be of no benefit to the persons for whom the benefit was intended by the legislature.

KOWALEK et al. v. NEW YORK CONSOL R. CO.

(Court of Appeals of New York. November 16, 1920.)

128 Northeastern Reporter 888

1. MASTER AND SERVANT—RAILROAD EMPLOYEE GOING FROM WORK HELD NOT KILLED BY INJURY "ARISING OUT OF AND IN COURSE OF EMPLOYMENT," WITHIN COMPENSATION LAW.

Where a railroad company permitted its employees to ride to and from their work without charge, but the contract of employment did not obligate it to transport them, an employee, who on termination of his actual work for the day went on the station platform used by the general public to take passage on a train, and was shortly afterwards found dead on the track, was not killed by an injury "arising out of or in the course of the employment," within the Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT—EMPLOYMENT, WITHIN COMPENSATION LAW, CONTINUES DURING TRANSPORTATION ONLY IF SO STIPULATED.

As respects the application of the Workmen's Compensation Law the employment continues throughout transportation of the employee by the employer, if the parties by their contract of hiring positively or inferentially so stipulated, but not otherwise.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

3. MASTER AND SERVANT—COMPENSATION LAW INAPPLICABLE TO DANGERS NOT CONNECTED WITH EMPLOYMENT.

The Workmen's Compensation Law is not applicable to an injury arising through a danger or hazard dissociated from or not inherent in the nature of the employment, and to which the employee would have been equally exposed apart from the employment, though he would not, except for the employment, have been where such danger or hazard existed.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding under the Workmen's Compensation Law by Ida Kowalek and another for compensation for the death of Max Gottesfeld, opposed by the New York Consolidated Railroad Company, employer. From an order of the Appellate Division (190 App. Div. 160, 179 N. Y. Supp. 637), affirming an award by the State Industrial Commission, the employer appeals by permission. Reversed, and claim dismissed.

Harold L. Warner, of New York City, for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent State Industrial Commission.

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COLLIN, J. The State Industrial Commission decided that Max Gottesfeld died from injuries received as an employee of the appellant, New York Consolidated Railroad Company, under conditions making the Workmen's Compensation Law (Consol Laws, c. 67) applicable. Their award has been unanimously affirmed by the Appellate Division. We are to determine whether or not the facts found by the commission uphold the award.

[1] His employment was flagman of the railroad company, which was engaged in the business of local transportation in New York City. His employment included, as overtime work, duty at times as train guard. On the date of the injuries he completed in the evening his day's work as flagman, returned to the passenger station, and there reported to the train dispatcher for overtime work, and was assigned as a guard on a train. He made one run or trip, and again reported to the train dispatcher, and was not given another assignment. He then signed up his time for the day, said good night to the train dispatcher, and went from the office of the train dispatcher upon the passenger platform of the station, with the apparent intention of taking a train for his home. It was the practice of the company to permit employees to ride to and from their work upon the cars or trains of the company without charge. About 10 minutes after he went from the dispatcher's office upon the passenger platform, his dead body was found, about 100 feet from the platform's end between the third rail and the running rail of the railroad His death was caused by electrocution due to contact with the third rail, and fractures which he sustained. The railroad, at the place where the body was found and at this location, was the private right of way of the railroad company, upon which the general public or the passengers of the railroad had not the right to be. Between the time he went upon the platform and the time his body was found a train left the platform in the direction of the decedent's home.

The death of Gottesfeld resulted from an accidental injury. In case the injury arose out of and in the course of the employment, the determination of the Industrial Commission is right. Workmen's Compensation Law, §§ 2, 3, and 10. We are thus brought to the question whether or not, under the facts as found, the injury arose out of and in the course of the employment. The decedent went, at the termination of his actual work for the day, from the office of the train dispatcher upon the passenger platform at the station. It is a general rule that, "if an employee is injured on the premises of the employer, in going, with reasonable dispatch and method, to or from actual performance of the specific duties of the employment, by a way provided by the employer, or reasonably used by the employee, compensation must be awarded. The going to and from the actual work and the risk involved in it are reasonably incidental to the employment. The rule, however, is not applicable to the facts in the instant case. The decedent went and was upon the passenger platform with the intention and for the purpose of taking a passenger train from it to his home. The company permitted him to ride to and from his work upon the cars or trains without charge. The contract of employment did not obligate the company to transport him. In enjoying or exercising the permission, he adopted his own will and choice and served his own convenience. The company was indifferent as to the way or means by which he reached the place where the day's work began. It did not contract that he should ride to and from work, or pay him for the time through which he was riding. The transportation was not an incident of the employment.

[2] The employment continues throughout the transportation in case the parties by their contract of hiring positively or inferentially so stipulate. If they do not so stipulate, the employee, when he enters into the process of the transportation, is not under the hiring or control or in the employment of the employer, and is not the employee. Vick v. N. Y.

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C. & H. R. R. R. Co. 95 N. Y. 267, 47 Am. Rep. 36; Donovan's Case, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 788; Fumiciello's Case, 219 Mass. 488, 107 N. E. 349; Diaz v. Warren Bros. Co. (Conn.) 111 Atl. 206; Swanson v. Latham, 92 Conn. 87, 101 Atl. 492; Matter of Littler v. Fuller Co., 223 N. Y. 369, 119 N. E. 554; Nolan v. Porter & Sons, 2 Butterworth's W. C. C. 106; Hebert v. Portland Railroad Co., 103 Me. 315, 69 Atl. 266, 125 Am. St. Rep. 297, 13 Ann. Cas. 886; Harrison v. Central Construction Corporation, 135 Md. 170, 108 Atl. 874. When the decedent went and was upon the station platform he was there, under the permission of the company, for the purpose of taking immediate passage on a train. The platform was open to and was occupied and used by the general public for that purpose. It was as public as the street which led to it. The decedent did not stand as an employee, even as he would not had he stepped from the office of the train dispatcher upon the street, and there stood for the purpose of taking passage upon a street car. The danger to which he was there exposed existed as to all persons who exercised the common privilege of going there for the purpose of being transported. It was neither connected with nor increased by the hazards of the actual duties of the employment. He had the right to be upon the platform and take the train for his home as a member of the public and the risks of injury in those acts were those to which every person performing them was subject. The risk to the decedent as an intending passenger, or as a passenger, was that to which he would have been equally exposed apart from his employment.

[3] The statute is not applicable to an injury which arises through a danger or hazard dissociated from or not inherent in the nature of the employment as its source and to which the employee would have been equally exposed apart from the employment. This conclusion is not affected by the fact that the employee would not, except for the employment. have been where such danger or hazard existed. An injury does not arise out of the employment unless the hazard causing it is, within rational apprehension, an attribute of or peculiar to the specific duties of the employment. The fact that the contract of employment exists and necessitates the acts of performance may or will occasion for the employee risks not reasonably incidental to the character of the work or employment. For the injuries caused by or flowing from those risks the statute does not direct or permit compensation. Myers v. Louisiana Ry. & Nav. Co., 140 La. 937, 74 South. 256; Hewett's Case, 225 Mass. 1, 113 N. E. 572, L. R. A. 1917B, 249; Donahue's Case, 226 Mass. 595, 116 N. E. 226, L. R. A. 1918A, 215; Fumiciello's Case, 219 Mass. 488, 107 N. E. 349; Ross v. John Hancock Mutual Life Ins. Co., 222 Mass. 560, 111 N. E. 390; McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306; Matter of Heitz v. Ruppert, 218 N. Y. 148, 152, 112 N. E. 750, L. R. A. 1917A, 344. Matter of DeVoe v. New York State Railways. 218 N. Y. 318, 113 N. E. 256. L. R. A. 1917A 250; Dennis v. White & Co. 1917. A. C. 479; Williams v. Sir C. G. A. Smith, 6 Butterworth's W. C. C. 102; Thier v. Widdifield, 210 Mich. 355, 178 N. W. 16; Griffith v. Cole Bros., 183 Iowa, 415, 165 N. W. 577, L. R. A. 1918F, 923. The death in the case at bar did not result from an injury arising either out of the employment or in the course of the employment.

The order of the Appellate Division and the award of the State Industrial Commission should be reversed, and the claim dismissed, with costs against the Industrial Commission in this court and in the Appellate Division.

Hiscock, C. J., and Chase, McLaughlin, Crane, and Andrews, JJ., concur.

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CARDOZO, J., concurs in the result, on the ground that, whether we look to the evidence or the findings, the only permissible inference is that the claimant's intestate was injured after he had left the station, and at a time when he was no longer in the course of his employment.

Order reversed, etc.

LORCHITSKY v. GOTHAM FOLDING BOX CO. ET AL.

(Court of Appeals of New York Nov. 16, 1920.)

128 Northeastern Reporter, 899.

2. MASTER AND SERVANT — INCORPORATING OPINION IN FINDINGS CONTEMPLATED BY COMPENSATION LAW IMPROPER PRACTICE.

It is bad practice for the Industrial Commission, when making findings of fact required by the Workman's Compensation Law, to incorporate the written opinion as part of the findings; the opinion being more or less general.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

3. MASTER AND SERVANT—IN REVIEWING AWARD UNDER COMPENSATION LAW, OPINION INCORPORATED IN FINDINGS OF COMMISSION SHOULD BE CONSIDERED.

Where the findings of the Industrial Commission state that the injuries suffered by claimant under the workmen's Compensation Law were sustained as set forth in the written opinion adopted as if set forth in full, the court, reviewing the case, must consider the opinion to ascertain the facts.

(For other cases, see Master and Servant, Dec. Dig. § 417[4¼].)

4. MASTER AND SERVANT—EVIDENCE REQUIRED TO ESTABLISH INJURY IN COURSE OF EMPLOYMENT, WITHIN COMPENSATION LAW.

Notwithstanding the presumption declared by Workmen's Compensation Law, § 21, there must be some evidence, in addition to proof of the accident from which the conclusion can be drawn that claimant's injuries arose out of and in course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

5. MASTER AND SERVANT—FINDINGS INSUFFICIENT TO SHOW INJURIES ARISING OUT OF AND IN COURSE OF EMPLOYMENT, WITHIN COMPENSATION LAW.

Findings by the Industrial Commission that the claimant's injuries resulted either from his fall on the floor, about an hour after an assault by a stranger, rebuked when he volunteered to assist, or from the assault, are insufficient to justify an award under the Workmen's Compensation Law, notwithstanding the presumption created by section 21; there being nothing to show that, if the injuries resulted from the fall, the fall was incidental to the employment, and, as the findings were alternative, each cause must be sufficient to justify the award.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Elkus, J., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

In the matter of the claim of Benjamin Lorchitsky for compensation under the Workmen's Compensation Act against the Gotham Folding Box

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Company, employer, and the United States Fidelity & Guarantee Company. From an order of the Appellate Division, unanimously affirming an award of the State Industrial Commission (179 N. Y. Supp. 932), the employer and Guarantee Company appeal. Reversed, and new hearing granted.

See, also, 180 N. Y. Supp. 943.

M. Linn Bruce and William Warren Dimmick, both of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondents.

HISCOCK, C. J.]1[A substantial award was made to the claimant because of injuries received by him while in the employ of the appellant box company. It is insisted by appellants that, while these injuries arose in the course of his employment, they did not arise out of it. Since the award has been unanimously affirmed, we are confined in a consideration of this claim to the facts as found by the commission.

[2, 3] At the outset of our consideration we encounter a practice by the commission which we regard as unfortunate. This is the one of incorporating the opinion written by the commission as part of the findings. The statute requires the commission to make findings of fact, and this contemplates a more precise and decisive statement of the facts than is apt to be found in an opinion which discusses the general features of a claim, the conflicting contentions of the parties, and the nature of the evidence tending to support those claims, as is illustrated in the present proceeding. A discussion which is entirely appropriate as a means of reaching and justifying the conclusions of a trial court is apt to be very unsatisfactory as a statement of the final and material facts which are found to have been established.

The findings proper state that while claimant was in the regular course of his employment he received certain injuries, and that these injuries arose out of and in the course of his employment. This latter statement is a mere conclusion, and an award ought not to rest upon so general and inadequate a basis. But, further than this, the findings then state that his injuries were sustained as set forth in the opinion of the commissioner writing in the case, "which is adopted herein as if set forth in full." We therefore are not only permitted, but required, to turn to this opinion in the endeavor to find out what did happen to the claimant and to ascertain how his injuries arose.

It appears therefrom that while claimant was engaged in his work an outsider offered to assist him, and notwithstanding claimant's rejection of his offer he attempted to do so. He bungled his work, and thereupon claimant applied an opprobrious epithet to him. This the stranger resented, by striking the claimant several blows. Some time thereafter, while claimant was engaged in his work he fell to the floor; his fall, so far as appears, not being caused by anything then connected with his employment. After these two occurrences—the assault and the fall—were over the claimant had the injuries complained of, and the commissioner writing the opinion proceeds to a discussion of the facts in the attempt to decide which caused the injuries. In the end, however, he does not decide this question, but simply reaches the conclusion that the injuries resulted from either one cause or the other, being of the opinion that it was unnecessary to determine which was the cause, because, where "there is distinct proof of an accident, section 21 of the Compensation Law raises the presumption that it arose out of and in the course of the employment."

[4] This view of the law was erroneous, and did not furnish any excuse for not determining which of the two causes resulted in claimant's injuries. It is not the law that mere proof of an accident, without other

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evidence, creates the presumption under section 21 of the Workmen's Compensation Law (Consol. Laws, c. 67) that the accident arose out of and in the course of the employment. On the contrary, it has been frequently held, directly and indirectly, that there must be some evidence from which the conclusion can be drawn that the injuries did arise out of and in the course of the employment. Matter of Eldridge v. Endicott, Johnson & Co., 228 N. Y. 21, 126 N. E. 254; Matter of Woodruff v. Howes Const, Co. 228 N. Y. 276, 127 N. E. 270; Matter of Hansen v. Turner Const. Co., 224 N. Y. 331, 120 N. E. 693, Matter of Belcher v. Carthage Machine Co., 224 N. Y. 326, 120 N. E. 735.

[5] Therefore, treating this opinion as stating findings of fact, as we are required to do by the action of the commission, we have it that it has simply been found that the claimant's injuries resulted from one or the other of two causes, and it is too well settled to require citation of authorities that such alternative findings are insufficient to sustain the award which has been made, unless each of the two causes was of such a character as would authorize and justify it. That is not the case.

There is some difference of opinion amongst the members of the court whether the assault committed up on the claimant was so connected with and incidental to his employment that it would justify an award. In view of the fact that a new hearing must be had, we shall not attempt now finally to decide this question, but leave it to be decided hereafter, if it becomes necessary on the evidence as it may then be presented to us. We are all agreed, however, that if the injuries resulted from claimant's fall there were no findings which indicated that such fall was in any manner connected with or incidental to the employment. In fact, some of the statement contained in the opinion would seem to indicate that it was more liable to have resulted from a diseased condition of the claimant in no wise connected with or arising from his employment. Under these circumstances, if claimant's injuries resulted from the fall, as for the purpose of testing the award we must assume they did, the findings do not justify the conclusions that they arose out of his employment, and no award could properly be made therefor. Matter of Hansen v. Turner Const. Co., 224 N. Y. 332, 120 N. E. 693.

Therefore the order and award must be reversed, and a new hearing granted, with costs to abide the event.

ELKUS, J. (dissenting). Benjamin Lorchitsky, the claimant, was employed by the Gotham Folding Box Company as a packer and general helper on March 11, 1918. On that day he was carrying bundles of cardboard from the sidewalk in front of his employer's premises, loading them on the elevator to be carried upstairs. While thus engaged, one Matrullo a stranger, offered to assist in his work. The claimant refused his services, but Matrullo insistead upon carrying a bundle and while so doing, the cord fastening the same broke. Thereupon the claimant called Matrullo vile names, and Matrullo, without any further cause, struck the claimant several times. That claimant continued his work for nearly an hour, when, walking in the permises of his employer, carrying another bundle, he suddently fell down and became unconscious. No one saw him fall, and whether he tripped on an obstacle or not is not known, and he is apparently unable to tell. It is conceded that the claimant is afflicted with paralysis of the right side of the face and upper and lawer limbs.

The Industrial Commission has found that he received injuries consisting of a fractured jaw, and that such injuries were received while in the course of his employment. An opinion was written by one of the commissioners after hearing the testimony, and this opinion had been specifically made a part of the award, which has been made in favor of the claimant. The Industrial Commission unanimously found, as a fact, that the claimant was injured while working for his enployer at his

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employer's plant, and that while engaged in the regular course of his employment he received the injuries stated, and that these injuries were accidental injuries arising out of and in the course of his employment. This determination has been unanimously affirmed by the Appellate Division.

In enacting the Workmen's Compensation Law, the Legislature was exercising the police power of the sovereignty under the provision of article 1 of the Constitution, and in so doing outlined a general scheme, the details of which, as applied to each individual state of facts, was necessarily left to the State Industrial Commission. The findngs of the commission, when supported by a proper hearing, with the opportunity to produce facts, is final, as though the legislature itself had passed the act specially to cover the facts presented. Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; Health Dept. of N. Y. v. Rector, etc., of Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St.. Rep. 579; Hibben v. Smith, 191 U. S. 310, 24 Sup. Ct. 88, 48 L. Ed. 195; Burfenning v. Chicago, St. P., M. & O. Ry. Co., 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; Bates & Guld Co. v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894.

Section 23 of the Compensation Law provides that the award or decision of the commission shall be final and conclusive, unless reversed or modified upon appeal. Upon such appeal, this court is bound by the presumptions imposed by the Compensation Law itself to the same extent as the commission. These presumptions are found in section 21 of the law and are as follows:

"In any proceedng for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary.

"1. That the claim comes within the provisions of this chapter;

"2. That sufficient notice thereof was given;

"3. That the injury was not occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another;

"4. That the injury did not result solely from the intoxication of the injured employee while on duty."

In the record of this case no evidence has been produced to rebut these presumptions. On the contrary, evidence was produced which was decided by the commission sufficient to sustain direct finding by it that the claimant received his injuries while engaged in the regular course of his employment. Matter of McQueeney v. Sutphen & Myer, 167 App. Div. 528, 153 N. Y. Supp. 554. In the absence of any evidence to rebut the presumptions, this finding becomes final and controlling. Matter of White v. N. Y. Central & H. R. R. R. Co., 216 N. Y. 653, 110 N. E. 1051; N. Y. Cent., R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629.

Section 20 of the Compensation Law expressly states:

"The decision of the commission shall be final as to all questions of fact, and, except as provided in section 23, as to all questions of law."

It is beyond the power of this court to transcend the law itself, and while this court may have power to set aside a finding clearly without any facts to support it, it cannot set aside a finding based on a conflicting state of facts. Matter of Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540.

There is a lengthy discussion of the facts and circumstances as to the injury and its causes in the commission's opinion. The majority opinion of this court properly finds fault with the practice of incorporating the opinion of the commission as a part of the findings. It is a prac-

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tice to be discouraged, and I concur in so much of the prevailing opinion. Criticism is also made of the statement in the opinion of the com mission that—

"If his fall was caused by the assault committed on the sidewalk, it arose out of his attempt to handle his employer's product and defend his employer's property. It therefore arose out of and in the course of his employment. If, on the other hand, his injuries resulted from a fall while carrying papers in his employer's loft, he is equally to be compensated under the law."

Opinions are necessarily argumentative and frequently discursive, and it is therefore at times difficult to ascertain what facts are exactly found; but where findings are conflicting, it is the duty of a court to endeavor to reconcile and to give each finding some office to perform. Green v. Roworth, 113 N. Y. 462, 467, 21 N. E. 165, 166. Chief Judge Ruger in that case said:

"So far, therefore, as these findings are conflicting, it is the duty of the court to endeavor to reconcile them and give to each some office to perform. It is only when this cannot, by a reasonable construction, be accomplished, that the court are bound to accept that finding most favorably to the appellant."

Chief Judge Ruger laid down the rule that examination must be made of the findings to see how far they are inconsistent. If the formal finding is broader than the one alleged to be inconsistent with it, then the formal finding will prevail. There may be an inconsistency between the findings as set forth in the opinion; but, when read in the light of the general finding of the commission, it is quite clear what was really found. Formal findng of the commission brings this case within the Workmen's Compensation Law, because it specifically finds that claimant was injured in the regular course of his employment, and that those injuries were accidental injuries, and arose out of and in the course of his employment. The evidence clearly justifies such findings. They are not necessarily inconsistent with any findings contained in the opinion.

The opinion contains a finding of the assault, and also of the fall upon the floor. It is the intent of the commissioner writing the opinion to show that the claimant was assaulted, following which, within a short time, he fell upon the floor, and the two things together caused the injuries which he sustained. The Industrial Commission had before it a question of fact. It decided that in favor of the claimant. To send this case back for a new hearing under these circumstances, would seem to be a useless task. Upon the identical evidence, the commission might well find that the claimant received his injuries while upon the sidewalk engaged in his employer's work and with his employer's possessions.

It is undisputed that, if the commission had found that the injuries which the claimant had received were those received on the sidewalk, although he did not collapse until an hour afterwards, and this finding had been unanimously affirmed, there would be no question of the right of the claimant to recover; but, because of the incorporation of the opinion in the finding and of the alternative language used in the opinion, the cause of the injury is said to be uncertain. That is the ground upon which the prevailing opinion is based.

The commission found that Matrullo, the assailant, without any sufficient reason, interfered with the claimant in his work, forced himself upon him with his assistance and when he was repelled, assailed the claimant more or less severely. Such an assault arose out of and in the course of the employment. The general finding of the commission that the claimant was injured in the regular course of his employment, and injuries are set forth.

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The purpose of the Workmen's Compensation Law was to provide an informal hearing and decision. A reasonable observance of rules of law, of course, must be had; but the law should be construed broadly and liberally without technicality. Matter of Petrie, 215 N. Y. 335, 109 N. E. 545; Matter of Costello v. Taylor, 217 N. Y. 179, 111 N. E. 775; Matter of Winfield v. N. Y. C. & H. R. R. R. Co. 168 App. Div. 351, 153 N. Y. Supp. 499, 216 N. Y. 284 110 N. E. 614, Ann. Cas. 1916A, 817; Matter of Rheinwald v. Builder's Brick & Supply Co., 168 App. Div. 425, 153 N. Y. Supp. 598; Matter of McQueeney v. Sutphen & Myer, 167 App. Div. 528, 153 N. Y. Supp. 554. Chief Judge Hiscock, in Matter of Petrie, 215 N. Y. 335, 338, 109 N. E. 549, 550, said:

"The Workmen's Compensation Law was adopted in deference to a widespread belief and demand that compensation should be awarded to workmen who were injured and disabled temporary or permanently in the course of their employment, even though sometimes the accident might occur under such circumstances as would not permit a recovery in an ordinary action at law. The underlying thought was that such a system of compensation would be in the interest of the general welfare by preventing a workman from being deprived of means of support as the result of an injury received in the course of his employment. The statute was the expression of what was regarded by the Legislature as a wise public policy concerning injured employees. Under such circumstances we think that it is to be interpreted with fair liberality, to the end of securing the benefits which it was intended to accomplish."

Applying this salutary rule of construction and having a due regard for the presumptions imposed by the statute, I believe that the findings are justified by the evidence and in accordance with the rule laid down by Chief Judge Ruger in Green v. Roworth supra, the award appeal from should be affirmed.

Collin, Hogan, Pound, McLaughlin, and Andrews, J. J. concur with Hiscock, C. J.

Elkus, J., reads dissenting opinion,

Order reversed, etc.

CLAYTON v. FOUNDATION CO. et al.

(New York Supreme Court, Appellate Division, Third Department. November 18, 1920.

185 New York Supplement 31

MASTER AND SERVANT—PERMANENT LOSS OF FINGER ESSENTIAL TO WARRANT AWARD FOR PROPORTIONATE LOSS OF HAND UNDER COMPENSATION LAW; "LOSS OF MORE THAN ONE FINGER."

Under Workmen's Compensation Law, § 15, there must be an actual physical loss of more than one finger, or a "permanent loss of the use of a finger," in order to constitute such loss, before the commission has jurisdiction to make an award for the "proportionate loss of the use of the hand", and a slight injury to three fingers does not constitute "the loss of more than one finger."

(For other cases, see Master and Servant, Dec. Dig. § 385[12.].)

(For other definitions, see Words and Phrases, First and Second Series, Loss of Limb.

John M. Kellogg, P. J., and Kiley, J., dissenting.

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Appeal from State Industrial Commission.

Proceeding by Taylor Clayton under the Workmen's Compensation Law to obtain compensation for personal injuries, opposed by the Foundation Company, the employer, and the Employers' Mutual Insurance Company of New York, insurance carrier. From an award, the employer and the insurance carrier appeal. Award reversed, and case remitted.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Blauvelt & Warren, of New York City (Francis J. MacIntyre, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for Industrial Commission.

WOODWARD, J. The award in this case is for the loss of use, to the extent of 50 per cent. of the use, of the left hand of the claimant. The only evidence as to the injury, outside of the alleged view of the commissioner, is that of the examining physician. He says that—

"There is evidence of the laceration of the distal phalange of the left index finger, with missing nail, and changes in the distal phalangeal joint, causing marked restriction of the index finger. Likewise evidence of laceration of the second surgical joint with tendon involvement and severing of the ligaments, causing stiffness of the distal and middle phalangeal joints of these two fingers."

With this evidence before the commission, the commissioner said to the claimant: "Let me see your fingers. These were cuts and lacerations?" The claimant replied: "They were cut off here"—indicating. The commissioner replied: "Practically three fingers. Let me see you close your hand." The examining physician gave it as his opinion that the injury was equivalent to the loss of one-third of the hand, but the commissioner decided that "from a vocational standpoint" the injury was equivalent to the loss of one-half of the use of the left hand, and the full commission has made an award upon this basis.

Under the provision of section 15 of the Workmen's Compensation Law (Consol. Law, c. 67), compensation is awarded "for the loss of a first finger," "for the loss of a second finger," etc. Then it is provided that—

"the loss of the first phalange of the thumb or finger shall be considered to be equal to the loss of one-half of such thumb or finger," and that "the loss of more than one phalange shall be considered as the loss of the entire thumb or finger."

Having thus carefully provided what shall constitute the loss of a finger the statute provides that—

"Where the injury results in the loss of more than one finger, compensation therefor may be awarded for the proportionate loss of the use of the hand thereby occasioned."

There must be a loss of one finger, as defined in the statute, and an injury in excess of such loss, as a condition precedent to the power to grant compensation for the loss of the use of the hand. A slight injury to three fingers does not constitute the "loss of more than one finger," as prescribed in the statute. It is true that it is provided that the "permanent loss of the use of a hand, arm, foot, leg, eye, thumb, finger, toe or phalange, shall be considered as the equivalent to the loss of such hand, arm, foot, leg, eye, thumb

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finger, toe or phalange"; but this, in the case of a finger, is for the permanent loss of the use, and not a mere impairment of the use of such finger, for it is provided that—

"For the partial loss or the partial loss of the use of a hand, arm, foot, leg or eye, compensation therefor may be awarded for the proportionate loss or proportionate loss of the use of such hand, arm, foot, leg or eye"

Nothing short of "the permanent loss of the use" of a finger is to be regarded as the equivalent of the loss of such finger, and the statute provides (section 15) that "the compensation for the foregoing specific injuries shall be in lieu of all other compensation," with an exception having no bearing here. In a case of "disability partial in character but permanent in quality" the compensation is provided in a fixed schedule with careful definition in section 15, and it is only in a case where there is a loss of more than one finger," as a loss is defined in the law, that there is any justification for making an award for the proportionate loss of the use of a hand thereby occasioned." There must be an actual physical loss of more than one finger, or a "permanent loss of the use of" a finger, in order to constitute such loss, and it is only where there is such a loss that the commission has jurisdiction to make an award for the "proportionate loss of the use of the hand." The arbitrary determination of a commissioner that "on the basis of the doctor's opinion and my own judgment from a vocational standpoint is equivalent to the loss of one-half of the hand " is not a determination, upon evidence, that there has been a "loss of more than one finger," as such loss is defined in the statute, and the award may not be sustained. Whatever may be thought of the maxim of the common law that "it is the duty of the judge, when requisite, to amplify the limits of his jurisdiction," there can be no justification for the State Industrial Commission, a mere statutory body, to reach out and bring within the law matters which are excluded by the language of the act.

The award should be reversed, and the case returned to the State Industrial Commission to make such award as the statute provides.

Cochrane and Henry T. Kellogg, JJ., concur.

JOHN M. KELLOGG, P. J. (dissenting). The statute fixes the compensation for the loss of a finger, and the Court of Appeals has held that in such a case it is immaterial what the vocation of the employee is. Matter of Grammici v. Zinn, 219 N. Y. 322, 114 N. E. 397. In this case there was not the loss of a finger or the use of a finger. The serious loss was to the hand, and the case is governed by the part of section 15 entitled "Partial Loss and Partial Loss of Use," which reads:

"For the partial loss or the partial loss of the use of a hand, arm, foot, leg, eye, thumb, finger, toe or phalange, a compensation therefor may be awarded for the proportionate loss or proportionate loss of the use of such hand, arm, foot, leg, eye, thumb, finger, toe or phalange."

The law is intended to protect workmen, and undoubtedly the commission has the right to consider, in determining as to the loss of the use of the hand, that the employee is a workman. Each case must depend upon its particular facts. Commissioner Perkins considered that the injury to the left hand of this left-handed carpenter resulted in a loss of at least one-half the hand. She came to this conclusion after manipulating the hand and ascertaining its grasping power. She evidently felt that the man, at his time of life and in his condition, was only able to earn a living by his hands. Manifestly an injury to his working hand would render him less useful as a

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wage-earner than it would if he were a clerk. The loss of use must depend in a degree upon the use a man has for the hand. The doctor certifies to a loss of grip in the hand. Commissioner Perkins tested the grip, and stated her opinion that the loss to the use of the hand was one-half. Her statement, as well as the statement of the physician, was a part of the atmosphere of the case, and the knowledge that she had and her determination that the loss was one-half of the use was before the commission. See section 65. She was one of the commissioners who in fact made the award appealed from. The award does not refer to the man's vocation. In effect it determines that, from the facts appearing upon the hearing, the doctor's certificate, the test of the hand by Commissioner Perkins, that the loss of the use of the hand was one-half. We may treat what the commissioner said at the hearing as to vocation as her opinion only. The commission in its determination did not adopt her opinion upon that subject, but agrees with her that one-half of the use of the hand was lost.

That the view and the testing of the hand by the Commissioner was important, and may override the expert testimony, must be conceded. In appeals from the Court of Claims, where the court has viewed the premises, and has based its award upon its view, and has not adopted the expert evidence, we consider that the view may well control the experts' opinions. The actual injury to the fingers was apparent. A loss of grip of the hand could be well ascertained by any person upon a practical test. It was not a question for expert evidence, but was a plain matter of common sense. The commission could not have any better evidence before it than the results of the test made by Commissioner Perkins. The question for us to consider is only whether there is any evidence upon which the award can stand. I feel that we are reviewing the determination of a question of fact, which the statute prohibits us from doing.

I favor an affirmance.

Kiley, J., concurs.

DAVIS v. BUTLER.

(New York Supreme Court, Appellate Division, Third Department. November 18, 1920.)

185 New York Supplement, 119.

MASTER AND SERVANT — COMPENSATION AWARD HELD SUBJECT TO REVERSAL FOR WANT OF NOTICE.

Where a death claim against a householder, who denied he was the employer of deceased, was not filed within a year after death, as required by Workmen's Compensation Law, and the notice of hearing which named the householder's agent, stated that the claim was against one whom the householder claimed was the employer, and the hearing was entitled as against that party who claimed to be a coemployee and the householder was not represented by attorney, but attended and under the commissioner's command testified as a witness, the statutory bar was not waived, and an award against the householder was subject to reversal as having been rendered without giving him his day in court.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

John M. Kellogg, P. J., dissenting.

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Appeal from State Industrial Commission.

Proceedings under the Workmen's Compensation Law (Consol. Laws, c. 67) by Mary E. Davis against Lawrence S. Butler, uninsured alleged employer, to recover compensation for the death of claimant's husband, Charles E. Davis. From an award of compensation by the State Industrial Commission, the alleged employer appeals. Award reversed, and claim remitted to the Commission.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

McKinstry, Taylor & Patterson, of New York City (Martin Taylor, of New York City, of counsel), for appellant.

Charles D. Newton, Atty. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

HENRY T. KELLOGG, J. This award was made for the death of one Charles E. Davis against one Lawrence Butler as his employer. Butler was a householder, who employed one Charles Hess to paint his house. Hess hired Davis to assist him. Davis fell from a ladder while painting the house, and died as a result of his fall. The Industrial Commission determined that Davis was employed by Butler, rather than by Hess. It is now claimed that these proceedings were laid against Hess, to the exclusion of Butler, and that accordingly the commission had no right to make the award which it did.

The widow filed a claim, naming Lawrence Butler as the employer, which was apparently dated the 17th day of July, 1918, and was apparently verified on the 16th day of July, 1919. The claim states that the death of her husband occurred on the 20th day of May, 1918, or more than one year prior to the time when the claim must have been filed. In this respect the claim was corroborated by an affidavit of the undertaker, who prepared the body of the deceased for burial, and a report of his attending physician. In addition to the claim against Butler another claim, entitled "Employee's Claim for Compensation," appears in the record. This claim states that the date of the death was May 20, 1919, and gives the "name of employer" as "charles Hess." Curiously enough, the claim seems to have been dated and verified on the 26th day of January, 1920, or more than two weeks after the award, from which the appeal is taken, was made. However, the fact that the Hess claim comes to us as a part of the record upon appeal, and the fact that the hearing had upon this matter was entitled "Charles E. Davis v. Charles Hess," indicate that, in spite of the dates appended thereto, the Hess claim was on file prior to any proceeding which was had in the matter.

Apparently, therefore, there were two claims filed for the death of Davis; the first one against Lawrence Butler, and the second one against Charles Hess. However, even if this inference is not justifiable, Butler may well have assumed that a claim against Hess had been filed from the fact that the only notice of hearing served read as follows:

"To Mrs. Mary E. Davis, Claimant, Stony Brook, N. Y., Box No. 9; Charles Hess, Employer, St. James, L. I.; Insurer None; Ernest Osborne, Atty., 71 Broadway, City: You are hereby notified that this claim will be heard on Thursday, October 9, 1919, Room 13A, at 9:30 a. m., at 230 Fifth avenue, New York."

On October 9, 1919, the day specified in the notice, a hearing was had before Commissioner Sayer, the minutes of the proceedings in which were, as before mentioned, entitled "Charles E. Davis, Claimant, against Charles Hess, Employer." The minutes show that there were present Charles Hess, Mrs. Davis, and Lawrence Butler, and

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that an attorney appeared for Hess, but no attorney appeared for Butler. In the course of the proceedings Commissioner Sayer turned to Osborne, who was named in the notice and was an agent for Butler, and said: "Is Mr. Butler represented?" To which Osborne replied:

"I do not represent him. I am not an attorney. I look after a good deal of the affairs of Mr. Butler, but Mr. Butler is not represented here. Mr. Butler is here himself. This is Mr. Butler."

Thereupon Commissioner Sayer said:

"Suppose you take the stand, Mr Butler, in regard to your knowledge of the situation."

Butler then took the stand and gave testimony. Not once during this hearing was it intimated to Butler by the commissioner or any other person, either directly or indirectly, that any effort was then being made to charge him with liability, or that the claim being tried was any other than a claim against Charles Hess, as indicated by the notice of the hearing and the heading which the minutes of the hearing bore. Thereafter, in January, 1920, Commissioner Sayer made an award, not against Charles Hess, but against Lawrence Butler. In an opinion then handed down by him he stated that the claim against Butler was not filed within a year after the death of the deceased, but that Butler could not take advantage of the bar of the statute, which otherwise would outlaw it, by reason of his neglect to raise that objection at the time the hearing was held. Thereafter an application was made by Butler to open the proceedings on the ground that he had never been notified that they were being had against himself. and therefore that he had been denied an opportunity to present his case.

It seems to me that this application should have been granted, and that the refusal to grant it, as well as the award previously made against Butler, was nothing less than a denial of justice. When Butler was notified, through the notice addressed to his agent, Osborne, that a hearing would be had, he was advised thereby that the claim to be heard was the claim made against Charles Hess. When he attended at the hearing, he was present there, not as a party, but either as a witness under a subpœna or out of curiosity as a spectator. When he took the stand as a witness, he did so, not to defend himself, but under the command of the commissioner who presided. He was at all times unattended by any attorney, who could advise him of the danger which impended in this quasi court, which knows no rules. He could have had no conception that a trial was being conducted against himself.

The deduction that Butler waived the bar of the statute by not raising it, when through a fault of the commission no attorney was present to advise him so to do, and there was nothing to indicate that he was being charged as a party, is a feat in reasoning which my mind lacks the agility to follow. I favor a reversal of this award, and the granting of a new trial, to give to Lawrence Butler his day in court.

The award should be reversed, and the claim remitted to the Industrial Commission. All concur, except

JOHN M. KELLOGG, P. J. (dssenting). The award was made January 5, 1920, and was made in death case No. 228.343. At the time it was made apparently there had been no claim filed against Hess, as the claim made against him was dated the 26th day of January, 1920, and was sworn to before the notary upon that date. It has no number. The correspondence between the commission and Butler gave the number of the claim against him. After the claim was filed the commission wrote Butler for a statement of the facts. Osborne, as his attorney, answered the letter, saying that Hess was the employer, and not Butler, and thereafter communications with reference to the claim so far as Butler was concerned, were between the commission and Osborne, his

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attorney. On September 3d, in a letter from the commission stating that Butler was the employer and giving the number of the claim, Osborne was informed that Hess denied liability and claimed to be a coemployee of the deceased, and continued:

"A very serious question arises as to whether Mr. Butler or Mr. Hess was the employer of the above-named deceased, and asked him for further information, which was given, giving the case as Davis against Butler."

After he had informed the commission that Hess, and not himself, was the employer, the notice of hearing described Hess as the employer, but below his name follows the name of Ernest F. Osborne, attorney. Osborne was not the attorney of Hess, but the attorney in fact of Butler. The minutes of the hearing mention Hess as the employer, and the number of the claim is the number of the claim against Butler. The stenographer's minutes at t he hearing for the first time named Hess as the employer, and that Hess appeared by an attorney, and that Butler was present. He was not present as a witness, and when it appeared that Butler was the employer, and not Hess, the commission asked if Butler was present. Mr. Osborne, his attorney, replied:

"I do not represent him. I am not an attorney. I look after a great deal of the affairs of Mr. Butler. Mr. Butler is not represented here. Mr. Butler is here himself. This is Mr. Butler."

The commissioner says:

"Suppose you take the stand, Mr Butler, in regard to your knowledge of the situation."

Mr. Butler was then sworn in full. Apparently the record indicates that, after the award was made, in some way, a claim was put into the record as against Hess; but, as we have seen, it was made and verified after the award. If that is so, there never was any legal proceeding against Hess. The proceeding was informal as to him. Butler evidently considered himself interested, and gave his side of the case, and was represented upon the hearing by his attorney. He gave a false scent, and in that way complicated the situation; but he is not prejudicated by this award, from the fact that he knew what was going on, had his day in court, and was fully heard.

I favor an affirmance.

FRANCISCO v. OAKLAND GOLF CLUB ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 10, 1920.)

185 New York Supplement, 97.

MASTER AND SERVANT — SOCIAL CLUB'S EMPLOYEE NOT EMPLOYED IN "BUSINESS FOR PECUNIARY GAIN," WITHIN WORKMEN'S COMPENSATION LAW.

A golf club, supported by annual dues and maintained exclusively for golf and social purposes, conducting its restaurant at a loss, and not declaring or expecting to pay dividends, is not engaged in "business for pecuniary gain," within Workmen's Compensation Law, § 3, subd. 5, and an award of compensation for injuries to its cook cannot be sustained.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

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Appeal from State Industrial Commission.

Workmen's compensation proceeding by Maria Francisco for the death of her husband, William Francisco, against the Oakland Golf Club, employer, and the Standard Accident Insurance Company of Detroit, insurance carrier. From an award by the State Industrial Commission, employer and insurance carrier appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Neile F. Towner, of Albany, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for Industrial Commission.

HENRY T. KELLOGG, J. The deceased employee was a cook in the employment of a membership corporation known as the Oakland Golf Club, which was in possession of a golf course and club house, the use of which was free to all members. In the club house a restaurant was maintained on the a la carte plan for members and their guests. While the deceased was at work cooking a chicken in the kitchen of the restaurant, he was fatally burned by the explosion of an alcohol stove.

The club was maintained exclusively for social purposes and to provide members with opportunities to engage in the game of golf and other out of doors sports. It was supported by annual dues paid by members, and was not engaged in any business enterprise whatsoever. Even its restaurant, which was operated to promote the social activities of the club, was so conducted that its yearly disbursements for maintenance exceeded its yearly receipts. No dividends were distributed by the club to its members, nor was it within the contemplation of its organizers or members that dividends should ever be paid.

It is entirely clear, therefore, that the deceased employee was not employed in a trade, business, or occupation carried on by his employer for pecuniary gain, within the meaning of subdivision 5 of section 3 of the Workmen's Compensation Law (Consol. Laws, c. 67). An award for his death, therefore, should not have been made.

The award should be reversed, and the claim dismissed. All concur.

GREENBERG v. GREENBERG et al.

(New York Supreme Court, Appellate Division, Third Department November 10, 1920.)

185 New York Supplement 258

MASTER AND SERVANT—ALTERNATIVE FINDING, NOT ELIMINATING CONTINGENCY OF INJURY THROUGH EMPLOYEE'S OWN UNAUTHORIZED ACT, HELD NOT TO JUSTIFY AWARD OF COMPENSATION.

Where Industrial Commission found, in the alternative, that the elevator which killed the employee was set in motion either by his attempt to run it, which was contrary to directions, or by the mechanism having got caught in sheets of canvas, which were properly being taken into the elevator by the employee, the commission, did not eliminate the

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contingency that the employee was killed by attempting to run the elevator himself, and its award of compensation to the widow must be reversed.

(For other cases, see Master and Servant, Dec Dig. § 416.)

Appeal from State Industrial Commission.

In the matter of the claim for compensation under the Workmen's Compensation Law (Consol. Laws, c. 67) for death of her husband, Alexander Greenberg, the employee, by Anna Greenberg, his widow, opposed by Max Greenberg, the employer, and the Ætna Life Insurance Company, the insurance carrier. From an award of the State Industrial Commission, the employer and insurance carrier appeal. Award reversed, and claim remitted to the Commission for further action.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellegg, and Kiley, JJ.

James B. Henney, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for State Industrial Commission.

Henry T. Kellogg, J. The employer was a boss painter, who had a job to paint the hallways in an apartment house. The deceased was one of three employees employed to execute the job. For the use of the tenants an elevator was maintained in the building. It was the practice of the painters to carry their ladders, canvases, and paint pots into the elevator every night in order to be taken to the cellar, where they might store them until morning. At the close of the day of the accident the deceased, with one Steinberg, carried a load of articles to the elevator. Steinberg entered first, and when depositing his load in the corner felt the elevator move upwards. He turned around and saw the deceased near the elevator switch, apparently partly in the doorway and partly in the elevator. When the elevator reached the floor above, the deceased was struck by the ceiling and killed.

It is not known whether the deceased attempted to start the elevator, or whether the mechanism was so jarred or struck that it automatically began to operate. It required a turn and a half of a large wheel to start the mechanism, so that it was at least highly improbable that any blow could accidentally have been struck which would have caused the necessary revolutions. On the other hand, if the deceased had started to operate the elevator, he was acting outside the scope of his employment. It was not known to his employer that he had ever tried to operate it until noon of the day in question, when his employer rebuked him and forbade his doing so again. He had run it a few times before, but had not made it a practice, nor was such a practice permitted. The Industrial Commission in this dilemma made the alternative finding that—

"The said elevator was set in motion either by the deceased attempting to run the same, or the mechanism of the same having gotten caught in the large sheets of canvas that were being taken to the upper floors."

Having made no decision between the two alternatives expressed, the commission has not elimnated the contingency that the deceased was killed by running the elevator himself, and doing that which he was not only employed to do, but that which he was particularly directed never to do. We express no opinion as to whether the evidence would bear the construction that the elevator started automatical-

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ly, preferring as the wiser course the remission of the case to the commission, not only for corrected findings, but for the taking of further proof if the same appear desirable.

The award should be reversed, and the claim remitted to the Industrial Commission for further action. All concur.

KADE v. GREENHUT CO., INC. et al.

(New York Supreme Court, Appellate Division, Third Department. November 18, 1920.)

185 New York Supplement 9

MASTER AND SERVANT—EVIDENCE HELD INSUFFICIENT TO SUSTAIN AWARD UNDER COMPENSATION LAW.

In a proceeding by an administratrix under the Workmen's Compensation Law, to obtain compensation for personal injuries to deceased, where the disability was an infection or disease of the kidneys, claimed to have been the result of an accident, evidence *held* insufficient to sustain award.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

John M. Kellogg, P. J., and Henry T. Kellogg, J. dissenting.

Appeal from State Industrial Commission.

Proceeding by Matilda Kade, under the Workmen's Compensation Law, to obtain compensation for the estate of Jessie Kade, deceased, for personal injuries suffered by the deceased, opposed by the Greenhut Company, Incorporated, the employer, and the Zurich General Accident & Liability Insurance Company, Limited, insurance carrier. There was an award of compensation, and the employer and insurance carrier apeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Philip J. O'Brien, of New York City (John N. Carlisle, of Albany, of counsel), for appellants.

Charles D. Newton, Atty. Gen., (E. C. Aiken, Deputy. Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. The State Industrial Commission has made an award to the administratrix of Jessie Kade, deceased, for compensation for disability, not death benefits, from December 29, 1917 to May 7, 1919, the date of her death. Whether it is proposed, after the payment of this compensation, to continue the punishment after death, and compel the insurance carrier to pay death benefits, does not appear, though almost anything seems possible. The claimant in this case is the administratrix of Jessie Kade, deceased, though for the purpose of convenience in discussion we will refer to the decedent as the claimant, and treat the case as though she had survived and was here claiming the compensation.

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The claimant, Jessie Kade, was employed by the Greenhut Company in New York, on the 18th day of July, 1917, as a saleswoman in the hardware department. On that date a stock of hardware was to be placed on the shelves. A part of the invoice consisted of galvanized tubs wired together in packages of six. Claimant removed the wires and found that the tubs stuck together, and being unable to separate them, she picked up the package, and in doing so she says that she "felt something snap inside of her," and "I fell backward; then I fell against the tubs, and I got weak, and I fainted. and when I came to I was on the floor." She further says that she struck her back and side against the washtubs; that she subsequently went to the toilet room, where in passing water she bled; that there was blood in the basin in the toilet, and she makes it sufficiently clear that this blood was not of menstrual origin; so that it may be assumed, for the purposes of this discussion, that there was an accident on the 18th day of July, 1917, happening in the course of the regular employment, and that the injury sustained was in the back and side in the region of the left kidney, and that this injury was sufficient to produce some flow of blood, although from the description given it is fair to presume this was not a large flow.

The claimant testifies that the accident happened at about half past 10 in the morning; that she stayed in the sick room until lunch time; that she went out to lunch, returning to the sick room, where she stayed until 4 o'clock, when she went back to her work. While the claimant says she frequently went back to the sick room for rests that she suffered pain in her side, etc., the evidence shows that she continued in the employment up to the middle of December, 1917, being attended by Dr. Eichberg, the store physician, who says the claimant told him she had been lifting something heavy, and that she had strained some of the muscles of her right abdomen; and the claimant testifies that "the doctor strapped my abdomen with adhesive plaster," and that this treatment was continued up to the time that she was sent to one Dr. Tompkins, a female physician, for an examination which she refused to male doctors. Dr. Eichberg, after testifying to sending the claimant to Dr. Tompkins, and that her diagnosis was "tipped uterus and right kidney dropped," said that he found no causal relation between the injury, and the subsequent condition developed at an operation, which was the conceded cause of the disability.

Dr. Tompkins testified to making an examination of the claimant and that she found a displaced uterus. This examination occurred on the 21st day of September, about a month after the accident, and the doctor was unable to say whether the tipped uterus and the dropping of the right kidney, which she also found, were due to the accident. She testified that they might have been, and that a woman standing on her feet a great deal, as in the case of the claimant, might develope these troubles independently of the accident; that this was quite common. Answering a hypothetical question. based on the conditions shown after the operation for the removal of the diseased left kidney, Dr. Tompkins testified that she did not think it would be possible for any connection between the accident and the disease of the kidney. Commissioner Archer asked at this point:

"If there were a pre-existing kidney lesion, would an accident such as described cause an acute exacerbation of the condition?"

To this Dr. Tompkins answered:

"Possibly, but it would be necessary to have germs in the kidney to have pus there, and an accident causing a dropping of the kidney could not put germs in the kidney."

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Dr. Eichberg agreed in this proposition, and Dr. Tompkins testified, in answer to the commissioner, that there need have been no disability from the accident itself; that there would have to be a little treatment for two years—one visit a month for two years— to cure the condition which she found on her examination.

The claimant's family physician was called, and testified that he had treated the claimant for a slight difficulty some time previous to the accident; that he was again consulted about the middle of December, 1917, and up to the time that he sent her to St. Francis Hospital, where the operation for the diseased kidney took place. He said, when she came to him in December, the claimant gave him a history of an exposure to a rainstorm; that he examined her, and thought she was suffering from grippe pleurisy; that he treated her for that a few days, and getting no results, became suspicious of his diagnosis, that he insisted upon a vaginal examination, which was refused. He says the claimant at that time informed him that she had been to Dr. Tompkins, and that Dr. Tompkins had inserted a pessary. The family doctor then says he made a urine examination, and after watching her for a few days sent her to St. Francis Hospital, where an examination revealed a pus kidney, for which an operation was performed, demonstrating the accuracy of the diagnosis. This doctor was asked if he found any causal relation between the accident and the condition which was demonstrated by the operation, and he practically confirms the two previous doctors, by introducing a theory as to the infection. He says:

"The only way I consider her condition is this: That the accident or injury she had formerly at Greenhut's weakened or bruised her kidney, and the insertion of the pessary carried infection to this bruised or injured Kidney and caused the infection."

Of course, if this is true then the accident was not the proximate cause of the disability for which this award has been made. In Laidlaw v. Sage 158 N Y. 73, 98, 99, 52 N. E. 679, 44 L. R. A. 216, the court, in discussing proximate cause, quotes with approval from Bishop on Non-Contract Law (section 42), that "if, after the cause in question has been in operation some independent force comes in and produces an injury, not its natural or probable effect, the author of the cause is not responsible"; and the Workmen's Compensation Law (Consol. Laws, c. 67) distinctly provides that personal injury shall "mean only accidental injuries arising out of and in the course of the employment and such disease or infection as may naturally and unavoidably result therefrom." Clearly the alleged infection, introduced a month after the alleged accident by the introduction of a pessary, was not such an "infection as may naturally and unavoidably result" from a fall which merely bruises the person.

It is to be noted that the award does not date from the alleged accident in July, 1917, but from December 29, 1917, at about which time the diseased kidney became manifest, and, according to the claimant's own physician, this disease was communicated, not by the accident, but by the insertion of a pessary a month or more after the accident, and the pessary, not the accident, conveyed the infection. Obviously, therefore, up to this point there is no casual relation between the accident and the conceded cause of disability. Prolapsus uteri and a falling of the right kidney, Dr. Tompkins says, would not produce any disability—was a condition requiring a monthly treatment for two years, which would not incapacitate the patient, and it was a condition quite common among women occupied as was the claimant.

Dr. O'Neill was a physician at St. Francis Hospital, and he testified that the claimant was suffering from a pus kidney when she reached the hospital on the 18th of January; that the record showed that she gave

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as the history of her then difficulty that she had been exposed to a severe rainstorm; that she was suffering from chills and fever, and had pleurisy. Answering a hypothetical question, this physician said the accident was "pretty remote."

Dr. Edgerton, who performed the operation on the claimant, in answer to a question by Dr. Lewy, the commission's advising physician, declared that he could not connect the injury with the disease. There appears to have been some controversy between Dr. Edgerton and Dr. Lewy as to what the facts were upon which the hypothetical questoin was based, and while it is difficult to follow the matter in the record with all the "ifs" and conjectures, it may be fairly said that Dr. Edgerton did give it as his opinion that, if the alleged fall of the claimant resulted in a hemorrhage of the left kidney, this condition might have remained dormant, and eventually have developed the condition of the kidney which he found on the operation, which does not appear to have been tubercular, though of unusual size. This, in connection with the testimony of the claimant that the blood was not due to menstruation, seems to be the extent of the evidence in any manner tending to show that the disease which was the conceded cause of the disability for which this award has been made, was produced by the accident.

This evidence does not, of course, show that the hemorrhage was that of the left kidney, nor of any kidney. Dr. Tompkins testified that upon her examination she found a prolapsed uterus and a slight falling of the right kidney, and no testimony is adduced to indicate that the alleged blood passed at the time of the alleged accident may not have come from this disturbance of the organs, which Dr. Tompkins says may have been produced by the accident. Dr. Lewy, who has never been accused of lack of capacity of zeal in developing theories to support awards under the statute, gives it as his opinion that the accident was not the cause of the disease, and the State Industrial Commission has heretofore refused an award; but after the death of the claimant, and upon considering the opinion of a deputy commissioner, who dwells heavily upon the alleged fact that the claimant was an unusually healthy girl, it reverses its previous conclusions and makes an award to the administratrix of the estate of the original claimant.

It may be that out of this massive record of 239 pages, of which counsel for the commission says about one-half is "devoted to verbal sparring betwen counsel, which it is not necessary to read," there may be patched together enough to constitute a scintilla of evidence to support this award; but it is certain that the verdict of a jury could not rest upon such a foundation, and the question is thus presented how far this court is limited by the provision of section 20 of the Workmen's Compensation Law, that "the decision of the commission shall be final as to all questions of fact, and except as provided in section 23, as to all questions of law." It has long been recognized that whether there was evidence to support or tending to sustain a finding of fact is a question of law (People ex rel. Stephenson v. Bingham, 205 N. Y. 168, 169, 170, 98 N. E. 384, and authorities there cited), and the Constitution, article 6, § 9, provides that—

"No unanimous decision, of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals."

This would seem to impose the duty upon this court, in ordinary matters of appeal, of determining whether there was evidence "supporting or tending to sustain a finding of fact," and the United States Supreme Court, in Ohio Valley Water Co. v. Ben Avon Borough,

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253 U. S. —, 40 Sup. Ct. 527, 64 L. Ed. —, holds squarely that it is necessary to due process of law that "the state must provide a fair opportunity for submitting the issue to a judicial tribunal for determination upon its own indepedent judgment as to both law and facts." The Public Service Commission of the commonwealth of Pennsylvania took under consideration a complaint as to the rates of a water company, and fixed the valuation at a given figure, and permitted a rate to yield 7 per cent. The company appealed to the Superior Court, which reexamined the question of values on which the rates were to be determined, and largely increased such valuation. The Supreme Court reversed the Superior Court and directed the reinstatement of the order of the commission. The United States Supreme Court reversed the Supreme Court of Pennsylvania, remarking that upon considering the entire opinion—

"We are compelled to conclude that the Supreme court interpreted the statute as withholding from the courts the power to determine the question of confiscating according to their own independent judgment when the action of the commission comes to be considered on appeal," and that "in all such cases, if the owner claim confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise, the order is void because it conflicts with the due process clause, Fourteenth Amendment."

It would seem to follow that if the Workmen's Compensation Law is to be literally followed, and the commission's conclusions of fact are to become final whenever there is a scintilla of evidence to be found in the record, the legislation does not meet with the requirements of due process of law, and this difficulty is not met by anything in the provisions of section 19 of article 1 of the state Constitution, which were designed to meet the objections pointed out in Ives v. South Buffalo Ry. Co., 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156, and do not profess to deal with the questions of the mode of determining the essential facts on which the right to compensation depends. If, however, we read the provision of the statute to provide that the "decision of the commission shall be final as to all questions of fact, which are supported by legal evidence, and as to all questions of law which are not reversed upon appeal as provided in section 23," the way is open to a rational system, and one which can command the sanction of the courts; and this, we apprehend, is the true construction of the statute. Starting with the established rule that whether there is evidence to support a finding of fact is always one of law (People ex rel. Stephenson v. Bingham, 205 N. Y. 168, 98 N. E. 384), we find that as early as the leading case of Laidlaw v. Sage, 158 N. Y. 73, 97, 52 N. E. 679, 44 L. R. A. 216, it was held upon a long line of decisions, uniformly followed, that—

"to justify the submission to the jury of any issue, there must be sufficient proof to sustain the claim of the party upon whom the onus rests, and that mere conjecture, surmises, speculation, bare possibility or a mere scintilla of evidence is not enough." Matter of Case, 214 N. Y. 199—203. 108 N. E. 408.

It can hardly be argued successfully that evidence which would not warrant a jury in finding that the accident on which this claim must rest was the proximate cause of the disability of the claimant can be relied upon to support a finding of fact made by the State Industrial Commission, thus depriving the employer and the insurance company of their property. Such a holding would be to deny to these defendants that due process of law, that equal protection of the law, which is accorded to the owners of other property within the state of New York, and we are bound to believe that no such result was intended

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upon an appeal to this court. The right to appeal. provided in section 23 of the Workmen's Compensation Law, is not such a judicial determination as demanded by the court in the Ohio Valley Water Company Case, supra, unless it permits a full review as to the law and facts, and the language of the act is satisfied by making the fact conclusive, unless reversed upon the short appeal provided to a single department of the Supreme Court, without going to the extent of holding that it contemplates an abitrary power on the part of the commission to find facts unsupported by evidence which would pass muster in an ordinary court of law|

If we are right in these propositions, this case comes fully within the rule in Alpert v. Powers, 223 N. Y. 97, 119 N. E. 229, and the award may not stand.

The award appealed from should be reversed.

Kiley, J, concurs.

Cochrane, J., concurs in result, on the ground that there is no evidence to sustain the award.

John M. Kellogg, P. J., and Henry T. Kellogg, J. dissent,

RUSSO v. JARVIS STORES, INC. et al.

(New York Supreme Court, Appellate Division, Third Department. November 10, 1920.)

185 New York Supplement 281

MASTER AND SERVANT—COMPENSATION AWARD FOR DEATH OF INJURED EMPLOYEE HELD UNWARRANTED BY PROOF, NOT WITHSTANDING STATUTORY PRESUMPTION.

Despite the presumption given by Workmen's Compensation Law, § 21, where the deceased employee, a stableman, might have finished all his work shortly after 7 p. m., and between 7:30 and 8:10 he was discovered lying with broken ribs in a gutter about 50 feet from the employer's premises, no broom being found there to indicate he had been engaged in sweeping the sidewalk at the time, and none other of his known duties calling him to work outside the stable, award of compensation to his widow and children cannot stand.

(For other cases, see Master and Servant, Dec. Dig.,§ 405[4].)

John M. Kellogg, P. J. dissenting.

Appeal from State Industrial Commission.

In the matter of the claim of Catherine Russo for compensation on account of the death of James Russo under the Workmen's Compensation Law against the Jarvis Stores, Incorporated, the employer. and the Ocean Accident & Guarantee Corporation, Limited, the insurance carrier. From an award of the State Industrial Commission, the employer and insurance carrier appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, Woodward, Cochrane, Henry T. Kellogg, and Kiley, J. J.

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Robert H. Woody, of New York City (James F. Barber, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel). for Industrial Commission.

HENRY T. KELLOGG, J. The deceased was a stableman in the employment of a corporation which conducted a warehousing and trucking business. He was required to care for and feed about 20 horses, to keep their stalls and the stable clean, to unlock the stable in the morning, to lock it up at night, and occasionally to sweep the sidewalk in front of the premises. It was his duty to remain at the stable until the last team came in at night, so that it might be fed by him. Before feeding such a team it was required that 30 minutes after its arrival should elapse. On the night in question the last team came in at about 6:30, so that on this occasion the deceased may have finished all his work at shortly after 7. Between 7:30 and 8:10 the deceased was discovered lying in a gutter of the street about 50 feet from the premises of his employer. His ribs were broken, and he was carried to a hospital, where he soon afterwards died.

No broom was found upon the street to indicate that he had been engaged in sweping the sidewalk at the time of the accident. As no other of his known duties would have called him to work outside the stable, no fact appears from which it could justly be inferred that the deceased was in the course of his employment when injured. Nor is the claim assisted in this respect by any presumption given by section 21 of the Workmen's Compensation Law (Consol. Laws, c. 67). We might have held otherwise, were it not for the recent decision of the Court of Appeals in Eldridge v. Endicott, Johnson & Co., 228 N. Y. 21, 126 N. E. 254. That case is clear authority to the effect that all the elements of an accidental injury arising out of and in the course of an employment must be shown to exist by common law proof, independently of the statutory presumption before a claim may be allowed. This claim was not supported, either directly or inferentially by such proof, and it must therefore fail.

The award should be reversed and the claim dismissed. All concur, except John M. Kellogg, P. J., who dissents.

STATE INDUSTRIAL COMMISSION et al. v. VOORHEES et al.

(New York Supreme Court, Appellate Division, Third Department. November 18, 1920.)

184 New York Supplement 888

1 MASTER AND SERVANT—CLERICAL AND PROFESSIONAL EMPLOYEES HELD NOT "WORKMEN OR OPERATIVES," WITHIN COMPENSATION LAW.

Employees doing clerical or professional work *held* not "workmen or operatives," within Workmen's Compensation Law, §2, 2d subd. 45, making Workmen's Compensation law applicable to employment in which four or more "workmen or operatives" are regularly employed. (Per Kiley and Woodward, J. J.)

(For cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series. Workman.)

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2. MASTER AND SERVANT—WHOLESALE PRODUCE COMMISSION MERCHANT, WITH MORE THAN FOUR WORKMEN OR OPERATIVES, HELD SUBJECT TO COMPENSATION LAW; "EMPLOYEE"

Wholesale produce commission merchant, with more than four men employed at his place of business, *held* within Workmen's Compensation Law, 2, 2d. subd. 45, making employers of four or more "workmen or operatives" regularly employed subject to the act; "workmen or operatives" being included in term "employees," in view of section 3, subd. 4.

(For other cases, see Master and Servant Dec.Dig. § 361.)

(For other definitions, see words and Phrases, First and Second Series, Employee.)

3. MASTER AND SERVANT—INJURY WHILE GOING FOR CUP OF COFFEE HELD ONE "ARISING OUT OF AND IN COURSE OF EMPLOYMENT," WITHIN COMPENSATION LAW.

Wholesale produce commission merchant's employee, injured while crossing street, in working clothes, during nighttime, working hours, to get a cup of coffee, pursuant to a custom of the men, while talking to a prospective customer, *held* injured by an accident "arising out of and in the course of his employment," within Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

4. MASTER AND SERVANT—CLASSIFICATION OF EMPLOYMENTS AS HAZARDOUS BY COMPENSATION LAW EXERCISE OF POLICE POWER.

The classification of certain employments as hazardous under the Workmen's Compensation Law is in exercise of the police power, and its validity depends on whether there is a reasonable ground for determining that the employments so classified are more hazardous than other employments. (Per John M. Kellogg, P. J.)

(For other cases, see Master and Servant, Dec. Dig. § 347.)

5. MASTER AND SERVANT—CLERICAL AND PROFESSIONAL EMPLOYEES HELD "WORKMEN OR OPERATIVES," WITHIN COMPENSATION LAW.

The term "workmen or operatives," within Workmen's Compensation Law, § 2, 2d subd. 45, defining employment, in which four or more "workmen or operatives" are regularly employed, as a hazardous employment, subject to the Workmen's Compensation Law, includes clerical and professional employees; the nature of the work being immaterial. (Per John M. Kellogg, P. J.)

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Cochrane and Henry T. Kellogg, JJ., dissenting.

Appeal from State Industrial Commission.

Proceeding by Mrs. Lucy Clark under the Workmen's Compensation Law for compensation for death of John G. Clark, her husband, opposed by William Voorhees, employer, and the United States Fidelity & Guaranty Company, insurance carrier. From an award of the State Industrial Commission for claimant, the employer and insurance carrier appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

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William Warren Dimmick, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, and Bernard L. Shientag and Thomas L. Green, both of New York City, of counsel), for respondents.

KILEY, J. This claim is presented under the second subdivision numbered 45 of section 2 of the Workmen's Compensation Law (Consol. Laws, c. 67). The award was in favor of the claimant. and the finding, in that regard, made by the State Industrial Commission, is as follows:

"On May 30, 1918, while the said John G. Clark was engaged in the regular course of his employment, and at about 4 a. m. on that day, together with one Domenico Ercale, he left the plant of his employer to go to a nearby restaurant for the purpose of getting a cup of coffee, as was the custom of men engaged in the same or similar line of business, due to the nature of the work, and the hours at which the work is carried on in the business in which the deceased was employed, which practice was incidental to the employment of the deceased. While the said John G. Clark was engaged in the regular course of his employment, while attempting to cross the street at Chambers and Washington streets, New York City, for the purpose aforesaid, he was struck by a motor truck carrying United States mail, thereby sustaining a fracture of the sixth and twelfth ribs, which caused internal hemorrhages, which brought about his death on that day."

The employer was a wholesale produce commission merchant, the employment in which is not hazardous as that term is defined in the Workmen's Compensation Law, unless it comes under the last subdivision numbered 45 of section 2 of said law.

Appellant's contentions are two: (1) That the business in which claimant's husband was employed is not covered by the compensation statute. (2) That the accident did not arise out of and in the course of his employment. First taking these grounds in their numerical order as given above, and as made at the time of the hearing, we will place the second subdivision 45 of section 2, Workmen's Compensation Law, before us:

"Group 45. All other employments not hereinbefore enumerated carried on by any person, firm or corporation in which there are engaged or employed four or more workmen or operatives regularly, in the same business or in or about the same establishment, either upon the premises or at the plant or away from the plant of the employer, under any contracts of hire, express or implied, oral or written, except farm laborers and domestic servants."

[1] As the exception "farm laborers" and "domestic servants" is made in the same amending statute, it is not necessary to observe such class of service is not intended to be covered by the preceding provisions of said second subdivision 45 of section 2. The decision under this point turns upon what construction or interpretation we shall give to the words "workmen or operatives," found in the subdivision. That this employer had four or more men at work in the business, "or in or about the same establishment," does not admit of serious contradiction. The Attorney General's opinion upon the meaning of these ambiguous words appears in the record, viz.:

"That the term 'workmen or operatives' would not be held to include clerical or professional work, but would be limited to those who do manual labor or were mechanics or artisans."

It would be a violent stretch of the imagination to place the injured employee, in this case, under either of the heads excepted from the benefit of the statute, viz. "clerical or professional" He was neither. Ex-

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cluding the class excluded by the learned Attorney General, it is pertinent here to ask what class was intended to be covered, outside of the class already covered before the addition by the Legislature of this subdivision 45 in 1918. To reach a correct determination of the question under consideration, the purpose of the whole statute, as well as this particular subdivision, must be kept constantly in view. Not a line of this statute takes away any beneficence or advantage the employee theretofore had. On the contrary, each change or addition has had in mind, as the purpose sought, to give to the laborer increased benefits, never enjoyed before; and as time demonstrated the necessity, in order to carry that purpose to full fruition, an increase of the classes of laborers to be benefited, became the object. Subdivision 45 of section 2 is the latter kind of legislation solely. No other benefit or privilege is contemplated by that amendment made in 1918, which took effect in May of that year. Definitions of "workmen or operatives," given under other statutes or in cases passed upon under other conditions, are not conclusive, for the reason that this statute, in its wide scope and general purpose, has overreached all previous attempts. We may accept the limitation placed upon the classes not conceived to be under this statute, and we are no nearer a solution if we stop there, because, as we have said before, the injured party here does not come within the prescribed class.

[2] Dugan v. McArdle, 184 App. Div. 570, 172 N. Y. Supp. 27, affirmed 225 N. Y. 668, 122 N. E. 879, cited by appellants, is the case of a produce dealer. The alleged accident in that case occurred in 1917, before the amendment applicable here, and this amendment was not considered. Sections 29 and 30 were the only sections discussed. Gleisner v. Grass & Herbener, 170 App. Div. 37, 155 N. Y. Supp. 946, was decided in 1915. Bowne v. Bowne Co., 221 N. Y. 28, 116 N. E. 364, was decided in 1917, and passed, adversely to claimant, upon the question whether employers who were officers of the corporation were covered by the Workmen's Compensation Law. The claimant in the last-cited case suffered his injury in March, 1916, and under the law as it then existed he could not recover. In May, 1916, section 54 was amended by adding subdivision 6 to that section, so that thereafter claimants similarly situated could recover; and discussion of the Bowne Case here is profitable only to show the trend of the legislative mind toward the extention of classes to which the law can be applied.

When it was said in De la Gardelle v. Hampton Co., 167 App. Div. 617, 153 N. Y. Supp. 162, decided in 1915, "But it is no function of this court to extend by judicial determination the category of occupations entitled to the protection of the statute," there was no second subdivision 45 of section 2. It is "a condition, not a theory," that confronts us here. Webster's Dictionary says an employee "is one who is employed." This was the legislative idea of the word. As such it embraces workmen or operatives. Simultaneously the Legislature designated certain kinds of occupation as hazardous, and said the benefits under this statute should extend to those only who were employed in those occupations. Subsequently followed the enlargement of the occupations, making benefits accruable and increasing the classes to which they should accrue.

We are not left to conjecture nor abstract reasoning to reach a solution. The whole plan of the statute, its progress by amendment toward the ends sought, and the statute itself, point to the intention of the Legislature to have workmen or operatives included in the term "employee." Subdivision 4 of section 3, enacted in 1916, defines "employee" as follows:

" 'Employee' means a person engaged in one of the occupations enumerated in section 2 or who is in the service of an employer whose

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principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer, and shall not include farm laborers or domestic servants."

It will be noted that there are several different positions, in any one of which an employee may find himself when injured, and still get compensation. We are concerned with only the first, the description of which stops at the first disjunctive "or" found in the subdivision. Second subdivision 45 is in section 2, and no matter what the injured person is called in that subdivision, under section 3, subdivision 4, he is an employee. This section and subdivision was the living statute when second subdivision 45 of section 2 became a law. These provisions are so closely related that their relevancy to and dependency upon each other cannot be assumed to have been overlooked. It is my conclusion that the employer was covered by his insurance contract. I have only alluded to the fact that the employer had four or more workmen, working in and around his place of business. The evidence supports the finding in that regard.

[3] The second ground urged by appellant is that the accident and injuries did not arise out of and in the course of his employment. The difficulty with that contention is that the evidence, including the evidence of the employer, is that he was in his employ at the time he was injured. Work commenced in this plant at 12 o'clock midnight. Claimant's husband got there about 2 or 3 o'clock that morning, took off his street coat, and put on a long white coat, such as were used by men in his position. He worked around the plant, as this was a holiday, and the dock where he worked when produce came to the dock was closed. The head salesman said they kept the store or business place open on holidays to supply customers from the store; that salesmen went out to see if they could sell or deliver goods to retail places desiring them. This man went out, and just before he was injured another dealer in produce was inquiring of him if they had or would have celery that day. He says the man had on his business cloak, long white coat, over his clothes, used only when he was at work. They started for a cup of coffee, and in crossing the street he was struck by an automobile, receiving the injuries from which he died the same morning.

A fair inference from this evidence is that he was the only man, except the head salesman, on the job that morning. That he had, by close application to business, inspired, acquired, and held the confidence of his employer, is manifest from the employer's evidence, when he says, in effect, that he would take Clark's report at the close of the day's business without question. The evidence does not warrant the characterization of Clark's temporarily stepping aside for a cup of coffee as abandonment of his employment. He died with his working harness on, in the livery of his employer, and the stroke that killed came while he was discussing his employer's business with a patron who desired to purchase, if the commodity wanted by him was in stock, and, if not, when it arrived at the dock. He was headed toward the dock and prospective customers when injured. The employer testified that the men ran out to get coffee when they wanted to do so; the practice was common, must have been so, with men who commenced work at midnight. That it was recognized by the employer as necessary to the efficiency of the men and incidental to the employment cannot admit of a doubt. To hold otherwise, we must hold he abandoned or finished his work for the day. Under the conditions appearing in the evidence the commissioner's finding to the contrary finds support.

While McInerney v. B. & S. R. R. Corp., 225 N. Y. 132, 121 N. E. 806; Glatzl v. Stumpp, 220 N. Y. 71, 114 N. E. 1053; De Salvio v.

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Menihan Co., 225 N. Y. 125, 121 N. E. 766; Heitz v. Ruppert, 218 N. Y. 152, 112 N. E. 750, L. R. A. 1917A, 344; De Voe v. N. Y. State Railways, 169 App. Div. 472, 155 N. Y. Supp. 12, affirmed 218 N. Y. 318, 113 N. E. 256, L. R. A. 1917A, 250; Newman v. Newman, 169 App. Div. 747, 155 N. Y. Supp. 665; Manor v. Pennington, 180 App. Div. 132, 167 N. Y. Supp. 424—all have some features in common with the case at bar, yet as a whole I do not think they point to error in the findings of the commission here.

Appellants quote from the opinion of Mr. Justice Lyon in Bylow v. St. Regis Paper Co., 179 App. Div. 555, 166 N. Y. Supp. 874. The award in that case was affirmed; the learned justice observing in the course of his opinion:

"Had the deceased once passed from his employer's premises and gained the public highway, or had he, instead of leaving the employer's premises, loitered thereon, or deviated from a direct and ordinary route of passage for purposes of his own, a very different question would be presented."

Claimant's husband was still pursuing his employment; he was going toward the dock, or toward regular customers, or looking for prospective customers; he had a customer with him; he was discussing his employer's business with that customer, and in a way beneficial to his employer. Under these circumstances a finding covering these facts is amply sustained by this evidence, especially so under the provisions of sections 21 and 68 of said statute.

The award should be affirmed.

Woodward, J., concurs.

JOHN M. KELLOGG, P. J. (concurring in result). [4] The classification of certain employments as hazardous under the Workmen's Compensation Law is an exercise of the police power, and its validity depends upon whether there is a reasonable ground for determining that the employments so classified are more hazardous than other employments. The Legislature cannot act arbitrarily in imposing a burden upon an individual or a business. Its conclusion in a case may not seem the best one; but when it determines that there are facts to make it proper for it to pass judgment upon the question, and there is some reasonable basis for the conclusion, we are bound by its determination.

Before 1918 the employments denominated hazardous by the act were such as were or might be claimed to be inherently hazardous. The classification then depended entirely upon the nature of the work to be done and the dangers arising from it. Chapter 634, Laws of 1918, made a change, and for the first time declared a business hazardous, not because of its inherent hazards, but because of the number of persons employed in it. To be valid, and impose a liability upon the employer, there must be some reason for saying that the number of persons employed, and not the nature of the business itself makes it hazardous. A person working alone in the shop of the employer, in a nonhazardous employment, with the fit tools and machinery which the law contemplates, ordinarily is only subject to accident arising from his own carelessness. The question is whether the risk of his employment is enhanced, so that it may be called a hazardous employment, because of the fact that, instead of working alone, he is working with a great many people.

We are not without precedents upon this subject, and the decision of the Court of Appeals of October, 1920, in Claim of Leonbrune v. Champlain Silk Mills, 128 N. E. ——, is important. There an employee in a factory lost the better part of his eye by being hit with an apple

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which a coemployee had thrown at him. He was not engaged in the horse play, but was a victim of it. He was compensated. The court said:

"The claimant's presence in a factory in association with other workmen involved exposure to the risk of injury from the carelessness acts of those about him. He was brought by the conditions of his work 'within the zone of special danger.' Thom v. Sinclair, [1917] A. C. 127. 142. Whatever men and boys will do, when gathered together in such surroundings, at all events if it is something reasonably to be expected, was one of the perils of his service. We think, with Kalisch, J.. in Hulley v. Moosbrugger, 87 N. J. Law, 103, 93 Atl. 79, that it was 'but natural to expect them to deport themselves as young men and boys, replete with the activities of life and health. For workmen of that age, or even of maturer years, to indulge in a moment's diversion from work to joke with or play a prank upon a fellow workman, is a matter of common knowledge to every one who employs labor.' The claimant was injured, not merely while he was in a factory, but because he was in a factory, in touch with associations and conditions inseparable from factory life. The risks of such associations and conditions were risks of the employment."

[5] Group 45, therefore, of hazardous employments, must stand upon the hazards arising from the number of workers, and not from the nature of the business itself. When we know the fact and purpose of an act, we pretty well understand the legislative intent. The statute classifies as hazardous "employments otherwise not enumerated in which there are engaged or employed four or more workmen or operatives regularly." The hazard being declared solely on account of the number of persons, we are enabled to determine more easily what the words "workmen or operatives" mean. I cannot agree with the prevailing opinion that this group does not apply to clerks or professional workers. If the hazard comes from the number, does it make any difference whether the persons are clerks or common laborers; whether they are professional men or artisans. The word "workmen" has a broad scope. The Century Dictionary treats it as meaning "in general one who works in any department of physical or mental labor." If we attempt to subdivide the classification, and apply it to some employees, and exclude others, we then abandon the theory that the number employed, creates the hazard, and, in my judgment, destroy the statute. Treating it, however, as relating to employments which engage four or more employees of any kind, the provision seems reasonable and valid: If a classification be made on account of the number of employees, it is for the Legislature, and not the court, to determine what the number shall be.

I favor an affirmance.

Cochrane and Henry T. Kellogg, JJ., dissent.

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GLOBE GRAIN & MILLING CO. ET AL. v. INDUSTRIAL COMMISSION OF UTAH. (No. 3535.)

(Supreme Court of Utah. Nov. 12, 1920.)

193 Pacific Reporter, 642.

1. MASTER AND SERVANT — REVIEWING COURT WILL EXAMINE RECORD ONLY TO DETERMINE WHETHER THERE IS ANY EVIDENCE TO SUPPORT AWARD UNDER COMPENSATION LAW.

In reviewing a finding by the Industrial Accident Commission on the question of dependency of a parent claiming benefits under the Workmen's Compensation Act (Comp. Laws 1917, § 3140) for the death of a son, the Supreme Court, in exercising the powers conferred by Laws 1919, c. 63, § 3148a. will examine into the evidence only to determine whether there is any substantial competent evidence to support the finding, and if there is such evidence the finding will be sustained; but, if there is no substantial competent evidence to support the finding, the award will be annulled, under the well-settled rule that, where there is no conflict in the evidence and no conflicting inferences may be drawn therefrom, the question whether the finding is supported by the evidence or not is a question of law.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—DEPENDENCY WITHIN COMPENSATION ACT.

Under the Workmen's Compensation Act (Comp. Laws 1917, § 3140), dependency of a parent claiming benefits for a son's death must exist at the time of the injury, although it may not be necessary to show that contributions were made at the precise time of the injury; but, to establish dependency, it is not sufficient merely to show that the deceased made some voluntary gifts or contributions at some remote time prior to the injury, nor is it sufficient that the deceased promised or intended, in case it became necessary in the future, to make contribution to his parent or parents who might become dependent.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

3. MASTER AND SERVANT—EVIDENCE HELD NOT TO SHOW FATHER'S DEPENDENCY ON SON WITHIN COMPENSATION ACT.

In a proceeding under the Workmen's Compensation Act (Comp. Laws 1917, § 3140) to recover compensation for the death of a son 20 years of age, *held* that there was no substantial evidence to support the finding of the commission that applicant was a dependent.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

Appeal from Award of State Industrial Commission.

Proceeding by Martin Groen under the Workmen's Compensation Act to obtain compensation for the death of his son, Dirk Groen, opposed by the Globe Grain & Milling Company, the employer, and the Continental Casualty Company, insurance carrier. There was an award of compensation, and the employer and insurance carrier appeal. Award annulled and cause remanded.

George H. Smith and Robert B. Porter, both of Salt Lake City, for appellants.

H. B. Maw, of St. Lake City, for appellee.

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FRICK, J. On August 30, 1919, one Dirk Groen, hereinafter referred to as the deceased, while in the employ of the Globe Grain & Milling Company, and in the course of his employment,, was injured, from which injury he subsequently died. The deceased, at the time of his death was 20 years and 11 months of age, and his father, Martin Groen, hereinafter referred to as applicant, made application to the Industrial Commission, hereinafter styled commission, for compensation under our workmen's Compensation Act. Two of the commissioners (one dissenting) made an award in favor of the applicant. The Globe Grain & Milling Company, the employer of the deceased, and the Continental Casualty Company, the insurance carrier, hereinafter called plaintiffs, present the record of the proceedings before the commission, including all the evidence produced at the hearing, to this court for review, and ask that the award be set aside and annulled upon the ground that the evidence does not support the findings of the commission and does not justify the award.

The act known as the Industrial Commission Act authorizes this court to review the findings of the commission in certain practiculars, to wit: (1) "Whether * * * the commission acted without or in excess of its powers;" and (2) "if findings of fact are made, whether or not such findings of fact support the award under review." Laws Utah 1919, c. 63, § 3148a. This court has repeatedly held that it will not weigh the evidence, but will examine the same for the purpose only of determining whether there is any substantial competent evidence to sustain the findings or to support the award made by the commission. In this case the plaintiffs vigorously assail the award upon the ground that there is no evidence whatever in support of the finding that the applicant was to any degree dependent upon the deceased at the time of his injury and death. Our statute (Comp. Laws Utah 1917, § 3140), after defining who are presumed to be dependents as matter of law, in referring to cases like the one at bar, proceeds:

"In all other cases, the question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case *existing at the time of the injury* resulting in the death of such employee, but no person shall be considered as dependent unless a member of the family of the deceased employee, or bears to him the relation of husband or widow, lineal descendent, ancestor, or brother or sister." (Italics ours.)

While it is conceded that the applicant comes within the statute just quoted, yet it is insisted that the evidence utterly fails to establish the fact of dependency. In that connection counsel for applicant insists that under the statute the question of dependency is one of fact, and in view that the commission has found that fact in favor of the applicant this court is bound by the finding of the commission.

[1] As before stated, this court will examine into the evidence only to determine whether there is any substantial competent evidence in support of the findings of the commission. If there is such evidence the findings will be sustained, but if there be no substantial competent evidence to support the findings this court, on application of the aggrieved party, is required to annul the award which is based on such findings. It is elementary that if there is no conflict in the evidence and no conflicting inferences may be drawn therefrom the question of whether a particular finding is supported by the evidence or not is purely a question of law. The rule is well stated by the Supreme Court of Appeals of West Virgina in the headnote to the case of Poccardi v. State Comp. Com'r 79 W. Va. 684, 91 S. E. 663, in the folowing words:

"The question of dependency in England and in this country, under Workmen's Compensation Law, is one of fact and not of law, to be

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determined by the evidence in each particular case; but where the evidence is all certified and there is no conflict, a question of law, and not of fact, may be thus presented."

The question for solution in this case therefore is whether there is any substantial competent evidence in this record in support of the finding that the applicant was dependent upon the deceased at the time of his injury and death.

The plaintiff produced no evidence at the hearing, and hence the finding of the commission is based solely upon the evidence produced by the applicant. Briefly stated, the controlling facts deduced from the evidence are that the applicant came to this country from Holland about seven years prior to the death of the deceased; that his first wife died in Holland, and that he remarried about 4 years prior to the accident; that at the time of the death of the deceased applicant's family consisted of his wife and a daughter 16 years of age, who lived with him; that the deceased joined the United States army in September, 1917, as a volunteer; that during the year 1917 the deceased from his earnings prior to entering the army gave the applicant $10 at three different times, making $30 in all, which he used in paying an indebtedness which he incurred in bringing his family to this country from Holland; while the deceased was in the army he purchased three $50 Liberty Bonds, which he sent home to applicant, and which the latter returned to the deceased after he returned from France. In testifying to the circumstances under which he received the $30 aforesaid, the applicant, in answer to the folowing questions, testified:

"Did he [the deceased] ever give you any other money at any time? A. No, not any other time. Q. What was that money given to you for? A. That was to help me out to pay for the emigration."

The testimony of applicant's wife is precisely to the same effect. The $30 were given to him during the summer of 1917, or several years prior to death of the deceased. While there is not a scintilla of evidence that the deceased ever gave the applicant anything after that time, there is evidence coming from the latter he did not. True, the applicant says that he might have used the proceeds from the three $50 Liberty Bonds, but that he did not do so, because he thought the deceased needed the money for clothes, etc., after he returned from France and was discharged from the army. It is also true that the applicant testified that the deceased told him that in case he, the applicant, should ever need help the deceased would help him; that the applicant did the same thing by his father, and that he felt certain that the deceased would do by him the same as he had done by his father in case of necessity. After the deceased returned from France he stayed for several weeks at applicant's home with the family. He generally lived away from home, however, at least after the year 1915, and provided for himself. The question, therefore, is, Does the foregoing evidence and the inferences to be deduced therefrom support the fact of dependency?

[2, 3] It should be rembered that under the Compensation Act the dependency must exist at the time of the injury of the deceased resulting in death. Such is the purport of our statute, and to that effect are all of the decisions based upon such acts. In a recent case entitled Western Indemnity Co. v. Industrial Acc. Com., 35 Cal. App. 104, 169 Pac. 261, the California Court of Appeals, in passing upon a case where the facts are similar to those in the case at bar, in the course of the opinion, says:

"The evidence shows that the deceased was 22 years old; that he had been in this country * * * four years; that for the purpose of providing means to procure his transportation from Austria to the United States, his father advanced him the sum of $130, and which he

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repaid. There is an entire absence of legal evidence tending to show that during said four years of his life spent in the United States he contributed anything whatsoever to the support of his father, William Pavlovic, or sent him any money other than the $130 in repayment of the loan."

There was some hearsay evidence in support of the award, but the court disregarded it. It was accordingly held that the award made by the commission should be annulled. While it is true that in this case it apeared the deceased did not repay to the applicant a loan, yet the money was given to the latter for the purpose of paying a debt which he had incurred in bringing his family, including the deceased, to this country from Holland. The money was not given, nor intended, for the support of the applicant or his family, and he did not so contend at the hearing. In 1 Honnold, Workmen's Compensation, in speaking of the character of contributions from which dependency may be inferred, the author says:

"Occasional gifts, not being contributions for support, do not prove dependency; nor does a moral obligation of support to be effectuated in the future constitute dependency in fact."

Moreover, the depndency under the statute must have existed at the time of the injury of the deceased, and the contributions whenever made, must have been intended for the suport of the dependent. Nor is it sufficient that the deceased made promises that if necessary he would make contributions in the future. That question was passed on by the Supreme Court of Illinois in the case of Alden Coal Co. v. Industrial Com., 293 Ill. 579, 127 N. E. 641, where, in referring to whether a certain arangement between a mother and her son might be considered in determining the dependency of the mother the court, in the course of the opinion, says:

"After her husband's death she did not become dependent upon Arthur [her son,] but provided for herself from her own resources. Had he lived to carry out the arrangement contemplated by his mother and himself, a different question would be presented; but the question here is one of actual dependency at the time of the injury, and evidence of a proposed arrangement which might result in a condition of dependency in the future does not tend to show an actual existing dependency."

The award made by the commission was set aside. To the same effect is the decision in the case of Henry Pratt & Co. v. Industrial Com., 293 Ill. 367, 127 N. E. 754. The following cases all hold that the contributions must be made at or about the time of the injury causing the death, and that the dependency must be established as of that time. In re Carroll, 65 Ind. App. 146, 116 N. E. 844; in re Fierros Case, 223 Mass. 378, 111 N. E. 957; Birmingham v. Westinghouse, etc., Co., 180 App. Div. 48, 167 N. Y. Supp. 520; Pinel v. Rapid R. R. System, 184 Mich. 169, 150 N. W. 897; Hammill v. Railroad Co., 87 N. J. Law, 388, 94 Atl. 313, judgment affirmed 88 N. J. Law, 717, 96 Atl. 292

We remark that no hard and fast rule can be laid down which will control in all cases. Nor do we wish to be understood as holding that in order to prove dependency it must be shown that the contributions were made at the precise time of the injury. What we hold is that each case must, to a large extent, be determined upon its own particular facts and circumstances to establish dependency, however, it is not sufficient merely to show that the deceased made some voluntary gifts or contributions at some remote time prior to the injury Nor is it sufficient to show dependency that the deceased promised or intended, in case it became necessary in the future to make contributions to his parent, or parents, who might become dependent. It is not sufficient to show potential or expected dependency, but under the Compensation Act

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the dependency must exist as an actual fact at the time of the injury which results in death. The Compensation Act is a most beneficent law and its mainifest purpose and intent is to require the industry in which the injury resulting in death occurs to provide for the dependents of the deceased to the same extent, so far as that can be accomplished, as he would have provided for them in case he had lived, and had continued to earn the wage he received at the time of the injury. The responsibility resting upon those whose duty it is to administer the Compensation Act is therefore of the utmost gravity and importance. Upon the one hand, the utmost patience and care should be exercised in order to protect all actual dependents, while, upon the other hand, the law should not be so construed as to require the industry to bear the burden unless the applicant comes within the provisions of the act. If, therefore, in any case it appears that the commission has exceeded its power or has made findings which are not supported by some substantial competent evidence, whether for or against any applicant, upon application to this court it becomes its duty to annul the findings and set aside the award.

We remark that in this case the commission allowed $150 as "reasonable funeral expenses." In a case like the one at bar, where there are no dependents, our statute (Comp. Laws Utah 1917, § 3140, subd. 1, as amended by chapter 63, Laws Utah 1919) provides:

"If there be no dependents, the employer or insurance carrier shall pay the burial expenses of the deceased, as provided herein, and shall pay into the state treasury the sum of $750.00 unless the employer is insured in the state insurance fund."

In view, therefore, that the finding of the commission that the applicant was a dependent of the deceased must fail, the case comes within the provisions of section 3140, subd. 1, aforesaid.

It follows, therefore, that the award to the applicant should be, and accordingly is, set aside and annulled, and the cause is remanded to the commission, with directions to set aside the award and to make an allowance for the "funeral expenses," and to make such further orders as are contemplated by the statute in cases like the one at bar and in accordance with the views herein expressed. Costs of this appeal to be awarded to plaintiffs.

Corfman, C. J., and Weber, Gideon, and Thurman, J. J., concur.

OGDEN CITY v. INDUSTRIAL COMMISSON OF UTAH, (No. 3557.)

(Supreme Court of Utah. November 23, 1920,)

193 Pacific Reporter 857

1. MASTER AND SERVANT—COMPENSATION AWARD, SUPPORTED BY SOME EVIDENCE, CONCLUSIVE ON REVIEW.

Where there was some substantial evidence before the Industrial Commission to justify its conclusion as to dependency under the Workmen's Compensation Act, an award based thereon must stand.

(For other cases, see Master and ervant, Dec. Dig. § 417[7].)

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2. MASTER AND SERVANT—COMPENSATION ACT LIBERALLY CONSTRUED.

The Workmen's Compensation Act should be liberally construed, and doubts respecting the right to compensation should be resolved in favor of the employee or his dependents. (Chandler v. Industrial Com. 184 Pac. 1020.)

For other cases, see Master and Servant, Dec. Dig. § 348.)

3. MASTER AND SERVANT—MINOR'S MOTHER PARTIALLY DEPENDENT WITHIN COMPENSATION ACT THOUGH NECESSARIES WERE FURNISHED BY FATHER.

Where a minor son made substantial contributions to his mother's support, and paid bills which assisted her in maintaining the accustomed standard of living of the family, the fact that the mother was not dependent on the son for the bare necessities of life, which were furnished by her husband, will not prevent an award under the Workmen's Compensation Act on the theory of her partial dependency.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

4. MASTER AND SERVANT—EMPLOYER NOT ENTITLED TO CREDIT UNDER COMPENSATION ACT ON ACCOUNT OF PAYMENT OF SALARY UP TO DEATH.

Where a municipality paid a policeman's salary from the date of injury to his death, such payments having been made solely as salary, the municipality is not on proceedings for compensation under the Workmen's Compensation Act entitled to credit on account of such payments.

(For other cases, see Master and Servant, Dec. Dig. § 386[2].)

Original proceeding by Ogden City against the Industrial Commission of Utah to review an award under the Workmen's Compensation Act in favor of John Smalley and Alice Smalley, his wife, on account of the death of their minor son, Albert G. Smalley, a special policeman employed by Ogden City. Affirmed.

Henderson & Johnson, of Ogden, for plaintiff.

Joseph Chez, of Ogden, for defendant.

WEBER, J. The Industrial Commission of Utah, on the application of John Smalley and his wife, Alice Smalley, awarded compensation under the Workmen's Compensation Act (Laws 1917, c. 100, amended by Laws 1919, c. 63), in the sum of $1,442.50, together with hospital, funeral, and burial expenses, to Alice Smalley against Ogden City for partial dependency based on the death of applicants' son, Albert G. Smalley. At the date of his death the son was 19 years of age and unmarried. He was a special motorcycle policeman employed by Ogden City. On November 9, 1919, while on duty as such policeman, Albert G. Smalley was injured in a collision between an automobile and the motorcycle on which he was mounted. He died April 9, 19290, as a result of the collision.

Up to the time of his death Albert Smalley lived with his parents and regularly paid his mother $40 per month for his board and room. In addition he paid for the telephone $3 per month, and for ice, from $3.50 to $4 per month, during the summer months of each year. He also bought shoes and wearing apparel for his mother at Christmas and on her birthday, and made other purchases for her and other members of the family. The money paid by Albert for his board and room was used by Mrs. Smalley for her own needs. Plaintiff's principal con-

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tention is that the record contains no evidence to support the award, and that there is no evidence that Mrs. Smalley was partially dependent upon the deceased.

[1-3] Partial dependency is primarily a question of fact. As there was some substantial competent evidence before the commission to justify its conclusion, the award must stand. No procrustean rule can be applied to measure partial dependency but the question in each instance must be decided according to the facts. The law should be liberally construed in favor of the injured workman and his dependents, and "in case there is any doubt respecting the right to compensation, such doubts should be resolved in favor of the employee or of his dependents as the case may be." Chandler v. Industrial Com., 184 Pac. 1020. Albert Smalley had made contributions to his mother's support, and had given her substantial financial assistance, paying the telephone and ice bills, and thereby assisting in maintaining the accustomed standard of living of the family. The fact that the mother was not dependent on the son for the necessities of life, which she received from the husband, would not and should not deprive her of compensation if her son rendered material assistance in maintaining her in a condition suited to her station in life. In re Stewart (Ind. App.) 126 N. E. 42.

[4] Complaint is made by plaintiff that no credit was given by the commission for payment of salary made to the deceased from the date of his injury to his death. These payments were made wholly as salary, and not as compensation. The award dates from the date of his death, and not from the date of his injury. Therefore, in making an award because f the death, it was proper not to credit Ogden City with any amount that was paid to the injured employee as salary.

The award of the commission is therefore affirmed, with costs.

Corfman, C. J., and Frick, Gideon, and Thurman, J. J., concur.

SPRING CANYON COAL CO. et al. v. INDUSTRIAL COMMISSION OF UTAH. (No. 3505.)

(Supreme Court of Utah. November 12, 1920.)

193 Pacific Reporter 821

2. MASTER AND SERVANT—AWARD FOR TEMPORARY DISABILITY IN ADDITION TO COMPENSATION FOR LOSS OF LEG UNAUTHORIZED.

Under Comp. Laws 1917, §§ 3137, 3138, the Industrial Commission was without authority to allow compensation for temporary total disability of an injured employee in addition to compensation for loss of his leg above the knee, leaving a stump sufficient to permit the use of an artificial limb; there having been no other injury, and the temporary total disability having been caused solely by the loss of the leg.

(For other cases, see Master and Servant Dec. Dig. 387.)

Action by the Spring Canyon Coal Company, the employer, and others, against the Industrial Commission of Utah, to review its award of compensation under the Industrial Act in favor of Irvin Wimber, the employee. Award as made ordered set aside, and defendant directed to proceed in accordance with the opinion.

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The authorities cited in plaintiff's brief were: In re Maranovitch, 65 Ind. App. 489, 117 N. E. 530; Stefan v. Red Star Mill & Elev. Co., 106 Kan. 369, 187 Pac. 861; Kramer v. Sargent & Co., 93 Conn. 26, 104 Atl. 490; Hull v. U. S. Fidelity & Guaranty Co., 102 Neb. 246, 166 N. W. 628; In re Denton, 65 Ind. App. 426, 117 N. E. 520; Morck v. White, 41 Utah, 480., 126 Pac. 330.

The authorities cited in defendant's brief were: Marhoffer v. Marhoffer, 220 N. Y. 543, 116 N. E. 379; Limron v. Blair, 181 Mich. 76, 147 N. W. 546, 5 N. C. C. A. 866; Nitram Co. v. Creagh, 84 N. J. Law, 243, 86 Atl. 435, 3 N. C. C. A. 587; George W. Helme Co. v. Middlesex Comm Pleas, 84 N. J. law, 531, 87 Atl. 72, 4 N. C.C. A. 674; Stubbs v. Industrial Board, 280 Ill. 208, 117 N. E. 419; Wells v. Industrial Commission 285 Ill. 647, 121 N. E. 256 Industrial Coal & Mine Co. v. Industrial commission, 293 Ill. 524, 127 N. E. 703; Franko v. Wm. Schallhorn & Co., 93 Conn. 13, 104 Atl. 485; Kramer v. Sargent & Co., 93 Conn. 26, 104 Atl. 490; Industrial Commission of Colorado v. Ocean Accident & Guarantee Corporation (Colo.) 180 Pac. 568; Slago v. Industrial Commission, 293 Ill. 271, 127 N. E. 751; Holt v. Wood Bros. 5 N. C. C. A. 870; Bonaldi v. Hamburg American Line, 36 N. J. Law J. 302; Loughman v. Home Brewing Co., 36 N. J. Law J. 113.

De Vine, Stine & Gwilliam, of Ogden, for plaintiff.
Dan B. Shields, Atty. Gen., and Jas. H. Wolfe, Asst. Gen., for defendant.

THURMAN, J. There is no controversy in this case concerning the facts. On October 8, 1918, one Irvin Wimber, while in the employ of the plaintiff coal company, was severely injured in his left leg resulting in the complete loss thereof. Two days afterwards the limb was amputated at the knee joint, and a period of total temporary disability ensued from the date of the accident to and including November 15, 1919.

The applicant filed his petition under the Industrial Act for compensation. The commission found the above facts, and made its award for the sum of $12 per week from October 19, 1918, to and including November 15, 1919, in the sum of $674.38 on account of temporary total disability, and in addition thereto awarded compensation for the loss of the limb for a period of 150 weeks at $12 per week, not to exceed the sum of $1,800. Other allowances were made, but they are not involved in the question presented for our consideration.

This is an action to review the proceeding. But one question is involved, Did the commission exceed its jurisidiction in allowing compensation for the loss of the leg and in addition thereto compensation for temporay total disability? Plaintiffs strenuously contend that the law as it existed at the date of the accident permitted only compensation for the loss of the leg, as specifically provided in Comp. Laws Utah 1917, § 3138. Defendant contends that compensation should also be allowed as provided in section 3137. A solution of the question can best be determined by quoting in full the sections referred to and interpreting their meaning. We have italicized such portions of the sections as we deem of special significance in view of the argument and matter to be determined.

3137. "In case of temporary disability, the employee shall receive 55 per cent. of his average weekly wages so long as such disability is total, not to exceed a maximum of $12 per week, and not less than a minimum of $7 per week; but in no case to continue for more than six years from the date of the injury, or to exceed $4,500."

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3138 "Where the injury causes partial disability for work, the employee shall receive, during such disability and for a period of not to exceed six years beginning on the eleventh day of disability, a weekly compensation equal to 55 per cent. of the difference between his average weekly wages before the accident and the weekly wages he is able to earn thereafter, but not more than $12 a week. In no case shall the weekly payments continue after the disability ends, and in case the partial disability begins after a period of total disability the period of total disablity shall be deducted from such total period of compensation. *In case of the following injuries the compensation shall be 55 per cent. of the ave age weekly wages, but not more than $12 to be paid weekly for the periods stated against such injuries respectively,* to wit:

"For loss of:

One arm at or near shoulder	200 weeks
One arm at the elbow	180 weeks
One arm between the wrist and the elbow	160 weeks
One hand	150 weeks
One thumb and the metacarpal bone thereof	60 weeks
One thumb at the proximal joint	30 weeks
One thumb at the second distal joint	20 weeks
One first finger and the metacarpal bone thereof	30 weeks
One first finger at the proximal joint	20 weeks
One first finger at the second joint	15 weeks
One first finger at the distal joint	10 weeks
One second finger and the metacarpal bone thereof	30 weeks
One second finger at the proximal joint	15 weeks
One second finger at the second joint	10 weeks
One second finger at the distal joint	5 weeks
One third finger and the metacarpal bone thereof	20 weeks
One third finger at the proximal joint	12 weeks
One third finger at the second joint	8 weeks
One third finger at the distal joint	4 weeks
One fourth finger and the metacarpal bone thereof	12 weeks
One fourth finger at the proximal joint	9 weeks
One fourth finger at the second joint	6 weeks
One fourth finger at the distal joint	3 weeks
One leg at or so near the hip joint as to preclude the use of an artificial limb	180 weeks
One leg at or above the knee where stump remains sufficient to permit the use of an artificial limb	150 weeks
One leg between the knee and ankle	140 weeks
One foot at the ankle	125 weeks
One great toe with the metatarsal bone thereof	30 weeks
One great toe at the proximal joint	15 weeks
One great toe at the second joint	10 weeks
One toe other than the great toe with the metatarsal bone thereof	12 weeks
One toe other than the great toe at proximal joint	6 weeks
One toe other than the great toe at second or distal joint	3 weeks
One eye by enucleation	120 weeks
Total blindness of one eye	100 weeks

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"The amounts specified in this section are all subject to the limitation as to the maximum weekly amount payable as hereinbefore specified in this section and in no event shall more than a total of $4,500 be required to be paid.

It will be noted that the first sentence of section 3138, down to and including the word "compensation" relates to partial disability on account of injuries not resulting in the loss of a member, and allows compensaton therefor at $12 per week while the disability continues, not exceeding six years, while the remainder of the section relates to permanent partial disability on account of the loss of a member and allows as compensation therefor a fixed and definite amount. As to these amounts the commission has no discretion; when the loss of the member is ascertained the law specifically determines the compensation. As to injuries of this character the section last quoted reads:

"In the case of the following injuries the compensation shall be 55 per cent. of the average weekly wages, but not more than $12 to be paid weekly for the periods stated against such injuries respectively, to wit."

Then follows an enumeration of specific injuries, consisting in each case of the loss of a member, and the number of weeks for which the person injured is entitled to compensation.

The meaning of the language last quoted, together with the enumeration following, standing alone, seems to the writer to be plain and unambiguous It means that for the injuries specified a definite sum is allowed, payable in weekly installments for a fixed and definite period. As applicable to the case at bar, the section provides that for the loss of a leg at or above the knee where the stump remains sufficient to permit the use of an artificial limb the compensation shall be $12 per week for a period of 150 weeks.

[1] The Attorney General, appearing for the defendant, ingeniously contends that, inasmuch as the latter part of the section contemplates that the toal sum of $4,500 may be paid in some cases while the maximum allowed for the loss of a member, as in the case of an arm at or near the shoulder, is only $2,400, therefore it must have been contemplated by the Legislature that other compensation than that specified in the schedule might be allowed not exceeding the sum of $4,500. Just why the amount "$4,500" was used is difficult to explain, in view of the other provisions of the law. The amount is not referable to any other provision of the statute relating to compensation. It is certainly not referable to any maximum appearing in the schedule, for, as contended by the Attorney General, the maximum therein stated is $2,400. It is not referable to the class of injuries covered by the first part of section 3138, for the maximum therein stated is $12 per week for a period of not exceeding six years, which, when calculated, is shown to be only $3,744. The same is true of section 3137. The maximum in that section for a period of six years is exactly the same as the maximum under the first part of section 3138, or $3,744. Section 3137, however, is also inconsistent with itself, for while it limits the payments to 12 per week for a period of not exceeding six years, which produces the sum of $3.744 as above stated, yet the section says in no case shall the compensation exceed $4.500. The sum of $4,500 is manifestly irreconcilable with the other provisions of the statute relating to the subject. The discrepancy is difficult to explain, except on the theory that incongruous statutes must have been inadvertently used by the draftsman in preparing the bill, and overlooked by the Legislature when the law was enacted. We confess that this is an extreme view to take in construing a statute. It is our duty to reconcile apparent inconsistencies when possible so as to give effect to every provision of the statute. When this is impossible it then becomes our duty to ascertain the meaning of the Legislature by the application of other means not inconsistent with the legislative intent.

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[2] The particular provision of the statute with which we are immediately concerned, as we have shown, reads:

"In the case of the following injuries the compensation shall be 55 per cent. of the average weekly wages, but not more than $12 to be paid weekly for the period stated against such injuries, to wit: * * *

"One leg at or above the knee where stump remains sufficient to permit the use of an artificial limb. * * * "

We are constrained to hold that the language last quoted is mandatory in both form and substance, that it definitely fixes the compensation to be paid for the loss of specific members of the body, and that the compensation thus fixed is exclusive of any other compensation for disability arising solely from the loss of the particular member in question. If there should be other members injured in the same accident, or other injuries resulting, causing disability, that would present an entirely different question, and one which we will not undertake to determine in the case at bar.

The facts in the present case are singularly free from complication. It does not appear that there was any injury or disability whatever resulting from the accident except the loss of the leg. No other member of the body was affected, and the temporary total disability for which the applicant was awarded additional compenstion resulted entirely from the loss of the leg, and continued until he was supplied with an artificial limb. By no process of reasoning can we arrive at any other conclusion than that the total disability for which the applicant was awarded additional compensation was attributable to the loss of the limb. If this be true, it seems to us the additional compensation was not justified by anything contained in the statute.

Most of the authorities relied on by defendant deal with cases in which other injuries were received in addition to the loss of a member. In such cases it may be that compensation should be allowed for such total disability as is attributable to such injuries. That question, however, is reserved until a proper case is presented for its determination.

Plaintiff's attorney calls our attention to the fact that since this accident occurred, section 3138 as above quoted has been amended so as to allow compensation for temporary total disability in addition to compensation for loss of a member. The amendment follows the word "respectively" in the second line from the bottom of the page as the same appears in Comp. Laws Utah 1917, § 3138, and reads as follows:

*"And shall be in addition to the compensation hereinbefore provided for temporary total disability, to wit. * * * "* Sess. Laws, 1919, § 3138, p. 161. (Italics ours.)

Plaintiff insists that this amendment authorizes the defendant to allow compensation for temporary total disability in a case of this kind, a power which it did not possess before. We find it difficult to avoid the logic of this contention. To say that the amendment made in 1919, after an experience of two years' administration of the law, adds nothing to the meaning of the statute as it was enacted in 1917, which we have heretofore quoted, is venturing further than the court is willing to go. In our opinion it is more consistent with the legislative intent to assume that the Legislature in 1919 arrived at the conclusion that in cases of this kind compensation should be allowed for temporary total disability in addition to the compensation for the loss of a member, and so made the amendment referred to, and thus supplied an omission which would not have been made by the Legislature of 1917 if it had had the same experience.

In view of the conclusion at which we have arrived, it would seem a useless task to review the authorities presented by counsel representing the respective parties. These will no doubt be cited by the reporter

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in his report of the case. It is sufficient to say that none of the authorities cited on the part of the defendant are exactly in point, nor are they sufficiently analogous to furnish reasonable grounds for arriving at a different conclusion. As before suggested, the authorities relied on by defendant, in nearly every instance, allowed additional compensation only in cases where there were other injuries in addition to the loss of a single member. The authorities cited by plaintiff generally support the conclusion which the court feels bound to adopt.

The defendant was not authorized to allow compensation for temporary total disability in addition to compensation for the loss of the leg.

It is therefore ordered that the award as made be set aside, and the defendant is directed to proceed in accordance with the views herein expressed.

Corfman, C. J., and Frick, Weber, and Gideon, JJ., concur.

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GOUANILLOU v. INDUSTRIAL ACCIDENT COMMISSION ET AL.
(S. F. 9396.)

(Supreme Court of California. Nov. 30, 1920.)

193 Pacific Reporter, 937.

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION AWARD SUBJECT TO DISAFFIRMANCE BY MINOR NOT REPRESENTED.

The industrial Accident Commission being a judicial body exercising judicial functions, its decisions and awards are subject to those general legal principles which circumscribe and regulate the judgments of all judicial tribunals, including the principle that a minor can disaffirm an adjudication obtained in a proceeding in which he has not been duly represented until barred by laches after reaching his majority.

(For other cases, see Master and Servant Dec. Dig § 416).

3. MASTER AND SERVANT—AWARD TO MINOR NOT REPRESENTED BY GUARDIAN SUBJECT TO DISAFFIRMANCE AFTER MAJORITY.

If the injured employed was a minor under the terms of the Workmen's Compensation Act of 1913, as amended in 1915 (St. 1915, p. 1086), at the time of the first application for compensation and hearing thereon, wherein she was not represented by guardian, she had the right incident to her minority to disaffirm the award of the commission rendered in such proceeding within a reasonable time after reaching majority.

(For other cases, see Master and Servant Dec. Dig § 416).

5. MASTER AND SERVANT—COMPENSATION ACT PRESCRIBES STATUS OF MINORITY FOR ALL PERSONS UNDER 21.

For the purpose of enforcing rights accruing under the Workmen's Compensation Act of 1913, its section 16d, and section 11d of the act of 1917, which is identical in terms, prescribe the status of minority, with the privileges and dissabilities incident thereto, for all persons male and female, under the age of 21, despite Civ. Code, § 25, providing that females of 18 are not minors.

(For other cases, see Master and Servant Dec. Dig. § 357.)

6. MASTER AND SERVANT—"MAY" IN WORKMEN'S COMPENSATION ACT NOT PERMISSIVE AS REGARDS RIGHT OF INFANT TO APPEAR WITH OR WITHOUT GUARDIAN.

The word "may" in the Workmen's Compensation Act of 1913, § 16d, as amended in 1915 (St, 1915, p. 1086), and in the act of 1917 (St. 1917, p. 842) § 11d. incidental in terms, is not permissive as regards an infant employee's right to appear with or without representation by guardian, but is intended as an enabling provision to give the guardian provided for by the section a standing before the Industrial Accident Commission in default of or supplementary to any other method designated by the commission.

(For other cases, see Master and Servant Dec. Dig. § 400.)

(For other definitions, see Words and Phrases, First and Second Series, May.)

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7. MASTER AND SERVANT—FEMALE EMPLOYEE UNDER 21 A "MINOR" ENTITLED TO DISAFFIRM AWARD.

An injured female employee, who was under 21 at the time of her first application for compensation under the Workmen's Compensation Act and hearing thereon before the Industrial Accident Commission, was a "minor" for the purpose of enforcement of rights acquired under the act, and as an incident to her status of minority she possessed the right to disaffirm the award of the commission which deprived her of right to representation by guardian to which she was entitled by the act of 1913, § 16d, act of 1917, § 11d, and the fact that she became 21 before the award was rendered does not defeat her right of disaffirmance exercised within a reasonable time after reaching majority.

(For other cases, see Master and Servant Dec. Dig. § 416.)

(For other definitions, see Words and Phrases, First and Second Series, Minor.)

8. MASTER AND SERVANT—FINDING OF WORKMEN'S COMPENSATION COMMISSION THAT MINOR EMPLOYEE DISAFFIRMED AWARD WITHIN REASONABLE TIME CONCLUSIVE.

The finding of the Industrial Accident Commission that the female employee, a minor when her first application was made, filed disaffirmance of award within reasonable time and that there was no unequivocal act on her part affirming the decision prior to the disaffirmance proceedings, cannot be disturbed on certiorari.

(For other cases, see Master and Servant Dec. Dig. § 417[7].)

9. MASTER AND SERVANT—FAILURE OF COMMISSION TO ENTER ORDER SETTING ASIDE FIRST AWARD DISAFFIRMED BY MINOR DID NOT INVALIDATE SECOND AWARD.

Where second judgment and award of the Industrial Accident Commission, by virtue of the findings, on which it was based in effect set aside and superseded the commissions previous decision, disaffirmed by the injured female employee, a minor at the time of her first application, the failure of the commission to enter a separate order setting aside the first award is a mere informality not invalidating, in view of St. 1915, p. 1102, § 28 amending section 77a of St. 1913, p. 313, St. 1917, p. 871 § 60a, the second award under review on certiorari.

(For other cases, see Master and Servant Dec. Dig. § 416.)

Angellotti, C. J., and Wilbur, J., dissenting.

In Bank.

Application for certiorari to review an order of the Industrial Accident Commission awarding compensation for injuries, by Cyprien Gouanillou, the employer, against the commission, A. J. Pillsbury and others its members and Marie Michaud, the employee. Award affirmed, and cause remanded, with directions.

C. H. Patterson, of Oakland, for petitioner

A. E. Graupner, of San Francisco, and Fred W. Fry of Oakland (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

LENNON, J. Certiorari to review an order of the Industrial Accident Commission awarding compensation to an employee of petitioner for injuries sustained November 25, 1917. An application by the employee for adjustment of the claim to compensation was denied by the commission on March 11, 1919, upon the ground that the proceeding as barred by the

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statute of limitations prescribed by the Workmen's Compensation Act (St. 1913, p. 279); the application having been filed on October 17, 1918, more than six months after the date of the injury. No steps to obtain a rehearing taken. Miss Marie Michaud, the injured employee, was 20 years of age at the date of the filing of her application for adjustment and at the date of this proceeding have ever been taken. Miss Marie Michaud, the injured employee was 20 years of age the date the filing of her application for adjustment and at the date of the hearing of said application, becoming 21 on November 10, 1918, two days after the termination of the hearing. On April 25, 1919, by a new attorney, she filed a disaffirmance of the proceedings upon the ground of minority, a notice of motion to set aside all previous proceedings upon the claim to compensation, and a new application for adjustment of the same claim. A hearing was held, and on December 30, 1919, the commission entered an award granting compensation to the employee. A rehearing of this second proceeding and award was denied by the commision, and petitioner seeks a review thereof by this court.

[1-3] It is conceded that the decision of the commission rendered March 11, 1919, is valid and in full force and effect, and consequently that the second proceeding and award are in excess of the power of the commission, unless the employee possessed the right of disaffirming the first award on the ground of her minority. The right of a minor to disaffirm an adjudication of his rights by a judicial tribunal obtained in a proceeding in which he has not been duly represented as provided by law continues until barred by laches after the minor has attained the age of majority; the right is not dependent upon statute, but is a general rule of law enforced as a necessary incident to the statute of minority. Joyce v. Joyce, 5 Cal. 161: Johnston v. S. P. Co. 150 Cal. 535, 89 Pac. 348, 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181. 22 Cyc. 641, 699. Since the Industrial Accident Commission is a judicial body exercising judicial functions, its decisions and awards are subject to those general legal principles which circumscribe and regulate the judgments of all judicial tribunals. Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390; Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218; Smith v. Ind. Acc. Com., 26 Cal. App. 560, 147 Pac. 600. Therefore, if the employee was a minor, under the terms of the Workmen's Compensation Act, at the time of the first application and hearing, since she was not represented therein by a guardian, she had the right, incident to minority, of disaffirming the award of the commission rendered in such proceeding within a reasonable time after reaching the age of majority.

Section 16d of the Workmen's Compensation Act of 1913 (St. 1913 p. 288), as amended in 1915 (Stats. 1915, pp. 1079, 1086), which was in force on the date the injuries were sustained, and section 11d of the present act (Stats. 1917, pp. 831, 842), provide:

"If an injured employee, or in the case of his death, one or more of his dependents, shall be under twenty-one years of age or incompetent at any time when any right or privileges accures to such person under the provisions of this act, a general guardian, appointed by the court, or a guardian ad litem or trustee appointed by the commission or a commissioner may, on behalf of any such person, claim and exercise any such right or privilege with the same force and effect as if no such disability existed; and no limitation of time provided by this act shall run against any such person under twenty-one years of age or incompetent unless and until such guardian or trustee is appointed."

[4] It cannot be questioned that the age of majority is a matter of legislative regulation and that the Legislature may prescribe a longer period of minority for some purposes than for others. Magee v. Welsh, 18 Cal. 155. Moore v. Williams, 19 Cal. App. 600, 610, 611, 127 Pac. 509; Dwight, Law of Persons and Personal Property, p. 284; 22 Cyc. 511. Petitioner raises the question, however, as to whether the Legislature has, in fact,

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altered the age of majority of females for the purpose of the Workmen's Compensation Act. The contention of petitioner is that the above-quoted section of the Workmen's Compensation Act is to be construed with section 25 of the Civil Code, which provides, in effect, that females of the age of 18 are not minors, and therefore that the section of the act quoted above has a different effect and operation in its application to females between the ages of 18 and 21 than to males under 21 and females under 18. That is to say, it is contended that the effect of the act was not to place females between the ages of 18 and 21 in the category of minors, but merely to confer upon them certain specified rights in addition to those ordinarily accorded them as persons sui juris; that these rights, as to females between the ages of 18 and 21, do not carry with them the privileges ordinarily incident to minority, such as the right of disaffirmance, and may be waived by an election to proceed as a person sui juris.

[5] We are of the opinion that this contention cannot be sustained, and that, at least for the purpose of enforcing rights accruing under the Workmen's Compensation Act, the section of the act previously set forth prescribes the status of minoritty, with the privileges and disabilities incident thereto, for all persons under the age of 21. The language of the statute is general, providing for representation by a guardian ad litem, or a general guardian, and a suspension of the statute of limitations for all employees under 21. The right to appear by a guardian and the suspension of the running of the statute of limitations until the appointment of a guardian are not special privileges independent of minority. The conferring of such rights is a recognition of certain disabilities appertaining to the period of minority which require particular protection by the granting of special privileges. The period at which such privileges and disabilities shall cease cannot, logically, depend upon individual volition, and there would be no logic or purpose in permitting a female 20 years of age to adopt certain privileges of minority or to waive all such privileges and, at her own option assert the rights of a person who has attained the age of majority. A provision for representation by a guardian for the enforcement of certain rights, and a provision for the suspension of the running of the statue of limitations until the appointment of such guardian for a person sui juris as to the enforcement of such rights, would be such an anomaly in our system of jurisprudence that it cannot be presumed to have been intended in the absence of express legislative declaration.

Morever, the wording and history of the section of the act under consideration are prolific with proof that the intent of the Legislature was to adopt a uniform age of majority for the purposes of the section. This section of the Workmen's Compensation Act, as enacted in 1913, contained the words "a minor" in the place of "under twenty-one years of age". the latter phrase being substituted by amendment in 1915. It is thus evident that the Legislature originally intended to adopt the respective ages of majority fixed by the Code for males and females, but altered the law in 1915 to put females upon an equal footing with males as regards the disabilities and privileges of minority. The following phraseology of the section is also significant:

"A * * * guardian * * * may, on behalf of *any such person*, claim and exercise any such right or privilege with the same force and effect as if *no such disability existed*." (Italics ours.)

The addition to this section of the following sentence by amendment in 1917, indicates that all persons under 21 are considered minors within the purview of the section:

"The commssion shall have power to determine the fact of the *minority* or incompetency of any injured employee and may appoint a trust to receive and disburse compensation payments for the benefit of such *minor* or incompetent and his family." (Italics ours.)

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Finally, the classification of females betweeen the ages of 18 and 21 with persons ordinarily not sui juris, namely, females under 18, males under 21, and incompetent persons, is a strong indication of a legislative intent that they, likewise, are to be regarded as not sui juris.

[6] The fact that section 16d of the act of 1913 (section 11d of the act of 1917) provides that a guardian "may" appear for the persons specified is relied upon by petitioner in support of his argument that the statute is not mandatory, merely permissive, and that a female over 18 may elect whether or not she will be represented as provided by the section. This section must be construed in the light of subdivisions 2 and 3 of section 75 of the act of 1913 (subdivision a of section 57 of the act of 1917), which give the commission general power to regulate the manner and by whom minors and incompetents are to be represented before the commission. The provisions of section 16d. of the act of 1913 section 11d. of the act of 1917) were undoubtedly intended to prescribe a method for the representation of minors and incompetents before the commission in addition to and in default of any method adopted by the commission under the authority conferred by the subsequent sections of the act. It is clear, therefore that the word "may" is not permissive as regards the right to appear with or without representation by a guardian, but is intended as an enabling provision for the purpose of giving the guardian provided for by the section a standing before the commission in default of or supplementary to any other method designated by the commission

[7,8] The employee, being under 21 at the time of the first application and hearing, was therefore a minor for the purpose of the enforcement of rights acquired under the terms of the act. As an incident to her status of minority she possessed the right of disaffirming the award of the commission, which deprived her of a right to which she was entiled, and the fact that she became 21 before the award was rendered would not defeat her right of disaffirmance if exercised within a reasonable time after reaching majority. Childs. v. Lanterman, 103 Cal. 387, 37 Pac. 382, 42 Am. St. Rep. 121. She exercised this right by filing her disaffirmance and second application within six months after becoming 21 and within 1 month after the rendition of the first award. The finding of the commission that this was a reasonable time, and that there was no unequivocal act on the part of the employee affirming the decision prior to the disaffirming proceedings, cannot be disturbed. Walker v. Ind. Acc. Com., 177 Cal. 737, 171 Pac. 954, L. R. A. 1918F, 212.

[9] The commission failed to specifically pass upon the motion of the employee to set aside the first award which motion was made at the time of the filing of the second application and upon stipulation, heard and considered together with and at the time of the hearing of the second application. Inasmuch as the second judgment and award itself, by virtue of the findings on which it was based, in effect set aside and superseded the previous decision, the failure of the commission to enter a separate order setting aside the first award is an informality which does not operate to invalidate the award under review. Stats. 1915, c. 607, § 28 (section 77a as amended) p. 1102; Stats. 1917, c. 586, § 60a, p. 871.

The second award is therefore affirmed, and the cause remanded, with directions to the commission to correct the irregularity above indicated by entering an order setting aside the first award.

We concur: Shaw, J.; Olney, J.; Lawlor, J.; Sloane, J.

ANGELLOTTI, C. J. I dissent. To my mind the section of the Workmen's Compensation Act here involved does not purport to make a woman who has reached the age of majority by attaining the age of 18 years, a minor until she attains the age of 21, for the purposes of the act, or debar her from prosecuting a claim under the act without the inter-

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position of a guardian. It simply purports to authorize the appointment by the commission or a commissioner of a guardian ad litem or trustee for any one under 21 years of age, or incompetent, and provides that no limitation of time provided by the act shall run against any person under 21 years of age or incompetent until a guardian or trustee is appointed.

In this case the first judgment was given in a proceeding brought by the woman herself. She was then nearly 21 years of age. She became 21 years of age two days after the termination of the hearing. Judgment was not given until four months after she had attained the age of 21. I think the judgment was a valid and binding one, not open to disaffirmance, and subject to review only in the manner and within the time provided in the act.

I concur: Wilbur, J.

NORTHWESTERN REDWOOD CO. ET AL. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA ET AL. (S. F. 9393.)

(Supreme Court of California. Dec. 8, 1920.
Rehearing Denied Jan. 6, 1921.)

194 Pacific Reporter 31.

1. MASTER ANR SERVANT—WORKMEN,S COMPENSATION ACT, ALLOWING WIFE OF INJURED EMPLOYEE TO PROSECUTE PROCEEDINGS, HELD VALID.

Workmen's Compensation Insurance and Safety Act of 1917, § 24 (b) subd. 5, allowing living expenses to the wife or minor children of an injured employee who has deserted or is neglecting his family, is not unconstitutional in permitting a wife to proceed in behalf of the community to secure the compensation, which is community property particularly where the husband has deserted the wife.

(For other cases see Master and Servant Dec. Dig. § 347.)

2. MASTER AND SERVANT—CHANGE IN TITLE OF WIFE'S PETITION FOR COMPENSATION HELD NOT A NEW PROCEEDING BARRED BY LIMITATION.

Where an injured employee deserted his wife, and she instituted proceedings under Workmen's Compensation Insurance and Safety Act of 1917, §§ 17 (a), 24(b), 55(a), for compensation, entitling them in her husband's name, signing the application herself, but later amended the application so as to bring the proceedings in her own name, the fact that such amendment was made after the expiration of the six months fixed by law for the bringing of the proceedings had expired *held* not to bar her claim; the mere change in the title being merely a correction of an informality within section 60(a), and not the commencement of a new proceeding.

(For other cases, see Master and Servant Dec. Dig. § 398.)

3. MASTER AND SERVANT—CONSTRUCTIVE NOTICE HELD BINDING ON INJURED EMPLOYEE DESERTING WIFE PETITIOING FOR COMPENSATION.

Where an injured employee deserted his wife, who later instituted proceedings for compensation under the Workmen's Compensation Insur-

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ance and Safety Act to enforce her rights in the community property, constructive notice to the husband by publication *held* sufficient as to him, as the proceeding may be characterized as one quasi in rem.

(For other cases, see Master and Servant Dec. Dig. § 398.)

4. MASTER AND SERVANT—EVIDENCE HELD TO SHOW INJURED EMPLOYEE HAD DESERTED WIFE APPLYING FOR COMPENSATION.

In a proceeding by a wife under Workmen's Compensation Insurance and Safety Act to recover for injuries to her husband, evidence *held* to show that he had deserted her and was living.

(For other cases, see Master and Servant Dec. Dig. § 405[1].)

In Bank.

Certiorari to Industrial Accident Commission.

Proceedings under the Workmen's Compensation Act by Mary A. Schaefer, opposed by the Northwestern Redwood Company, employer, and the Fidelity & Casualty Company of New York, insurance carrier, to recover compensation for injuries sustained by her husband Jack Schaefer. An award of compensation was made by the Industrial Accident Commission, and employer and insurance carrier apply for certiorari. Award affirmed.

R. P. Wisecarver, of San Francisco (Redman & Alexander, of San Francisco, of Counsel), for petitioners.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

WILBUR, J. Petitioners seek to review and annual an award of the respondent commission which was made because of an accident suffered by Jarck Schaefer, husband of respondent Mary Schaefer February 14, 1918., while he was employed by the Northwestern Redwood Company, resulting in the amputation of one finger and the crippling of the other fingers of the hand. No question is raised as to the amount or as to the obligation to make compensation for said injuries under the Workmen's Compensation Law. The contention of the petitioners is that the award could not properly be made upon the petition of the wife. The injured employee had married the respondent Mary A. Schaefer about a week before the accident. Two months after the marriage he left his wife, taking with him $5000 of her money, came to San Francisco, wrote her that he would return on the next Sunday, and he has not been heard of since.

The respondent, Mary Schaefer, based her right to the award upon the provision of section 24, subd 5. of the Workmen's Compensation Insurance and Safety Act of 1917 (Stats. 1917, pp. 831, 852), which is as follows:

"(b) The commission may fix and determine and allow as a lien against any amount to be paid as compensation: * * * (5) The reasonable living expenses of the wife or minor children of the injured employee, or both, subsequent to the date of the injury, where such employee has deserted or is neglecting his family, to be allowed in such proportion as the commission shall deem proper, upon application of the wife or guardian of the minor children."

Petitioner claims, however, that the application for compensation must be made by the injured employee, and that the application by the wife as a lien claimant is not authorized by the law. The statute expressly authorizes the application by any party in interest. The provision is in sections 17 and 55, as follows:

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"Sec. 17. (a) Upon the filing with the commission by any party in interest, * * * concerning any right or liability arising out of, or incidental thereto, jurisdiction over which is vested by this act in the commission, a time and place shall be fixed for the hearing thereof. * * *"

"Sec. 55. (a) All proceedings for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto, or for the enforcement against the employer or an insurance carrier of any liability for compensation imposed upon him by this act in favor of the injured employee, his dependents or any third person, or for the determination of any question as to the distribution of compensation among defendants or other persons * * * or for obtaining any order which by this act the commission is authorized to make, or for the determination of any other matter, jurisdiction over which is vested by this act in the commission, shall be instituted before the commission, and not elsewhere, except as otherwise in this act provided, and the commission is hereby vested with full power, authority and jurisdiction to try and finally determine all such matters, subject only to the review by the courts in this act specified and in the manner and within the time in this act provided

[1] In dealing with the right of the wife to maintain a proceeding, it is well to remember that the compensation inuring to the husband by reason of his disability is community property. Although the interest of the wife in such property is inchoate, there is no constitutional objection to a law which permits her to proceed in behalf of the community to secure the property belonging to the community, particularly where the husband has deserted the wife and defaulted in his obligations to the marital partnership. Morever it is quite as consistent with the whole theory of the Workmen's Compensation Act, to allow the wife or children of an injured employee, who is neglecting his obligation to his family by desertion or otherwise, to prosecute the proceedings for the recovery of compensation as it is to allow the dependents of a deceased husband to prosecute a similar proceeding. The latter course has been sustained as a constitutional exercise of authority (Western Metal Supply Co. v. Industrial Accident Commission, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390), and for the same reasons the provisions of the act relied upon by the respondent Mary Schaefer must be sustained as constitutional.

With these preliminary observations, we return to a consideration of the points raised by the petitioner with reference to the procedure adopted in this case for the enforcement of the claim or lien of the wife against the compensation due to her husband because of the injuries received by him in the course of his employment.

On May 22, 1918, the wife filed an informal request with the commission asking that she be granted a lien upon the compensation alleged to be due her husband on account of this injury. On June 5, 1918, the commission filed and served an order upon the petitioners to show cause why such a lien should not be granted. A return was made denying that any compensation was due the husband. On June 17, 1918, Mary A. Schaefer signed and filed a formal application with the Industrial Accident Commission requesting an adjustment of the claim of her husband and the enforcement of her lien thereon. This application, although made by the wife in her own name, was entitled, "Jack Schaefer, applicant, v. Northwestern Redwood Company, a Corporation, defendant." Notice of the hearing of the application was given for July, 17, 1918. The petitioners appeared and resisted the application. At the hearing the petitioner testified that she had no authority from her husband to file the application on his behalf, that she did not know where he was, and that he had disappeared, and related the circumstances of his disappearance. On September 20, 1918, the commission denied the application of petitoner herein to dismiss the application, and on September 26, 1918, more than

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six months after the injury, an order was made amending the title of the application by substituting Mary A. Schaefer as the applicant instead of Jack Schaefer, and that Jack Schaefer, the injured employee, be made a defendant with the petitioner herein, and that the proceedings be continued under the new title. It was further ordered that notice of the time and place of hearing of the application should be published. On October 17, 1918, a notice of hearing was served upon the petitioners herein, and the hearing was set for January 17, 1919. It appeared on that date that the notice had not been properly published, and on February 11, 1919, the commission again set the hearing in the case and ordered publication of notice to the defendant husband. The hearing was fixed for April 30, 1919. At that time, it appearing to the commission that proper notice had been published, a hearing was had and an award made that the employee had received an injury in the course of his employment, and that by reason thereof he was entitled to $2,314.35, payable at $16.67 per week for 139 weeks; that the amount of compensation accrued and payable to December 29, 1919, equaled the sum $1,598.40. The commission further found that Mary A. Schaefer was the deserted wife of Jack Schaefer; that she was entitled to $60 a month as a lien on his compensation from and after the 16th day of April, 1918; and that the amount accrued to the 16th day of December, 1919, a period of 20 months, was $1,200. This amount was ordered payable forthwith to Mary A. Schaefer, with an award to her of $60 a month beginning December 16, 1919, and continuing until the exhaustion of the disability indemnity of $2,314.35 due Jack Schaefer. It is claimed by the petitioners that substitution of the respondent wife as a petitioner before the commission was in legal effect the beginning of a new proceeding on her behalf after the period of 6 months fixed by law for the bringing of such proceedings had expired, and that therefore her claim is barred. This claim is based upon the assumption that the first petition was a wholly unauthorized application by the wife as agent for the husband, and, hence, ineffective to toll the statute of limitations.

[2] However, it is clear from the entire proceeding that the wife from the first was seeking to enforce the obligation which the statue authorized her to enforce, namely, a claim or lien upon the compensation due her husband. The fact that the first petition was entitled as if brought by the husband is immaterial. The face of the petition showed the nature of the claim asserted and that the petitioner signed the petition in her own right. The Workmen's Compensation Act and the Constitution both expressly require the commission to proceed without formality, and the act (section 60a) directs that the awards of the commission shall not be set aside because of any informalities in the procedure. The commission is directed by the provisions of section 60(a) to "make inquiry in such manner, through oral testimony and written and printed records, as is best calculated to ascertain the substantial right of the parties and carry out justly the spirit and provisions of this act. No informality in any proceedings or in the manner of taking testimony shall invalidate any order, decision, award, rule or regulation made, approved or confirmed by the commission." In view of the nature and character of the proceeding, we hold that the mere change in the title of the petition and of the proceedings had no effect upon the substantial matters submitted to the commission for adjudication, and that they had jurisdiction under the petition as filed, with or without amendment, to determine the rights of the deserted wife to the compensation allowed to her husband and herself by law.

[3] Petitioners also claim that the award is improper because of the fact that no notice other than by publication was served upon the husband, for the reason that he is thus deprived of his property without due process of law. Respondent maintains that this constitutional question cannot properly be raised by the employer, who, in any event, is bound to make compensation. Without passing upon respondent's con-

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tention, it is sufficient to say that the purpose of this proceeding is to enforce the rights of the wife in community property located in this state, and that constructive notice to the husband is, therefore, sufficient to give jurisdiction to pass upon the questions so involved.

The proceeding may be characterized as one quasi in rem. In such proceeding notice by publication is a sufficient compliance with the federal Constitution. The distinction between this type of action and an action in personam is pointed out in L. R. A. 1918F, 609, 610. It is unnecessary to discuss this matter at length as the right to subject the claim within the state of California to the lien of the wife is sufficiently clear from the authority just cited. The rule in such matters is stated in the leading case of Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565:

"The state, having within certain property of a nonresident, may hold and appropriate it to satisfy the claims of her citizens against him, and her tribunals may inquire into his obligation to the extent necessary to control the disposition of that property. If he has no property within the state, there is nothing upon which her tribunal can adjudicate.

[4] The petitioners next contend that there is a presumption that the husband is dead, and that, therefore, the award is improper. It is argued that the presumption that the husband is innocent of crime overcomes the presumption of the continuance of life, and that, therefore, the presumption of innocence required the commission to find that the husband was dead. This contention is based upon the fact that under section 270a of the Penal Code it is a felony for a husband to wilfully abandon his wife in a destitute condition, or to refuse or neglect to provide such wife with necessary food, clothing, etc. It appears, however, that the commission were amply justified in finding that the injured employee was still living. The wife has never heard from him since his arrival in San Francisco. Either he left home intending to desert his wife or afterward formed that intention, or suddenly died without sufficient warning to notify his wife of his condition. He was in good health when he left home. There was no reason, other than his sudden death or an intention to desert, why he should not have written his bride of two months, if, for any reason he had changed his plan to come home the next Sunday. If he had died suddenly, no doubt the wife would have been notified. She received no such notice. There were other facts and circumstances, which need not be stated, which also supported the conclusion of the commission that Jack Schaefer was living.

The award is affirmed.

We concur: Angellotti, C. J.; Sloane, J. Olney, J. Shaw, J. Lawlor, J. Lennon, J.

PACIFIC GOLD DREDGING CO. ET AL. v. INDUSTRIAL ACCIDENT COMMISSION. ET AL. (S. F. 9524.)

(Supreme Court of California. Dec. 6, 1920.
Rehearing Denied Jan. 3. 1921.)

194 Pacific Reporter 1.

1. MASTER AND SERVANT—CHILD, AWARDED TO CUSTODY OF DISAPPEARING MOTHER, HELD "DEPENDENT" ON FATHER, WITHIN WORKMEN'S COMPENSATION ACT.

Though, under Civ. Code, § 196, making the parent entitled to a child's custody liable for his support, a divorce decree, awarding custody of a boy to the mother, without requiring the father to contribute to his support,

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relieved the father from liability for the time being, where the mother abandoned the boy, and disappeared, and was presumptively dead, the father was under a legal duty to provide for him, making the boy "dependent" on him, within the Workmen's Compensation Act (St. 1917, p. 844).

(For other cases, see Master and Servant Dec. Dig § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent.)

5. MASTER AND SERVANT—FINDING OF DEPENDENCY, WITHIN WORKMEN'S COMPENSATION ACT, HELD WARRANTED.

In a workmen's compensation proceeding evidence *held* to justify the conclusion that deceased, denied custody of a minor child by a divorce decree, had voluntarily resumed his parental relations and obligations, and assumed the burden of the child's maintenance, education, and support.

(For other case, see Master and Servant Dec. Dig. § 405[5].)

6. MASTER AND SERVANT—SON A DEPENDENT, WITHIN WORKMEN'S COMPENSATION ACT WHERE DIVORCED FATHER RESUMED RESPONSIBILITY FOR SUPPORT.

Where a father, deprived of the custody of a son by a divorce decree, had voluntarily resumed responsibility for the son's support and had taken the boy to live with him, the relation of the parent and child was restored, and the child was dependent on the father, as though the relation had never been disturbed.

(For other cases, see Master and Servant Dec. Dig § 388.)

7. MASTER ANR SERVANT—CHILD UNDER 18 CONCLUSIVELY PRESUMED DEPENDENT, WITHIN WORKMEN'S COMPENSATION ACT, THOUGH WORKING OUT FOR BOARD.

Under Employers' Liability Act. § 14, providing that a child under 18 is conclusively presumed dependent on the parent legally liable for his maintenance, there being no surviving dependent parent, where deceased was divorced from his wife, and the custody of a boy was awarded to her, but he voluntarily resumed responsibility for the boy's support, the boy was dependent on him, though at the time of the death working for a third person for his board.

(For other cases, see Master and Servant Dec. Dig. § 388.)

In Bank.

Proceeding under the Workmen's Compensation Act by Kenneth Frank Fruit for compensation for the death of his father, John A. Fruit, opposed by the Pacific Gold Dredging Company and others. Compensation was awarded, and defendants bring certiorari

Affirmed.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

SLOANE, J. This is a proceeding to review the action of the Industrial Accident Commission in awarding compensation to the respondent Kenneth Frank Fruit, a minor, 15 years of age, under the Workmen's Compensation Act of 1917 (St. 1917, p. 831), on account of the accidental death of his father, John A. Fruit. The Commission awarded the maximum amount for total dependency, being three times the annual earnings of the father. The only points in controversy arise upon the question of dependency of the minor upon his father.

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It is urged that dependency was not shown, either actual or presumptive. The undisputed facts disclose that the mother of the minor had, on May 16, 1908, procured a decree of divorce from John A, Fruit for extreme cruelty and habitual intemperance, and the custody of the minor son was therein awarded to the mother, on the finding that she was a fit and proper person to have such custody and that the father was not. About two years later the mother placed the boy, the respondent here, in an orphanage in Portland, Or., where they resided when the decree of divorce was obtained, and then disappeared. and since that time neither the directors of the orphanage nor members of her family have had any information or knowledge of her existence or whereabouts.

About the time of the divorce the father also disappeared, and it was not until some 10 years later that the son had any knowledge of or connection with him. In 1918, through a letter from an uncle, the son located his father, who was then employed with a dredging company near Trinity Center, Trinity county, Cal. As a result of correspondence between them, the father sent Kenneth a present of a watch and contributed money to him on several occasions. Subsequently, about April, 1918, the father outfitted the boy with clothing and sent him money for his traveling expenses from Oregon to Trinity county, where he joined his father in May, 1919. They lived together in a cabin on the properties of the dredging company during May, June, and July of 1919. the father providing the boy with his board, clothing, and spending money. From the conversations and relations between them it was apparent that the father manifested his intentions of resuming parental relations with his son and affording him support and education. It was tentatively agreed between them that the father would give up his present employment and move to the town of Westwood, in Lassen county, where he would obtain work and send the boy to school. Before any change of location was made, and 3 or 4 days before the father's death, Kenneth, apparently with his father's consent, left the cabin where they were living and went to Trinity Center, some 2 or 3 miles distant, where he entered the home of a Mrs. Miles, with the understanding that he was to work for his board, and at the beginning of the school term go to school. He was also to receive $1 per day for extra work that Mrs. Miles had in contemplation. No definite duration for this arrangement with Mrs. Miles was agreed upon. This was the situation of the parties when the father met with the accident resulting in his death.

[1, 2] It is probably clear that the decree giving the custody of the boy to the mother relieved the father from all legal responsibility for support of his son and removed all relation of dependency, at least for the time being. Section 196 of the Civil Code provides that—

"The parent entitled to the custody of a child must give him support and education suitable to his circumstances."

No requirement was made in the decree that the father should contribute anything to the boy's maintenance. When a parent is deprived of the custody of his child, and therefore of its services and earnings, he is no longer liable for its support and education. Selfridge v. Paxton, 145 Cal. 713, 79 Pac. 425; Ex parte Miller, 109 Cal. 648, 42 Pac. 428; McKay v. McKay, 125 Cal. 65, 57 Pac. 677; Matter of McMullin, 164 Cal. 504, 129 Pac. 773; People v. Hartman, 23 Cal. App. 72, 137 Pac. 611. This exemption, however, is not unconditional, and may not be permanent. In divorce proceedings power is reserved by section 138 of the Civil Code to the court, at the hearing of the case or at any time during the minority of children of the marriage, to "make such order for the custody, care, education, maintenance and support of such * * * children as may seem necessary or proper, and it may at any time modify or vacate the same"; and section 139 of the Civil Code provides that "where a divorce is

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granted for an offense of the husband the court may compel him to provide for the children of the marriage," and "may from time to time modify its orders in these respects," and this irrespective of the fact that the control and custody of the children are taken from him. Similarly, section 199, Civil Code, provides for an action between husband and wife without divorce to determine the custody of children of the marriage, with authority in the court to make such order in the decree as to their support, education and maintenance as may be just, and to amend, vary, or modify such decree as the natural rights of the parties, including the children, may require.

[3] The requirement of section 196, Civil Code, means no more than that the parent who is entitled to the custody of the child is primarily liable for its support and education, and between such parent and the one who has been deprived of such custody the latter is absolved from liability, in the absence of any decree of court requiring contribution to such maintenance. It is true that it has been held that a father, deprived of the custody of his child in divorce proceedings, without requirement that he contribute to its support, is not liable to a third party furnishing such child with the necessaries of life (Selfridge v. Paxton, supra); but, under section 207, Civil Code, third persons seeking such recovery are limited in their right of action to the parent in charge of the minor. It is also held, in People v. Hartman, supra, that the defendant was not liable to prosecution, under section 270 of the Penal Code, upon charge of willfully, unlawfully, and feloniously failing to furnish necessary food, clothing, shelter, or medical attendance for his infant child. In that case the infant had been given into the custody and control of the mother in a divorce action, without a requirement that the father contribute to its support, and no showing was made that its legal custodian was not abundantly able to care for it. In fact, the opinion states that "there is no evidence that the child failed to receive all 'necessary food, clothing, shelter, or medical attendance.'"

We find no authority for holding that, as between parent and child, the father is absolved from his legal duty to provide support to his minor child, who has no other source of maintenance, because, on account of his own fault, he has been deprived of the custody of such child. Both a legal and moral obligation rests upon a father to support his minor children. And while, as between himself and third parties, that obligation may be shifted in proceedings of divorce or guardianship, and he may by misconduct forfeit his right to the custody of his child, it may be doubted if by such proceedings, to which he is not a party, a minor can be deprived of his natural right to turn to his father for maintenance, if the substituted source of supply fails. It has been held that such right to look to a father for maintenance cannot be taken from the infant by contract between the parents (Fernandez v. Aburrea, 183 Pac. 366), and it certainly would be a reproach upon the law if a father, by his own misconduct making him an unfit custodian of the child, could absolve himself from legal responsibility for its support. He, at least, may voluntarily resume his legal responsibility.

[4] Conceding in this case, that the minor was not a dependent upon his father during the period he remained in the custody of his mother, there was nothing in the legal status of the parties at the time Kenneth joined his father in California to prevent the latter from voluntarily resuming responsibility for his son's support. It has been repeatedly held by this court that on the death of the mother, to whom the custody of a child has been given in divorce proceedings, the right to such custody reverts to the father. Schammel v. Schammel, 105 Cal. 258, 38 Pac. 729; Matter of Allen's Estate, 162 Cal. 625, 124 Pac. 237; Bell v. Krauss, 169 Cal. 387, 146 Pac. 874. It is urged that the father in this instance has been divorced for cruelty and intemperance and adjudged an unfit cus-

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todian of his child. On the other hand, the mother has been shown to have abandoned the child. Under section 224 of the Civil Code neither of them perhaps could have interfered with the adoption of Kenneth by a third party, but nobody has manifested any desire to adopt him. Is he to be left a waif in the community with no right to parental care, because both his parents have been derelict in their duty toward him?

The mother abandoned him 2 years after her divorce by leaving him in an orphan asylum, where he remained several years without provision for his support. She is presumptively dead, not having been heard from for more than 7 years. Code Civ. Proc. § 1963, subd. 26. The evidence on this point is not very very full, but Kenneth testified that both he and his mother's other relatives had made persistent search and inquiry for her without avail.

[5, 6] It is clear that the boy was without means of support and had no legal guardian. Whatever the father's rights were to his son's custody his duty to provide for him was clear, both legally and morally. The commissioners were justified by the evidence on this point in concluding that the father had voluntarily resumed his parental relations and obligations and had taken the boy to live with him and assumed the burden of his maintenance, education, and support. This being the fact, the relations of parent and child had been restored. The condition of dependency existed at the time of the father's death as though it had never been disturbed, unless is was again suspended by the fact that the boy had taken up a fortuitous residence and employment outside the father's home, some 3 or 4 days before the latter's death.

[7] In considering the relations of the parties at the time of the father's death, if we accept the fact that the duty of support and maintenance had been restored, we must treat the situation precisely as if this relation had never been disturbed. Would it, under the usual relationship between a father and his 15 year old son, be considered for a moment that the status of dependency had been destroyed or interrupted by the fact of such a casual outside employment as is shown here? In any event, the provisions of the Compensation Act are conclusive on this point. Section 14 of the Employer's Liability Act provides:

"(a) The following shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (2) A child or children under the age of eighteen years * * * upon the parent with whom he or they are living at the time of the death of such parent or for whose maintenance such parent was legally liable at the time of death, there being no surviving dependent parent,"

Assuming that the first condition of this couclusive presumption is avoided by the temporary residence and employment of Kenneth with Mrs. Miles, we have left the alternative condition, that of a minor under 18 years of age, whose father at the time of his death was liable for the minor's maintenance, with no other dependent parent. We are of the opinion that the fact of the child being left without any other means of support, whether by abandonment by or death of his mother, restored him to his right of dependency upon the father, and that, in any event, the Industrial Accident Commission was justified in reaching a conclusion favorable to the minor from the evidence showing a voluntary resumption of his parental obligations by the father. The only issue presented here is on the question of dependency, and the findings of the Commission expressly cover that issue.

The award is affirmed.

We concur: Angellotti, C. J; Lennon, J.; Wilbur, J.; Olney, J.; Shaw, J.; Lawlor, J.

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CITY OF CHICAGO v. INDUSTRIAL COMMISSION ET AL.
(No. 13482.)

(Supreme Court of Illinois. Dec 21, 1920.)

129 Northeastern Reporter, 112.

MASTER AND SERVANT—CITY MUST PAY WORKMEN'S COMPENSATION TO EMPLOYEE OF UNINSURED CONTRACTOR.

Under Workmen's Compensation Act, § 31, requiring employers to pay compensation to their own employees and to the employees of uninsured contractors, a city is liable to an injured employee of an uninsured contractor, although section 5 provides that a contractor's employee shall not be considered an employee of the city which made the contract.

(For other cases, see Master and Servant Dec. Dig. § 364.)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Workmen's compensation proceedings by Tenie Murray against the City of Chicago and Susan Burns. From a judgment confirming an award by the Industrial Commission, the City of Chicago brings error. Affirmed.

Samuel A. Ettelson, Corp. Counsel, and William H. Devenish, City Atty., both of Chicago (Robert H. Farrell, of Chicago, of counsel), for plaintiff in error.

Beach & Beach, of Chicago, for defendant in error.

DUNN, J. This writ of error was awarded on the petition of the City of Chicago to review a judgment of the Circuit court of Cook county which confirmed an award of compensation by the Industrial Commission in favor of Tenie Murray against the city of Chicago and Susan Burns for an injury received by Tenie Murray, and the sole question presented, as stated in the brief of the plaintiff in error, is whether a city is liable, under section 31 of the Workmen's Compensation Act, to pay compensation to an employee of an independent contractor who has not insured or guaranteed his liability to pay such compensation.

Tenie Murray was injured as the result of a collision between an ash wagon upon which he was riding and a street car in the city of Chicago. At the time of the accident he was driving a team owned by Susan Burns, who furnished the team, wagon, and driver to haul ashes and garbage for the city under the direction of the ward superintendent of the city and the inspection of city inspectors, whose duty it was to see that the alleys of the city were kept clean and that the drivers of wagons did their work in a satisfactory manner. The decision of the Industrial Commission finds that at the time of the accident the petitioner was an employee of the respondent Susan Burns, who was a subcontractor of the respondent the city of Chicago; that at the time of the accident she was not insured in any company or association authorized under the laws of this state to insure her liability to pay compensation under the Workmen's Compensation Act; and that she had not guaranteed her liability to pay such compensation. The plaintiff in error contends that section 5 of the Workmen's Compensation Act excludes from the provisions of that act the employees of a contractor.

Section 31 of the Compensation Act provides that—

"Any one engaging in any business or enterprise referred to in subsections 1 and 2 of paragraph (b) of section 3 of this act who undertakes to do any work enumerated therein, shall be liable to pay compensation to his own immediate employees in accordance with the provisions of this

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act, and in addition thereto if he directly or indirectly engages any contractor whether principal or subcontractor to do any such work, he shall be liable to pay compensation to the employees of any such contractor or subcontractor unless such contractor or subcontractor shall have insured, in any company or association authorized under the laws of this state to insure the liability to pay compensation under this act, or guaranteed his liability to pay such compensation." Laws of 1917, p. 504.

The language of this section makes it applicable to a city engaged in any business enterprise of the kind mentioned. Section 5 of the act defines the term "employee" so as to include every person in the service of a city under appointment or contract of hire except any official of the city, and contains the proviso that one employed by a contractor who has contracted with the city shall not be considered as an employee of the city which made the contract. The contention of the plaintiff in error that this section excludes from the provisions of the act the employee of a contractor cannot be sustained. It simply declares that such employee shall not be considered an employee of the city and by such provision excludes the contractor of the employee from the general provisions of the act, but section 31 expressly provides that the city shall be liable, in the cases mentioned in that section, to pay compensation, not only to its own employees in accordance with the provisions of the act but also to the employees of the contractor, unless such contractor shall have insured his liability to pay compensation or guaranty his liability. No claim is made that the city was not engaged in any business or enterprise referred to in subsections 1 and 2 of section 3 or that Susan Burns was not engaged to do any work enumerated in those subsections. We held in City of Rock Island v. Industrial Com., 287 Ill. 76, 122 N. E. 82, that a city in the sweeping and cleaning of its improved public streets, is engaged in the business of maintaining a structure, and that the finding of the Industrial Commission in that case that a person who was engaged in such work was engaged in an extrahazardous occupation could not be said to have been unsupported by the evidence.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

MT. OLIVE COAL CO. v. INDUSTRIAL COMMISSION ET AL (No. 13471.)

(Supreme Court of Illinois. Dec. 21, 1920.)

129 Northeastern Reporter 103.

1. MASTER AND SERVANT—"TEMPORARY TOTAL INCAPACITY" WITHIN COMPENSATION ACT DEFINED.

The period of temporary total incapacity within the Workmen's compensation Act is that temporary period immediately after the accident during which the injured employee is totally incapacitated for work by reason of the illness attending the injury, and may be described as the period of the healing process.

(For other cases, see Master and Servant Dec. Dig. § 385[15].)

2. MASTER AND SERVANT—"TEMPORARY TOTAL INCAPACITY" WITHIN COMPENSATION ACT HELD PERIOD OF INABILITY TO WORK BECAUSE OF BROKEN ARM.

Where a workman suffered a broken arm the period of temporary total incapacity within the Workmen's Compensation Act was the period

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during which he was unable to work because of the broken bone in his arm, and when that bone had completely knitted, and the usual attendant soreness and stiffness disappeared, the period of the temporary incapacity ended, and any disability then existing was the result of the permanent character of the injuries received.

(For other cases, see Master and Servant Dec. Dig. § 385 [15].)

3. MASTER AND SERVANT—INDUSTRIAL ACCIDENT COMMISSION CANNOT COMPEL COMPENSATION CLAIMANT TO SUBMIT TO OPERATION.

There is no power in the Industrial Commission or elsewhere to compel an injured employee to submit to an operation, but it is within the power of the commission in the first instance to determine the extent to which the loss of use of a hand in attributable to an accident or to the refusal of the employee to have an operation performed.

(For other cases, see Master and Servant Dec. Dig. § 385[18].)

4. MASTER AND SERVANT—REFUSAL OF COMPENSATION CLAIMANT TO SUBMIT TO REASONABLE SURGICAL OPERATION RELEASES EMPLOYER.

If an operation to cure a compensation claimant is not attended with danger to the life or health or extraordinary suffering and if according to the best medical or surgical opinion, the operation offers a reasonable prospect of relief he must either submit to the operation or release his employer from the obligation to maintain him.

(For other cases, see Master and Servant Dec. Dig. § 385[18].)

5. MASTER AND SERVANT—REFUSAL OF COMPENSATION CLAIMANT TO SUBMIT TO SIMPLE OPERATION HELD CAUSE OF PERMANENT DISABILITY.

Where a workman sustained a broken arm which was set, a solid union of the bone resulting and the only remaining disability being adhesions in the tendons of his wrist and hand, curable by mere manual manipulations, forcibly breaking up the adhesions under laughing gas, attended with no danger whatever, but the workman refused to submit to such operation, *held* that the permanent disability of the workman was due to his refusal to submit to the operation and not to the accident.

(For other cases, see Master and Servant Dec. Dig. § 385[18].)

Error to Circuit Court Macoupin County; Frank W. Burton, Judge.

Proceedings under the Workmen's Compensation Act (Hurd's Rev. St. 1919, c. 48. §§ 126-152i), by Daniel Ivers, employee, opposed by the Mt. Olive Coal Company, employer, to recover for personal injuries. An award of the Industrial Commission was affirmed by the circuit court, and the employer brings error. Reversed and remanded, with directions.

T. W. Quinlan, of Springfield, for plaintiff in error.
Kerr, MacDonald & Murphy, of Chicago, for defendant in error.

THOMPSON, J. This writ of error is prosecuted by leave of court to review the judgment of the circuit court of Macoupin county confirming an order of the Industrial Commission awarding compensation to defendant in error, Daniel Ivers, for a period of 54 weeks for temporary total incapacity and for a period of 120 weeks for 80 per cent. loss of the use of his right hand.

Defendant in error was 61 years old, and was hurt October 13, 1917, while loading coal in the mine of plaintiff in error. His right arm was broken about 1½ inches above the wrist., the doctor describing the break as a green-stick fracture of the radius.

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There are but two questions presented for our consideration: First, what is the meaning of the term "temporary total incapacity," and is there evidence in the record to sustain the finding that the period temporary total incapacity in this case was 54 weeks? Second, what is the effect of the unreasonable refusal of an injured employee to submit to proper medical or surgical treatment, and does the evidence in this record show the refusal of defendant in error to submit to surgical treatment to be unreasonable?

For about five weeks after the injury the arm of defendant in error was kept in splints, and after the splints were removed the hand was kept bandaged for about 2 more weeks. According to the testimony of defendant in error he "got well about 10 weeks after the accident." The only disability that prevented him from returning to his work was the stiff condition of his hand. The arbitrator entered his award November 16, 1918, and the review before the Industrial Commission was had about six months later. There had been practically no change in the condition of the hand since about January, 1918. Dr. Don Deal testified that he examined defendant in error June 19, 1918, and found that there was limitation of motion of the right wrist of about 40 per cent., and that there was limitation of flexion in each of the fingers of the right hand of about 50 per cent. It was his opinion that this condition was due to immobility over a long period, and was not due to the fracture. He found that there had been a solid union of the bone, and that the wrist and hand would improve with use. It was also his opinion that the only thing that would improve the condition of the hand was motion, either by the patient himself, or by some other person with the patient under an anæsthetic. He proposed to give defendant in error laughing gas, and then to forcibly break up the adhesions. He stated that there was no injury except the adhesions in the tendons, and that if these were forcibly broken up there would be a complete recovery in 4 to 6 weeks. The operation is simply manipulating the fingers and hand by forcibe motion. No instruments whatever are used, and the anæsthetic is given solely for the purpose of enabling the patient to bear the pain. Laughing gas is a nitrous oxide, and is a pleasant anæsthetic, used only in minor operations. It is used especially on account of its safety in cases where the patient has kidney or heart trouble. Defendant in error refused to take the anæsthetic and refused to submit to the operation.

[1, 2] The period of temporary total incapacity is that temporary period immediately after the accident during which the injured employee is totally incapacitated for work by reason of the illness attending the injury. It might be described as the period of the healing process. Temporary, as distinguished from permanent, disability is a condition that exists until the injured workman is as far restored as the permanent character of the injuries will permit. Vishney v. Empire Steel & Iron Co., 87 N. J. Law, 481, 95 Atl. 143. The injury to defendant in error furnishes an apt illustration of the distinction between temporary total incapacity and permanent disability. The period of temporary total incapacity is that period during which defendant in error was unable to work because of the broken bone in his arm. When that bone had completely knitted and the usual attendant soreness and stiffness disappeared, the period of the temporary incapacity ended, and any disability then existing was necessarily the result of the permanent character of the injuries received. If defendant in error had lost his hand in the accident, the period of temporary disability would have been the physical state of the patient until the stump was healed and he was able to get about. The loss of the hand would have been the permanent disability for which compensation is allowed under another division of the act. We find no evidence in the record to jusify the finding of the arbitrator that the period of temporary total incapacity was 54 weeks. It is clear from what we have said before that

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three-fourths or more of this period was after the healing process was completed, and the disability was therefore due to the permanent character of the injuries, rather than temporary illness following the accident.

[3, 4] It is further contended by plaintiff in error that the continuance of the permanent disability was not due to the original accident, but was due to the unreasonable refusal of defendant in error to submit to proper medical treatment. It is conceded that there is no power in the Industrial Commission or elsewhere to compel defendant in error to submit to an operation, but, on the other hand, it must be conceded that whether the loss of 80 per cent. of the use of the right hand of defendant in error is attributable to the accident or to the refusal of defendant in error to have the adhesions in the tendons forcibly broken up is a question for the commission, in the first instance, to determine. The uncontradicted evidence in the record shows that there was no possibility of danger to defendant in error from the operation. It is such an operation as any reasonable man would take advantage of, if he had no one against whom he could claim compensation. A reasonable and salutary rule, which has been followed by the American and English courts of last resort, is this:

"If the operation is not attended with danger to life or health or extraordinary suffering, and if, according to the best medical or surgical opinion, the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employer from the obligation to maintain him." Kricinovich v. American Car & Foundry Co., 192 Mich. 687, 159 N. W. 362 Jandrus v. Detroit Steel Products Co., 178 Mich. 265, 144 N. W. 563; L. R. A. 1916A. 381, Ann. Cas. 1915D, 476; Lesh v. Illinois Steel Co., 163 Wis. 124, 157 N. W. 539, L. R. A. 1916E, 105.

[5] The evidence here shows, without dispute, that there is a solid union of the bone, and that the only thing the matter with defendant in error is the adhesions in the tendons of his wrist and hand. The operation is a simple one, attended with no danger whatever, and with no pain under a mild and entirely safe anæsthetic. We must therefore hold the permanent disability of defendant in error is due to his refusal to submit to this simple operation, and not due to the accident. Joliet Motor Co. v. Industrial Board, 280 Ill, 148, 117 N. E. 423.

For the errors appearing in the record this cause must be remanded to the Industrial Commission for further proceedings consistent with the views expressed in this opinion. If the operation should be had and prove unsuccessful, plaintiff in error would be liable for whatever loss of use of his hand defendant in error suffers, as well as surgical and hospital services necessary for the operation and for treatment already received, but if successful its liability would be for temporary loss of time and for treatments had and surgical and hospital expenses incurred in the operation. Whatever time the commission finds from the evidence defendant in error has lost by his unreasonable refusal to submit to this operation must be credited to plaintiff in error in awarding compensation. Such loss of time must be attributed to the voluntary act of defendant in error in refusing to submit to proper medical treatment, and must not be attributed to the accident.

The judgment is reversed, and the cause is remanded to the circuit court, with directions to set aside the order of the Industrial Commission, and for such further proceedings as are provided by statute.

Reversed and remanded, with directions.

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PAYNE, DIRECTOR GENERAL OF RAILROADS, v. INDUSTRIAL COMMISSION ET AL (No. 13481.)

(Supreme Court of Illinois. Dec. 21, 1920.)

129 Northeastern Reporter 122.

1. MASTER AND SERVANT—COMPENSATION CLAIMANT'S INJURY MUST ARISE OUT OF AND IN COURSE OF EMPLOYMENT.

To render the employer liable under the Workmen's Compensation Act, the employee's injury must arise out of as well as in the course of the employment.

(For other cases, see Master and Servant Dec. Dig. § 371.)

2. MASTER AND SERVANT—INJURY BY SHOOTING COMPRESSED AIR IN PLAY HELD NOT ONE "ARISING OUT OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Where boys between 15 and 16 years old, using a machine operated by compressed air attached the air hose after taking it from a locker, and while playing with hose according to a practice unknown to the employer one of them was killed by shooting air into his body per rectum as he turned to start his work, the injury, though occuring during the course of the employment, did not arise out of the employment within the Workmen's Compensation Act so as to render the employer liable.

(For other cases, see Master and Servant Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Error to Circuit Court, Vermilion County; Augustus A. Partlow. Judge.

Application under Workmen's Compensation Act (Hurd's Rev. St. 1919, c. 48, §§ 126—152i) by Florence E. Eagelson, as executrix of Frederick Eageleson, deceased, for compensation, opposed by John Barton Payne, Director General of Railroads, in charge of the Chicago & Eastern Illinois Railroad Company. An award was allowed by the arbitrator and later by the Industrial Commission, but was set aside by the circuit court on certiorari, and the executrix brings error. Judgment affirmed.

O. M. Jones and C. W. Fleming, both of Danville (W. T. Henderson, of Danville, of counsel), for plaintiff in error.

H. M. Steely and H. M. Steely, Jr., both of Danville, for defendant in error.

CARTER, J. Frederick Eagleson, a boy 17 years old, died as a result of injuries received while in the employ of the Chicago & Eastern Illinois Railroad Company in its shops at Danville, Ill., in January, 1919. Application was made to the Industrial Commission of Illinois for compensation, which was allowed by the arbitrator and later by the Industrial Commission. On review by writ of certiorari in the circuit court the award of the commission was set aside, and the cause has been brought to this court by writ of error.

The deceased worked in the oil room, so called, of the Chicago & Eastern Illinois shops at Danville for about a month in March and April, 1918, hen he was promoted and transferred to what is known as the grease room. The evidence shows that the oil room was about 40x40

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feet in size, and the foreman of the oil and grease department sat in the southwest corner of this oil room. Near the notheast corner of this room there was a door in the east wall opening into the grease room, about 12x15 feet in size, and along the south wall of this room were pipes that carried compressed air, with valves and nozzles for attaching hose, and along and on this south wall were also hopper machines for pressing hard grease. The machine at which Eagleson was employed at the time of his injury pressed the grease into flat cakes for use in lubricating the journals of locomotives. There was another machine in the room that pressed the hard grease into round sticks, which were then cut into two-inch sections, for use in the rod cups of the locomotives. These various machines, when filled and closed, were operated by compressed air attached at the tops and there appears to be nothing dangerous or arduous about this work, the operator simply watching the machines and cutting off the cakes and sticks to the right length. On the north wall of this grease room was a locker, in which was kept a long air hose, which, when needed, was taken out and one end attached to an air nozzle in the grease room and the other end to one of the receptacles in the oil room, in order to transfer oil or grease by air pressure from one receptacle to another. This hose, when not in use, was not allowed to lie around on the floor or left attached to the air nozzle, but was detached and replaced in the locker or cabinet. The evidence shows that on the morning of April 22, 1918, three boys, two aged 16 and one 15, who were employed in the oil room, desiring to transfer some oil from one receptable to another in the oil room, went into the grease room, and one of the boys, Nulken, took the hose from the cabinet on the wall, and, according to the usual procedure, attached it to an air nozzle on the south wall, and then put a new nozzle in the further end of the hose. About this time they began among themselves to "skylark" with the hose, shooting compressed air at each other. The evidence does not show whether the door between the grease room and the oil room was open or closed, but it does show that this hose was attached behind the door, and that from where the foreman sat at his desk in the corner of the oil room he could not see what was going on in the grease room. While playing with the air hose one of the boys would hold the nozzle and another would stand at the valve on the wall and turn on the air, and then they would shoot one of the other boys with the compressed air. When the accident happened Nulken was holding the nozzle at the outer end of the hose and the Elwell boy was at the valve turning the air off or on. The testimony is that the end of the air hose was held six or seven inches from the body or anus of Eagleson, the deceased. and Elwell turned on the air when Eagleson shouted, "I am blowed up!" and fell to the floor. He was taken to the first-aid station at the shops, and later to the hospital, where he died. The tesetimony of these boys is that they had played around the apparatus at other times, shooting one another with compressed air in the same way, and some of the boys testified that on the day in question the Eagleson boy had been participating in the sport and had helped to shoot the other boys with the air, although one of the boys testified that Eagleson had not taken part in the skylarking that ended in the accident; that just before the accident Eagelson had turned around facing towards the machine. to start his work. The evidence does not show clearly which one of the boys started the play and is not entirely in harmony as to whether Eagleson himself took any part in it.

There can be no question that the accident occurred during the course of the employment of the deceased. The only question is whether it arose out of the employment. While this court has never been required to pass on a question whether an air hose is a dangerous appliance, that question has been passed on in other jurisdictions in cases similar to this where the injury arose in the course of play, and has been held in some cases not to have arisen out of the employment and not to have been

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reasonably incident thereto, and in others to have arisen out of the employment. In the case of In re Loper, 64 Ind. App. 571, 116 N. E. 324, where the injury arose in a similar manner from playing with compressed air, it was shown that the employer knew of the custom and such play was permitted. It was held that the employer was liable, largely on the ground that playing with the air, as was done at the time of the accident, had become a habit with the employees, which was known to the employer through his superintendent.

In the case of Robinson v. Melville Mfg. Co., 165 N. C. 495, 81 S. E. 681, 52 L. R. A. (N. S.) 385, the compressed air hose was permitted to lie about the floor of the factory without warning to employees against using it, and in sport a boy was shot with the air and died. It was there held, because the employer negligently left the appliance lying around under conditions shown by the testimony, that it should be held liable for the injury.

In Willis on Workmen's Compensation (12th Ed.) 22, it is stated:

"It is not within the scope of employment for workmen, whether boys or men, to indulge in horseplay, and injury thereby sustained by a workman, even though he is not a party to the 'larking,' is not an injury by accident arising either in the course of or out of the employment."

In Federal Rubber Mfg. Co. v. Havolic, 162 Wis. 341, 156 N. W. 143. L. R. A. 1916D, 968, the Supreme Court had under consideration a case similar in principle and facts to the one at bar. The court there said:

"This court has endeavored to give to the Workmen's Compensation Act a broad and enlightened construction, to the end that it may accomplish to the fullest extent its beneficent purpose. It is to be remembered, however, that the purpose was to compensate for injuries resulting from one class of accidents only, namely, industrial accident. There is liability only 'where, at the time of the accident, the employee is performing service growing out of and incidental to his employment. [Citing authorities.] It was held in Hoenig v. Industrial Com. 159 Wis. 646 * * * after full argument and consideration, that the injuries covered by the act are such as 'are incidental to and grow out of the employment.' This seems * * * to mean the same thing as the expression in the English Compensation Act 'arising out of and in the course of the employment.' Under the English act it has been held that accidents resulting from 'larking' or playing with machinery cannot be held to arise out of the employment. * * * How injuries resulting from such inexcusable and revolting horseplay as this can be said to be incidental to the employment we are unable to understand. It is equally impossible to understand how it can be said that the claimant at the time of the accident was performing service 'growing out of and incidental to his employment.'"

This reasoning was quoted with approval by the Supreme Court of Michigan in Tarper v. Weston-Mott Co., 200 Mich. 275, 166 N. W. 857, L. R. A. 1918E, 507.

Ballard's Adm's v. Louisville & Nashville Railroad Co., 128 Ky. 826 110 S. W. 296, 16 L. R. A. (N. S.) 1052, as a case where a death occurred from one employee, as a prank, using a compressed air hose which is was not his duty to handle, in such a way that the air entered the body of the second employee and killed him, and the court there held that a compressed air hose is not such a dangerous agency that a master is required to guard it to prevent ignorant or reckless employees from using it to the injury of others, and held that, as the master was responsible for the acts of the servants only within the scope of their employment, the master was not liable for this injury; that, while the accident occurred during the course of the employment , it did not arise out of the employment. To the same effect is Kirby v. Louisville & Nashville Railroad Co., 187 Ala. 443, 65 South. 358.

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[1] While it is true, as stated in some of these cases, that the use of compressed air in the master's business similar to the use here involved is not inherently dangerous as to the appliance or mode of its use, the fact it has been found dangerous in the cases cited when used in a spirit of play and sport is evidence, to some extent at least, that employeees do not always appreciate the dangerous character of such use. It may also, without question, be presumed that boys of about the age of those in this case would be more liable to be tempted to play with the air hose than more mature employees. It is held in most jurisdictions, as here, in construing workmen's compensation statutes, that the injury suffered by the employee must arise out of the employment as well as in the course of the employment. Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764; Mephan & Co. v. Industrial Com., 289 Ill. 484, 124 N. E. 540; Marion County Coal Co. v. Industrial Com., 292 Ill. 463, 127 N. E. 84. Where an employee is doing something not required in his employment or the work, he was hired to perform, the employer's knowledge and acquiescence or knowledge of the existence of such custom or practice, must be shown to sustain an award. Sunnyside Coal Co. v. Industrial Com., 291 Ill. 523, 126, N. E. 196. The hose in question was kept in a cabinet or locker, and the evidence indicates that the employer or his representative, the foreman of the department, did not know that in skylarking the hose had ever been used by the employees as it was used at the time of the accident. The employer is not an insurer against all injuries arising during the time of employment, but only those arising out of the employment or which are reasonably incident to it. We think it hardly reasonable to suppose that the employer would anticipate such use of the hose as that here in question.

We think this case is clearly distinguishable from Pekin Cooperage Co. v. Industrial Board, 277 Ill. 53, 115 N. E. 128, and Pekin Cooperage Co. v. Industrial Com., 285 Ill. 31, 120 N. E. 530, which are cited and relied on by counsel for plaintiff in error. In the first case the injured person, in order to get his turn at the pay window, was required to fall in line and stand there for some time and while so standing in line was jostled and fell and was injured. It may well be said that going to and getting his pay in the manner provided by the employer was a part of his work. The employer knew the conditions and surroundings, and, whether he was jostled as a prank by a fellow worker or not, it was a danger he was compelled to incur in order to get his wages. In the second case the men were employed to place staves in racks and it seems that they were compensated by the number of racks filled with staves. The company had allowed a practice to grow up and be indulged in by which when one man did not have quite enough staves to complete his rack he would take or steal staves from the rack of a neighboring workman. A dispute arose between two employees due to this practice, resulting in injury to one of them. In both these cases the practice causing the accident seems to have been well known by the employer.

[2] Here it was not shown that there was any knowledge or acquiescence on the part of the employer as to the employees playing with the hose and the compressed air. The hose was kept in a place which ordinarily would be held a sufficient guard against danger. It was not within the scope of the ememployment to use it except for the work defined for each employee. We agree with the Supreme Court of Wisconsin in saying that an injury resulting from such inexcusable horseplay could hardly be said to have arisen out of the employment or to be incidental thereto.

The circuit court rightly set aside the award of the Industrial Commission, and the judgment of said court will be affirmed.

Judgment affirmed.

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ROCKFORD CABINET CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13485.)

Supreme Court of Illinois. Dec. 21, 1920.)

129 Northeastern Reporter 142.

1. MASTER AND SERVANT—DEPENDENCY WITHIN COMPENSATION ACT QUESTION OF FACT NOT REVIEWABLE.

The question of dependency and its extent under the Workmen's Compensation Act is a question of fact; and, when there is evidence to sustain the finding of the Industrial Commission confirmed by the circuit court, the Supreme Court is without jurisdiction to review such finding.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

2 MASTER AND SERVANT—"DEPENDENT" WITHIN COMPENSATION ACT DEFINED.

A "dependent" within the Workmen's Compensation Act is one who is sustained by another, or who relies upon another for support or for reasonable necessaries consistent with the dependent's position in life.

(For other cases, see Master and Servant Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent.)

3. MASTER AND SERVANT—MOTHER AND MINOR SISTER OF DECEASED MINOR HELD PARTIALLY DEPENDENT WITHIN COMPENSATION ACT.

Where deceased, his father. and a wage-earning sister gave their earnings to deceased's mother, who used the common fund for the upkeep and maintenance of the home, and purchased clothes for deceased and other members of the family therefrom, the mother and a minor sister, not wage-earning, were partially dependent on deceased.

(For other cases, see Master and Servant Dec. Dig. § 388.)

4. MASTER AND SERVANT—COMPENSATION AWARD MUST BE SUSTAINED BY EVIDENCE SHOWING ACCIDENT EMPLOYMENT.

To sustain an award under the Workmen's Compensation Act, there must be some competent evidence that the accident or injury arose out of or in the course of the employment of the injured employee.

(For other cases, see Master and Servant Dec. Dig. § 405[4].)

5. MASTER AND SERVANT—BURDEN ON COMPENSATION CLAIMANT TO SHOW ACCIDENT IN EMPLOYMENT.

In a proceeding under the Workmen's Compensation Act the burden is on the applicant or his legal representative to make proof that the accident arose out of or in the course of the employment.

(For other cases, see Master and Servant Dec. Dig. § 403.)

6. MASTER AND SERVANT—INJURY FROM DISOBEDIENCE NOT WITHIN COMPENSATION ACT; "ARISING OUT OF EMPLOYMENT."

If an injured employee receives the injury in the act of violating an instruction of his employer, by which violation he is taken outside of the scope of his employment, the injury does not arise out of his employment within the Workmen's Compensation Act.

(For other cases, see Master and Servant Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

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7. MASTER AND SERVANT—EVIDENCE HELD TO SHOW INJURY BY FALL FROM ELEVATOR AROSE OUT OF EMPLOYMENT WITHIN COMPENSATION ACT.

Evidence *held* to show employee's death by falling from an elevator arose out of and in the course of his employment, though, when employed, he was told not to go on the elevator alone, and a sign forbade operation of the elevator except by certain employees.

(For other cases, see Master and Servant Dec. Dig. § 405[4].)

Error to Circuit Court, Winnebago County; Robert K. Walsh, Judge.

Proceedings under the Workmen's Compensation Act by Carl E. Lundberg, administrator, for compensation for the death of Alexander Lundberg, opposed by the Rockford Cabinet Company, employer. Compensation was awarded, and the award affirmed by the circuit court and the employer brings error. Affirmed.

A. D. Early and B. B. Early, both of Rockford, for plaintiff in error.
Roy F. Hall, of Rockford, for defendant in error.

STONE, J. This cause comes to this court by writ of error to the circuit court of Winnebago county to review a judgment confirming an award of the Industrial Commission of Illinois. The errors assigned raise the questions of dependency, and whether the injury arose out of and in the course of the employment of the deceased employee, Alexander Lundberg. The Industrial Commission entered an award in the sum of $1,650 under paragraph (c) of section 7 of the Compensation Act (Hurd's Rev. St. 1917, c. 48, § 132).

Alexander Lundberg at the time of his death, November 6, 1918, was 17 years of age, and lived with his parents as a member of the family, consisting of the father, the mother, a sister 16 years of age, and a sister 11 years of age. At the time of the injury he was working for the plaintiff in error, and had been for about two months, and the average wage of other employees engaged in the same class of work as the deceased at the time of the injury is $13.06 per week. The deceased was paid twice a month, and the testimony shows that on each pay day he gave the money so received to his mother, and the mother mingled the same with the earnings of the father and one sister, who were also wage-earners, and all was used for the upkeep and maintenance of the home. The mother and younger sister were not wage-earners, but were dependent upon said income. From this common fund the mother of the deceased purchased his clothes, along with those of other members of the family. The deceased assisted his father in cultivating about seven acres of land connected with the home, and did such other work as a boy of his age would be expected to do.

[1-3] The question of dependency and extent of it under the Workmen's Compensation Act is a question of fact, and where there is evidence tending to sustain the finding of the commission this court is without jurisdiction to review such finding. In law a dependent is one who is sustained by another, or who relies upon another for support or for reasonable necessaries consistent with the dependent's position in life. Rock Island Iron Works v. Industrial Com., 287 Ill. 648, 122 N. E. 830. Under the showing in this case there was a partial dependency on the part of the mother and minor sister which entitled the claimant to the award made here, if otherwise the claim therefor is valid.

At the time of the injury the deceased was employed by the plaintiff in error to assist an operator of a machine-driven saw. The testimony shows that it was the duty of the deceased to take lumber as it came from the saw and place a portion of it on a truck. The truck was then

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moved over a double saw on the same floor. Sometimes the deceased moved the truck, and at other times assisted in so doing. After the pieces were delivered to the double saw the deceased would run to his original position and fill another truck. In case there were unsufficient trucks on the floor on which the deceased was working, he and the man operating the saw would go to the next floor and secure a truck, bringing it down by means of an elevator. The employees who handled the trucks were called "truckers." At the time of the employment of the deceased the superintendent of plaintiff in error told him not to go on the elevator except in company with the man he was helping. On the elevator appeared the following:

"For Using the Elevator—No one allowed to run the elevator except the trucker, without permission."

The testimony is conflicting as to the use of the eltvator, but there is testimony tending to show that the deceased had been seen using it about a week before his injury, and that employees other than truckers were in the habit of running the elevator; that any one of the "old men" that knew how to run the elevator was permitted to run it, to the knowledge of the plaintiff in error. The deceased had been seen twice on the elevator alone, and at other times in company with the truckers or older employees. On the day of the injury the deceased, as was the custom, ate his lunch on the premises. There was no particular place for the employees to go while eating their lunch, but each sought out a place at his convenience. One-half hour was set apart for this purpose. Just prior to the injury the whistle had blown, notifying the employees to return to work, and some had gone to their machines and were oiling them preparatory to actual operation. The deceased was seen on the elevator between the first and second floors immediately after the whistle blew. He was alone, and for some reason not shown by the evidence he fell from the elevator to the bottom of the elevator shaft and was killed. After the deceased fell another employee stopped the movement of the elevator by reaching in and taking hold of the cable. When stopped the elevator was a few feet above the second floor. This elevator was used for the purpose of carrying freight, and was intended to be used only by those engaged in moving objects from one floor to the other.

[4-7] It is contended by the plaintiff in error that the fact of disobedience of instructions by the deceased in operating the elevator, unaccompanied by a trucker or older employee, while not in the performance of any of the duties of his employment, makes the injury one not arising out of the employment. It is the well-settled rule in this state to sustain an award for compensation there must be some competent evidence that the accident or injury arose out of or in the course of the employment of the injured employee. The burden of making such proof is upon the applicant or his legal representative. Wisconsin Steel Co. v. Industrial Board, 288 Ill. 206. 123 N. E. 295; Peterson v. Industrial Board, 281 Ill. 326, 117 N. E. 1033; Northern Illinois Traction Co. v. Industrial Board, 279 Ill. 565, 117 N. E. 95. If the injured employee receive such injury in the act violating an instruction of his employer, by which violation he is taken outside of the scope of his employment, the injury cannot be said to have arisen out of his employment. Nelson Construction Co. v. Industrial Com., 286 Ill. 632, 122 N. E. 113; United Disposal Co. v. Industrial Com., 291 Ill. 480, 126 N. E. 183. It appears from the testimony of the superintendent of the plaintiff in error that men who have been engaged for a sufficient length of time to be characterized as "old men" about the plant were allowed to run the elevator in question, but that new men were cautioned not to do so. It also appears from his testimony that the deceased, when he was employed, was cautioned not to run the elevator. Deceased had been employed for two months. Whether he was to be characterized as on "old man" or a "new man" was a question of

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fact, depending upon all of the circumstances of the case. It is evident that the warning against the use of this elevator was not intended to apply to him for an indefinite period of employment, but until such time as he had become sufficiently experienced to become characterized as one of the "old men" in plaintiff in error's employ. Whether he was to be so considered at the time of the injury was a question of fact, concerning which, on the record in this case, we are unable to say that there was no evidence. There was evidence in the record tending to show that he was a trucker, that is, that he moved the trucks upon which the pieces of lumber were laid. It is undisputed that truckers were allowed to use this elevator. Deceased appears to have at times done whatever work was necessary to be done in connection with trucking. We are of the opinion, therefore, that there is evidence in the record tending to show that the injury arose out of and in the course of the employment of the deceased.

The judgment of the circuit court will therefore be affirmed.

Judgment affirmed.

ROCKFORD CITY TRACTION CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13496.)

(Supreme Court of Illinois. Dec. 21, 1920.)

129 Northeastern Reporter, 135.

1. MASTER AND SERVANT—COMPENSATION AWARD FOR WELDER'S LOSS OF EYESIGHT HELD WARRANTED.

An award of compensation in favor of a welder who lost the use of both his eyes *held* warranted on the theory that it was the result of the accidental breaking of his hood, which exposed his eyes to the dazzling light resulting from welding and not from pre-existing disease.

(For other cases, see Master and Servant § 405[4].)

2. MASTER AND SERVANT—AWARD UNDER COMPENSATION ACT PROPER WHERE DISEASE IS ACCELERATED BY ACCIDENTAL INJURY.

Compensation may be awarded under the Workmen's Compensation Act, though there was a pre-existing disease, if such disease was aggravated and accelerated by an accidental injury in the course of the employment.

(For other cases, see Master and Servant Dec. Dig. § 376[2].)

3. MASTER AND SERVANT—EVIDENCE IN COMPENSATION CASE HELD TO SHOW RELATION.

Testimony by claimant under the Workmen's Compensation Act that he was employed by a particular company and paid by it is sufficient to [illegible] the relation of employer and employee between claimant and such company.

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

4. MASTER AND SERVANT — BURDEN ON EMPLOYER TO SHOW THAT CLAIMANT WAS ENGAGED IN INTERSTATE COMMERCE.

Where an employer seeks to avoid liability under the Workmen's Compensation Act on the ground that the employee was engaged in interstate commerce at the time of his injury, the burden is on the employer to show that the employee was at that time engaged in interstate commerce.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

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Error to Circuit Court, Winnebago County; Robert K. Welsh, Judge.

Claim by Thomas Gould for compensation under the Workmen's Compensation Act against the Rockford City Traction Company. An award of the Industrial Commission to claimant was confirmed on certiorari to the circuit court, and the traction company, employer, brings error. Affirmed.

Fisher, North, Welsh & Linscott, of Rockford, for plaintiff in error.

Roy F. Hall, of Rockford, for defendant in error.

THOMPSON, J. Defendant in error was employed by plaintiff in error as a welder. In the latter part of May, 1918, while he was welding rails he suffered an injury which has resulted in the total loss of the use of both eyes. In welding rails defendant in error operated an electric welder which used about 550 volts of electricity. The welder is applied to the ends of the rails as they are laid in the track, the purpose being to melt the steel and thereby cause the rails to join. In doing this a dazzling light is generated and it is necessary for the welder to protect his eyes with colored glasses. For this purpose plaintiff in error provided defendant in error with a hood which had in it a double thickness of colored glass—one red and the other green. Because of the excessive heat or a piece of molten metal coming in contact with the glass, or for some other unexplained reason, one set of these glasses broke and dropped out and defendant in error received the flash of light on his naked eyes. He jumped back from his work, but for some minutes his sight was blurred to such an extent that he could not see. After a few minutes' rest his sight returned and he replaced the broken lenses and in about 30 minutes returned to his work. His sight gradually failed him until he was no longer able to work. On application to the Industrial Commission compensation was awarded, and on certiorari to the circuit court of Winnebago county the award of the commission was confirmed. This writ of error is prosecuted to review that judgment.

[1, 2] Much of the evidence appearing in the record tends to show that the loss of sight is not due to the accident but to the existence of a pre-existing disease. Defendant in error was 33 years of age and up to the time of the accident had never had any trouble with his eyes. About 2 years before this accident Dr. W. G. Hatch removed a little piece of solder from the right eye of defendant in error. The injury was not a serious one, and had little, if any, permanent effect on his eye. Dr. Hatch tested Gould's eyes at that time and found the vision of his right eye to be two-fifths normal and the vision of his left eye better than normal. Immediately after the accident Gould's eyes began to pain him. They bothered him while he was at his work and he was unable to sleep at might on account of the pain. On the 23d of May he resigned because his eyes were in such condition that he could no longer attend the work. The commission was justified in its finding that the disability of Gould was the result of the injury. Though it may be conceded that Gould was suffering from a pre-existing disease that would eventually have effected his eyesight, we think it fair to conclude from the evidence in this record that the blindness developed as a result of the injury. Compensation may be awarded although there is a pre-existing disease, if the disease is aggravated and accelerated by an accidental injury in the course of the employment. Big Muddy Coal & Iron Co. v. Industrial Board, 297 Ill. 235, 116 N. E. 662; Wabash Railway Co. v. Industrial Com., 286 Ill. 194, 121 N. E. 569; Jakub v. Industrial Com., 288 Ill. 87, 123 N. E. 263; Spring Valley Coal Co. v. Industrial Com., 289 Ill. 315, 124 N. E. 545. While much emphasis was laid on this point in the presentation of evidence, the point seems to have been abandoned in the brief and we will not consider it further.

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[3-6] The point urged in the brief of plaintiff in error for a reversal of this judgment is that defendant in error was engaged in interstate commerce at the time of his injury and that recovery must be had, if at all, under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665). This contention is made on the theory that at the time of the injury he was engaged in repairing an instrumentality used in interstate commerce. Plaintiff in error, the Rockford City Traction Company, operates a street railway in the city of Rockford, and as associated company, the Rockford & Interurban Railway Company, operates four interurban lines out of Rockford—one each to Belvidere, Freeport, and Camp Grant, Ill., and a fourth line to Beloit and Janesville, Wis. These companies are in law two corporations, but they are operated from the same office by the same officers and agents, and their connection is so close that it is almost impossible for any one to know what are the activities of the one and what of the other. Defendant in error was injured in the city of Rockford, near the east end of the East State street bridge across Rockriver. Over the point where he was injured the Rockford City Traction Company runs practically all its lines of cars, and the Rockford & Interurban Railway Company used the same tracks for its cars that run to Beloit and Janesville, Wis. Defendant in error testified that he was employed by the Rockford City Traction Company and was paid by that company and not by the interurban company. This was sufficient to establish the relation of employer and employee between defendant in error and plaintiff in error. Chicago Traction Co. v. Industrial Board, 282 Ill. 230, 118 N. E. 464. Where the employer seeks to avoid liability under the Workmen's Compensation Act (Hurd's Rev. St. 1919, c. 48 §§ 126-152i) on the ground that the employee was engaged in interstate commerce at the time of his injury, the burden is on the employer to show that the employee at the time of his injury was engaged in interstate commerce. Atchison, Topeka & Santa Fe Railway Co. v. Industrial Com., 290 Ill. 590, 125 N. E. 380; Chicago & Alton Railroad Co. v. Industrial Com., 290 Ill. 599, 125 N. E. 378. Before the federal Employers' Liability Act controls, it must be shown that the employee was at the time of his injury engaged in the interstate commerce of his employer; that is, both the employee and the employer must at the time be engaged in interstate commerce within the meaning of the act. Chicago & Alton Railroad Co. v. Industrial Com., 288 Ill. 603, 124 N. E. 344. None of the business of plaintiff in error was interstate business, and the circuit court properly held that the Industrial Commission had jurisdiction of the cause. San Francisco-Oakland Terminal Railways v. Industrial Accident Com, (Cal.) 179 Pac. 386. Whatever the arrangement between plaintiff in error and the Rockford & Interurban Railway Company might have been would in no way affect the relation existing between plaintiff in error and defendant in error.

The judgment of the circuit court is affirmed.

Judgment affirmed.

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O. W. ROSENTHAL & CO. v. INDUSTRIAL COMMISSIAN ET AL.
(No. 13376.)

(Supreme Court of Illinois. Dec. 21, 1920.)

129 Northeastern Reporter, 176.

1. MASTER AND SERVANT—OPERATION TO CURE COMPENSATION CLAIMANT DETERMINED BY INDUSTRIAL COMMISSION IN ITS DISCRETION.

Whether an operation requested for the cure of an employee's injury is reasonably essential is for the Industrial Commission to determine, based upon the evidence submitted to it, and it is only in a case where the commission has acted unreasonably or abused its discretion that the court can interfere with its finding under Workmen's Compensation Act, § 19, par (d), vesting the commission with a right to suspend compensation for refusal to submit to such surgical treatment as is reasonably essential to promote recovery.

(For other cases, see Master and Servant Dec. Dig. § 385[18].)

2 MASTER AND SERVANT—REFUSAL TO SUBMIT TO OPERATION FOR HERNIA HELD UNDER EVIDENCE TO JUSTIFY SUSPENSION OF COMPENSATION AWARD.

Where a workman sustained an injury resulting in hernia and refused to submit to an operation, evidence *held* to justify a finding of the Industrial Commission suspending the award on the ground of such refusal under Workmen's Compensation Act, § 19, par. (d).

(For other cases, see Master and Servant Dec. Dig. § 405[6].)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings under Workmen's Compensation Act by Sylvester Bush, employee. Opposed by O. W. Rosenthal & Co., employer, to recover for an injury resulting in hernia. An order of the Industrial Commission modifying the award was set aside by the circuit court, and employer brings error. Reversed.

Zimmerman, Mack & Garrett, of Chicago, for plaintiff in error.
Hope Thompson, of Chicago, for defendant in error.

CARTER, J. This as a petition filed by the defendant in error, Sylvester Bush, before the Industrial Commission of Illinois, praying for compensation on account of an injury resulting in hernia. The cause was before this court under the same title in 290 Ill. 323, 125 N. E. 250, and the principal facts concerning the injury are there stated. The judgment entered in the original trial of the case, not being in accordance with the statute was reversed by this court, with directions to enter an order confirming the award in accordance with the provisions of the statute. Such an order was entered by the Industrial Commission, but upon certiorari proceedings subsequent to its entry the judgment in favor of the defendant in error was modified so that payments under the award were suspended, on the ground that the applicant refused to submit to an operation which the commission thought reasonable. The order of the Industrial Commission modifying the award was set aside by the circuit court of Cook county, and this writ of error was sued out from this court to review the proceedings.

The sole question now before this court in this case is whether the Industrial Commission properly suspended compensation upon the employee's refusal to submit to a surgical operation such as was requested

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here for the cure of the hernia. The testimony offered to show a justification for such refusal is briefly as follows: The applicant himself testified that at the time he was examined by Dr. Nordholz, the physician of the guaranty company carrying the insurance risk of plaintiff in error, he was not physically able to stand the operation. also that he was requested to sign some paper and then go to the hospital without any definite arrangement as to compensation. Dr. Nordholz, on behalf of plaintiff in error, testified that he had operated on 35 or 40 cases of hernia. and had assisted in many more such operations; that when he examined the applicant he found him normal and a good surgical risk,—that is, that his life would not be jeopardized by the operation, and that the condition caused by the hernia could be corrected and the applicant be able to resume his regular work as a carpenter; that statistics showed that only about two-tenths of 1 per cent. of such operations were fatal; that in his judgment is was reasonably certain that such an operation would be successful. Dr. E. D. Levisohn, applicant's physician at the time of the injury, gested Bush had bronchitis, and was not in proper physical condition to testified that when he examined him at the time the operation was sugbe operated on. He stated, however, that the bronchitis was of short duration, and that at the time he testified he thought the operation could be performed. He and Dr. William Loeser, who also testified, stated that each had had experience in many operations for hernia, and that the chances for recovery were from 85 to 90 per cent. Dr. James T. Sullivan, who had examined the applicant for plaintiff in error, also testified that after such an operation the applicant would be able to resume light work within 8 weeks and his regular work within 12 weeks. The services of Dr. C. R. G. Forrester appear to have been tendered the applicant, with the written statement that if an operation were necessary it would be paid for by the insurance company. It appeared from the record that the operation proposed involved cutting through the skin, the subcutaneous tissue, the covering of the muscles, and the muscles, making a slit about 2½ inches long, an opening to be made reaching to the peritoneum or tunica vaginalis, depending upon the type of hernia, and involving some further manipulation of parts and surgical work in correcting the condition caused by the hernia. The testimony of the physicians was to the effect that is was a comparatively superficial operation, though counsel for defendant in error argues, that it is a major operation, and one involving some danger to life, and should not be required as a prerequisite to obtain compensation for the injury.

[1] This and similar questions have been before the courts quite frequently. Paragraph (d) of section 19 of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, § 144) vests the Industrial Commission with the right to suspend the compensation of an injured employee if he "shall refuse to submit to such * * * surgical treatment as is reasonably essential to promote his recovery." Whether the operation is reasonably essential is for the Industrial Commission to determine, based upon the evidence submitted to it, and it would only be in a case where the commission had acted unreasonably or abused its discretion that the court would interfere with its finding. This court in Joliet Motor Co. v. Industrial Board, 280 Ill. 148 117 N. E. 423, held that where the evidence as to a claim for total loss of sight of an eye showed that such loss was caused by a cataract of slow growth, and that an operation could be performed which would cause little or no pain to the employee, and which would not endanger his life and would probably restore his sight, the Industrial Commission should not award compensation for total loss of sight of the eye, even though it could not compel the employee to undergo an operation. Of course, the question to be decided is not that of compelling a party to submit to an operation.

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"The question is whether a party who declines to undergo what would be described by experts as a reasonable and safe operation is to be considered as a sufferer from the effect of an injury received in the course of his employment, or whether his suffering and subsequent inability to work at his trade ought not to be attributed to his voluntary action in declining to avail himself of reasonable surgical treatment. * * * If in such a case the sufferer, either from defect of moral courage or because he is content with a disabled hand and is willing to live on the pittance which he is receiving under the Compensation Act, refuses to be operated upon, I should have no difficulty in holding that his continued inability to work at his trade was the result of his refusal of remedial treatment and that he was not entitled to further compensation." Donnelly v. Baird & Co. 1 B. W. C. C. 95.

See, also, to the same effect, Walsh v. Locke & Co., 7 B . W. C. C. 117; Kricinovich v. American Car & Foundry Co., 192 Mich. 687, 159 N. W. 362. Lesh v. Illinois Steel Co., 163 Wis. 124, 157 N. W. 539, L. R. A. 1916E, 105; Enterprise Fence & Foundry Co. v. Majors (Ind. App.) 121 N. E. 6. The same general rule is also stated in Bradbury on Workmen's Compensation (3d Ed.) 834.

In O'Brien v. Albrecht Co., 206 Mich. 101. 172 N. W. 601, 6 A. L. R. 1257, where an injury resulted in hernia and the testimony established that an operation could be performed without endangering life, and the plaintiff could not be cured without it, the court said (206 Mich. 104, 172 N. W. 601, 6 A. L. R. 1258):

"The physician of the company and the one of plaintiff's selection both advised an operation for the hernia. Such an operation is not attended with danger to life or health, and it appears to be undisputed that it affords the only reasonable prospect of restoration of plaintiff's capacity to labor at his trade, that of a carpenter. * * * We are impressed that plaintiff's refusal was unreasonable, * * * Until the plaintiff submits to an operation, which should be at the expense of defendants he is not entitled to compensation from them."

[2]Naturally, each case must depend largely upon its special facts. The hernia here was caused by the accident, but it appears that an injury of this kind is not recovered from in the ordinary process of healing by allowing nature to take the ordinary course, as is the case with many wounds. On the facts as found in this record, we think the findings of the Industrial Commission suspending the award, as stated above, were justified, and the courts are bound by the commissioner's finding.

We do not think the cases relied on by counsel for the applicant, such as McNally v. Hudson & Manhattan Railroad Co., 87 N. J. Law, 455, 95 Atl. 122, and Feldman v. Braunstein, 87 N. J. Law, 20 93 Atl. 679, both construing the Workmen's Compensation Act of New Jersey, are necessarily controlling here, as that statute is differently worded from the Illinois statute.

The circuit court erred in setting aside the award of the Industrial Commission, and its order in that regard will be reversed, and the finding and award of the Industrial Commission will be confirmed.

Judgment reversed.

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AMERICAN LEATHER PRODUCT CO. v. STONE. (No. 10827.)

(Appellate Court of Indiana, Division No. 2 Dec. 23, 1920.)

129 Northeastern Reporter, 264.

MASTER AND SERVANT — INDUSTRIAL BOARD'S FINDING SUPPORTED BY EVIDENCE IN COMPENSATION CASE NOT REVIEWABLE.

A finding of the Industrial Board in a proceeding under the Workmen's Compensation Act that the injury to the applicant arose out of and in the course of his employment will not be disturbed on appeal if there is evidence to support it.

(For other cases, see Master and Servant Dec. Dig. § 417[7].)

Appeal from Industrial Board.

Proceeding by William Stone under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the American Leather Products Company, the employer. There was an award of compensation by the Industrial Board, and the employer appeals. Award affirmed.

Howe S. Landers and Ketcham, McTurnan & Higgins, all of Indianapolis, for appellant.

Joseph R. Morgan, of Indianapolis, for appellee.

McMahan, J. The only question involved in this appeal is whether the finding of the Industrial Board, that the injury to appellee arose out of and in the course of his employment, is sustained by sufficient evidence. This was a question for the Industrial Board. There was evidence to support the finding, and under such circumstances it will not be disturbed on appeal. Leonard Construction Co. v. Boening, 126 N. E. 703; American Hominy Co. v. Davis, 126 N. E. 703.

The award of the Industrial Board is affirmed, under the statute (Laws 1915, c. 106) the amount thereof is increased 5 per cent.

HOOSIER VENEER CO. v. STEWART et al. (No. 10828.)

(Appellate Court of Indiana, Division No. 2. Dec. 21, 1920.)

129 Northeastern Reporter, 246.

1. MASTER AND SERVANT—COMPENSATION CLAIMANT'S DEPENDENCY ON CHILD FACT TO BE DETERMINED FROM EVIDENCE.

Under Workmen's Compensation Act, § 38, the dependency of parents on a minor child is a question of fact to be determined from the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

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2. MASTER AND SERVANT—COURT REVIEWING COMPENSATION CASE WILL TREAT FINDING OF EVIDENTIAL FACTS AS EQUIVALENT TO FINDING OF ULTIMATE FACT.

In proceedings by parents claiming under Workmen's Compensation Act, for the death of a minor child, where the Industrial Board, instead of finding ultimate fact of dependency, set out the evidential facts, and the only inference to be drawn from the evidential facts was dependency, the case will not be returned to the board for a specific finding, but the court will treat the evidential facts as the equivalent of a finding of ultimate fact.

(For other cases, see Master and Servant Dec. Dig. § 417[9].)

3. MASTER ANR SERVANT—PARENTS HELD SHOWN TO BE PARTIAL DEPENDENTS WITHIN COMPENSATON ACT.

In a proceeding under the Workmen's Compensation Act to obtain compensation for the death of a child, evidence *held* to prove that applicants were partial dependents.

(For other cases, see Master and Servant Dec. Dig. § 405[5].)

4. MASTER AND SERVANT—METHOD OF DETERMINING CHILD'S AVERAGE WEEKLY WAGE WITHIN COMPENSATION ACT STATED.

Where a servant entered upon his work July 29, 1919, and received injuries on August 6, 1919, from which he died on that date, never having worked for wages before, except in the preceding July, when he worked three weeks for an uncle helping in harvesting, the amount earned in harvesting should not be taken into account in determining the weekly wage under the Workmen's Compensation Act.

(For other cases, see Master and Servant Dec. Dig. § 386[1].)

5. MASTER AND SERVANT—METHOD OF DETERMINING CHILD'S WEEKLY CONTRIBUTIONS TO DEPENDENTS WITHIN COMPENSATON ACT STATED.

In a proceeding by parents under Workmen's Compensation Act to obtain compensation for the death of a child who had worked about a week for employer and had never worked for wages before, except three weeks helping an uncle in harvesting, Industrial Board was not required, for the purpose of determining the child's weekly contributions, to include any period of time other than the term of his employment with employer.

(For other cases, see Master and Servant Dec. Dig. § 386[1].)

Appeal from Industrial Board.

Proceeding by John Stewart and others under the Workmen's Compensation Act to obtain compensation for the death of Harold Stewart, opposed by the Hoosier Veneer Company, the employer. There was an award of compensation by the Industrial Board, and the employer appeals. Award affirmed.

Joseph W. Hutchinson, of Indianapolis, for appellant.

Frank B. Ross and Edward H. Knight, both of Indianapolis, for appellees.

DAUSMAN, P. J. It appears from the finding of facts that one Harold Stewart was employed by the Hoosier Veneer Company and entered upon his work July 29, 1919; that on August 6, 1919, he received a personal injury by accident arising out of and in the course of the employ-

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ment, and resulting in his death on said date; that he was 16 years and 24 days of age at the time of his death; and that he was the son of the appellee John Stewart. The proceedings before the Industrial Board resulted in an award of compensation to the father at the rate of $9.075 per week.

Appellant presents two contentions for our determination: (1) That the facts found do not show dependency; and (2) assuming that an award in some amount was proper, the board erred in fixing the amount of the weekly payments.

[1, 2] The question of dependency is one of fact to be determined from the evidence. Sections 38, W. C. A. (Acts 1919, p. 165). The board has not found specifically that the appellees are dependents. Instead of finding the ultimate fact of dependency, the board has set out the evidential facts. However, the only legitimate inference to be drawn from the evidential facts is that the appellees are dependent. While it was the duty of the board to have found the ultimate fact specifically, yet, since the board has acted on that inference, and in view of the attitude of the parties with respect thereto, we will not return the case to the board and require it to make a specific finding on that point, but will treat the evidential facts as the equivalent of the ultimate fact.

[3] The evidence tends fairly to prove that appellees are partial dependents. See In re Stewart, 126 N. E. 42.

It is conceded that Harold's wages were fixed by agreement at $16.50 per week, and at that rate his total earnings were $20.73. The entire amount so earned he contributed to his parents to aid in supporting the family. It is apparent, therefore, that the board's computation is correct. Section 76, W. C. A. (Acts 1919, p. 175).

[4] The evidence discloses that Harold had never before worked for wages except in the preceding July, when he worked three weeks for an uncle, helping in harvesting. For that work his earnings amounted to $27.25, all of which he contributed to his parents to aid in supporting the family. Appellant contends that the amount thus earned should be taken into the account when determining the average weekly wage. The language of the statute is a sufficient answer to that contention

[5] A further contention is that in determining the average weekly contributions the board should have taken into account the entire period from the time the workman commenced to work on the farm to the time of the fatal injury. We are of the opinion that under the facts of this case the board was not required, for the purpose of this computation, to include any period of time other than the term of his employment with the appellant.

Award affirmed.

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FARRIS ET AL. v. LOUISIANA LONG LEAF LUMBER CO. ET AL. (No. 23592.)

(Supreme Court of Louisiana. Nov. 3. 1920.
Rehearing Denied Dec. 4, 1920.)

86 Southern Reporter, 670.

(Syllabus by the Court.)

1. MASTER AND SERVANT—SURVIVING PARENTS OF MINOR INJURED IN ATTEMPT TO BOARD TRAIN CARRYING WORKMEN HOME HELD ENTITLED TO COMPENSATION.

Where, under a contract of employment, an employee is carried forth and back, on a working train and is under the orders of his foreman, and is paid from the time that he boards the train in the mornings, until his return to the starting point, and detrainment in the evening, and where, upon a particular occasion, the train is stopped upon the return trip and he gets off and renders a service as required by the foreman, and, being ordered to get on again, loses his life in the attempt so to do, his parents in default of wife or child, become entitled, under Act No. 243 of 1916, amending and re-enacting section 8 of Act No. 20 of 1914, to recover compensation equal to 50 per cent. during 300 weeks of the wages that he was receiving at the time of his death, and that, notwithstanding that the accident may have been attributable to the decedent's own negligence, or may have resulted from a risk, which under the general law of master and servant he might be held to have assumed.

(For other cases, see Master and Servant Dec. Dig. § 375[2].)

2. MASTER AND SERVANT—STATUTORY DISALLOWANCE OF COMPENSATION FOR DELIBERATE FAILURE TO USE GUARD HELD INAPPLICABLE.

Section 28 of Act No. 20 of 1914, which reads, "That no compensation shall be allowed for an injury caused * * * (3) by the injured employee's deliberate failure to use an adequate guard or protection against accident, provided for him," finds no application in a case where no guard or protection has been provided against a danger, the assumption of the risk of which has caused the accident, and where such risk has been assumed, not deliberately, but under conditions which rendered it necessary for the employee to decide instanter as between two courses, either of which, so far as he was informed, he was free to choose, the more efficiently, as he conceived to perform his duty to his employer.

(For other cases, see Master and Servant Dec. Dig. § 380.)

Appeal from Twelfth Judicial District Court, Parish of Sabine; John H. Boone, Judge.

Action under the Employer' Liability Act by A. B. Farris and another, as surviving parents of Mason Farris, deceased, against the Louisiana Long Leaf Lumber Company and others for compensation for his death. Judgment for plaintiffs awarding compensation, and defendants appeal. Judgment amended by increasing the monthly award and fixing the method of payment, and as amended affirmed.

Thornton, Gist & Richey, of Alexandria, for appellants.

Foster & Woosley of Leesville, for appellees.

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Statement of the Case.

MONROE, C. J. This is an action under the "Employers' Liability Act" (No. 20 of 1914), in which plaintiffs, as surviving parents, claim compensation for the loss of their son, Mason Farris, a minor under 18 years of age, who was killed by accident while in defendant's employ, and, as plaintiffs allege (that allegation presenting the main issue in the case), whilst "performing services arising out of and incidental to his employment in the course of his employer's business." Plaintiffs claim $2,700 as 50 per cent. of decedent's wages during a period of 300 weeks; and the trial court gave judgment in their favor against the two defendants, in solido, for $1,500. They and the Lumber Co. have appealed; the failure of the other defendant, Victoria, Fisher & Western Railway Company, to do likewise being explained by the fact that it was admitted on the trial that the lumber company owns the "holdings" of the railway company, the one company being therefore merely a subsidiary, or agent, of the other, and plaintiffs being apparently satisfied with the responsibility of the Lumber Co.

It appears from the evidence that in 1918, defendant was operating a sawmill at Victoria, in the parish of Sabine, and owned and operated (through the railway company) a railroad, connecting the town with "Fisher," about 24 miles distant, in the same parish; that the decedent, Mason Farris, was employed by it as a member of its "steel gang," consisting of 25 or 30 men (under a foreman, named Teasley) which gang had certain functions to discharge in the matter of the maintenance of the road; that for the discharge of those functions they were carried out from Fisher every morning, on a work train, consisting of a locomotive and caboose, which left Fisher at 7 o'clock and ran to the mill, at Victoria, whence its departure in the evenings was timed so as to enable the men to get back to Fisher (or "home," as that place was called) by 6 o'clock in the evenings; that on the afternoon of May 15, 1918, they left Victoria, and at about 20 minutes before 5 o'clock, had reached a point where they stopped to pick up tools which had been left on the side of the road, and then discovered that there was a train on the track, about 100 yards ahead of them, which the witnesses refer to as a wrecked train, and one of the cars of which was derailed; and that the accident here in question happened just after the tools had been taken aboard and the work train had started, and was moving slowly in the direction of the wreck. No witnesses were called to testify as to the immediate circumstances of the accident (probably because no one else was acquainted with them) except Ed Teasley, foreman of the steel gang, C. E. Bradshaw, conductor of the work train, and Ben Williams engineer in charge of the locomotive by which the killing was done; and the following synopsis from their testimony contains the substance of everything said by them which seems of importance to the questions to be decided, to wit: Ed Teasley, foreman, called by defendant, testifies as follows:

"Q. Just tell what you know of the facts in connection with his (Farris') death. A. I don't know anything more than before the accident happened. I was standing by the caboose door. The boy was standing by my side, and the gang was loading the tools on. He was helping load them. The last account I had of him, he was putting on the last tools. I made the remark. 'All right. we're through; let's go ahead and see what is ahead.' Time was up to go home. I never seen the boy any more. I walked the distance of 30 feet or more, and gave the signal to the conductor, and said 'All right; let's go; and the next moment the signal was given, the boy was killed. Q. Did you see him when he went in front of the engine? A. No, sir; I didn't see him. The last account I had of him, he was loading the tools * * * I saw the last tool put in the caboose, and I turned and hollered, 'All

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right let's go.' I walked to the engine before I said, 'Lets go,' and reached up to get on the engine. and said 'Let's go.' I don't know where the boy went from the place where we were loading, till he was killed. I told them to load on. Q. What did you mean by 'load on'? A. I meant for the boys to get on the car. You see my crew was supposed to stay on the car until I ordered them out, and when I got through with them, loading the tools on the outside, I told them to load on—meaning for them to get back on the car. This boy was in the caboose, and when I ordered the tools loaded on he came out with the rest and helped load the tools. Where he went after that, I couldn't say, * * * Q. Did they [the steel gang] have any instructions not to ride it [the engine]? A. Yes, sir; I told them, the whole crew, not to ride the train any more than the caboose. That was before the boy begun to ride. * * * Q. Ask you whether or not there was sufficient room, or accommodation, in the caboose, for all your men? A. Yes, sir; plenty of room, comfortably. * * *Q. Could he have heard you say 'All right; we'll move on down and see what the trouble is A. Yes, sir; he could have put his hand on me. Q. Then you know he could have known there was trouble ahead, with the other train? A. Yes, sir; when there was a train ahead and I got news there was a log car off. Q. Didn't you, at that time—the time you made the statement, 'We'll move on down and see what's the trouble ahead'—believe that you would have business for those boys to do? A. I don't know about that; I told the boys to 'load on, and let's go and see what is ahead.' This is my business. If I need the boys, afterwards, if I get any work, I go back and call such men and tools as I need to do it. I go ahead and see, and come back myself, and call for such tools as I need. Q. Then the boys were still under your direction? Q. Yes, sir; until they got to town. * * *Q. When does the men's time start? A. Seven o'clock in the morning. Q. Is that when he starts from the mill, on the train? A. Yes, sir. Q. And it stops when he leaves? A. Yes, sir Q. And it stops when he reaches town, at night? A. Yes, sir."

C. E. Bradshaw, the conductor of the train, testifies that, just before it started from the place where the tools were picked up, he got on the front of the engine, and was seated on the crossbar, on the fireman's side, and that a negro was seated on the bar on the engineer's side; that he was looking back, waiting for a signal from the foreman of the loading gang, and when he received it he passed it on to the fireman; that the engine was started and was moving very slowly when the boy made his appearance, near the front; that witness thought he was going to try to get on, upon the side, where he was sitting, and that he turned around to take his feet off so that the boy could get on, but that he failed to get on, on that side, and ran across the track, in front of the moving engine, and his foot seemed to slip, "and he failed to get it"; that witness saw him drop, and grabbed him with his right hand; held him until he saw that he could not get him when he turned him loose, and signaled for them to stop the train, which they did as quickly as they could; it was the duty of the work train to carry the men in, in the evenings; the boy was endeavoring to get on the engine when he was killed; the caboose was set aside for the carrying of passengers; it had side doors with steps up to them; doesn't know about Farris having had any warning about riding on the front end of the train; all he knows is that about two weeks before the engineer told witness to tell some negroes, on the front end of the engine, to get off, and that nobody was allowed to ride on there, and this white boy was on there, and when witness told the negroes what the engineer had said, witness saw him step aside; the engineer could only have seen the negroes; witness had taken his position before the train started; doesn't know when the negro got on; the train carried 25 or 30 workmen; doesn't know the

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size of the caboose; it was the duty of the train to carry the workmen out in the morning and home at night ; the distance from Victoria to Fisher is about 24 miles. We, now quote the witness, literally, as follows

"When I first saw the boy, he was coming around to where I was sitting on the train. He passed me, turning to catch on. I gave—I moved my feet so that he could get on, as I thought he was going to try to get on, where I was and, instead of catching on that side, he ran across, in front of the engine, and turned out, on the outside of the rail, before he turned to catch. The engine was running very slowly." Redirect: "Q. Did you hear anybody holler, 'All aboard'? A. No. sir; the steel gang foreman gave me the signal, 'All right.' Q. That was all that was said. A. That was all was said? A. When he got ready, he gave me the signal."

The quotation contains the last statement made by the witness.

Ben Williams, the engineer of the train testifies as follows: He saw no part of the accident; it is against his rule and the rule of the company for any one other than train employees to ride on the front end of the engine; and endeavored to enforce the rule by having the conductor and fireman put such others off; the steel gang were not permitted to ride on the engine; can't remember to have told Farris, individually, to get off the engine, but has told the whole crew, all of them, together; it has not been customary, since he has been there, for laborers to ride on the steps, or just anywhere they could get on, where the train was to move but a short distance; he never let any workmen ride on the engine at all; and that evening they were ready to go home; "yes," there was a wreck in front of them, but they were on their way home; "yes," he knew that they would have to stop at the wreck; "no," could not see the wreck, plainly; saw the train down there, and some one told them the cars were wrecked; "we had to assist in getting them on, and clearing the track."

It further appears that plaintiffs have nine surviving children, of whom five are living with them; three of the five (including two girls) being minors, the fourth a grown daughter, and the fifth, a son about 27 years of age; and all of whom, as we read the testimony (save, possibly, the last mentioned), derive their maintenance from the cultivation of 25, out of 80, acres of "poor, sandy, land," constituting the family homestead; some slight pecuniary assistance being contributed by a married son. During the year 1918 (immediately preceding that of the trial in the district court, the "farm," if it can be so called, is said to have yielded 2½ bales of cotton, 50 bushels of corn, a few potatoes, and some cane. The family own a cow and a calf, a pony and a horse. Prior to December 9, 1917, Mr. Farris had a store, with a stock of merchandise valued at $3,000 or $4,000 but it burned on that day and was wholly uninsured ,and thereupon the boy, Mason, left home and went to work at such wages as he could get, "to help, support the family." We are satisfied that he contributed to that object all that he earned, beyond that absolutely required for his expenses, which were very limited. A statement prepared by defendant shows that, up to the time of the accident, he had worked for it 17½ days in April, and 13 days in May at first at $2.20 a day, then at $2.75, and, when killed, at $3 or $18 a week.

Opinion.

Section 1 of Act 20 of 1914 begins by declaring that "this act shall apply only to the following." Then comes paragraph 1, which is inapplicable here, after which, this:

"2. Every person performing services arising out of and incidental to his employment in the course of his employer's trade, business or occupation, in the following trades, businesses and occupations."

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And then follows an enumeration of hazardous businesses, including "sawmills, and the maintenance and demolition of railways and railroads;" and other provisions from which it results that, the act being accepted, by both plaintiff and defendant, as the law of their case, neither the defense of assumption of risk, negligence of a fellow servant, nor negligence of the injured employee himself can be entertained. On the other hand, section 28 of the act reads:

"That no compensation shall be allowed for an injury caused (1) by the injured employee's willful intention to injure himself or to injure another, or (2) by the injured employee's intoxication at the time of the injury, or (3) by the injured employee's deliberate failure to use an adequate guard or protection against accident provided for him, or (4) by the employee's deliberate breach of statutory regulations affecting safety of life or limb."

[1] The evidence adduced furnishes no answer to plaintiff's allegation that their son was killed while in the discharge of his duties as an employee of the defendant. It was his duty to get on and off the work train, furnished by defendant for his transportation, when ordered by the foreman of his gang; and as, by order of the foreman, he got off the train and helped put the tools into the caboose, so by order of the foreman he was attempting to get on the train when he was killed. It is no answer to plaintiff's claim for compensation, under the quoted statute, to say that decedent brought about his own death, by negligently attempting to board the train while in motion and to get on the front of the engine, which was dangerous, when he might have boarded the caboose, in safety, while the train was standing still, since his negligence is not an element in the case, unless made so by section 28 of the act, to which we shall again refer. According to our understanding of the testimony, decedent's imprudence or negligence should be attributed to defendant's agents, and not to him. He entered defendant's employ young and wholly inexperienced, and, so far as the record shows, during the 30½ days that he rendered service in that employ he received no warning whatever of the great danger of attempting to board, while in motion, the train upon which he was carried to his work, and back; nor, so far as the record shows, was he ever informed that it was against any rule for other employees than the train crew to ride elsewhere than in the caboose. The danger in question is one which, it may safely be said, no boy fully appreciates, and which a boy in daily association with railroad men who constantly take the risk is likely to regard as altogether negligible. As to the alleged rule of the defendant company, not only does defendant fail to show that the boy was informed of it, but it appears that he had the evidence, furnished by his eyes, that no such rule was enforced, for the moment before he made his deplorable attempt he must have seen the foreman of the steel gang, who was not a member of the train crew, get on the engine, and, as we infer, into the cab, with the engineer; and perhaps the last things seen by him were the conductor of the train moving his feet in order to make room for him, on the front of the engine, and the negro, seated without objection from any quarter, on the other end of the "crossbeam," on engineer's side of the engine and in plain view of the engineer. It is true that the conductor and the engineer testify that the steel gang had been notified not to ride elsewhere than in the caboose, but the conductor says that his notice was given before the boy was employed, and the engineer fails to say that he gave any such notice to the boy, or to the steel gang within the 30 days after the boy had become a member of it. It is true also that the conductor testifies that the engineer on one occasion told him to tell some negroes who were on the front end of the engine to get off, that nobody was allowed to ride on there; that when he had delivered that order to the negroes, who were

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on the engineer's side and could be seen by him, he walked around to the other side, and found young Farris getting off from there; but he does not say that Farris was there when he spoke to the negroes, or that he heard the order given to them, or that he (the witness) knew that Farris applied the order to himself; or that the negroes had any connection with defendant's business; he merely and impliedly suggests the inference that the order was so heard and applied by Farris. On the other hand, the conductor himself testifies that on the day and at the very moment of the accident a negro was sitting upon the one end of the crossbar, on the engineer's side, the other end of which he (the conductor) was occupying, and we find no suggestion anywhere that it occurred to either the conductor or the engineer to order that negro to get off. Morever, the foreman, after testifying that he had instructed the steel gang, not to ride on the train, elsewhere than in the cabose, admitted, a moment later on cross-examination, that, "Sometimes the boys would sit on the hind end of the tank," to which apparently he made no objection.

The testimony of the foreman discloses rather a peculiar experience, and, taken in connection with that of the conductor, leaves the impression that the whole story of the tragedy has not been told by the witnesses. He says that he stood by the boy, at the door of the caboose, and saw him put in the last tool; and he then walked, say, 30 feet, and got on the locomotive, after calling and giving the signal to start, but that he did not again see the boy, and that he was killed immediately after the signal was given. If, however, the start was made as quickly as that, the boy must have passed over the 30 feet between the door of the caboose and the cab of the engine about the same time as the foreman, and it would seem remarkable that the foreman should not have seen him.

The conductor, up to the time that he received the signal to start, was seated on the crossbar, or beam, on the front of the engine, fireman's (or left) side, "looking back." He received the signal from the foreman, and must therefore have seen him; but, though the boy must have been in the line of his vision, he does not speak of seeing him until he was "coming around in front," etc. He makes two statements as to what then occurred——the one, in the beginning, and the other near the close of his testimony, to wit:

"I signaled the fireman to go ahead, and I didn't look back any more until I saw the boy coming around in front of me, and the engine was starting off very slowly, and, when I saw him I thought he was going to try to get on where I was, and I moved my feet to let him on, but he started to go across the track, I guess to get on the other side. I turned around to take my feet off, so that he could get on, and he failed to get on my side, but ran across the track, in front of the moving engine, and his foot seemed to slip, and he failed to get it. I saw him drop, and I grabbed him. I got the boy with my right hand, and I held him until I saw I couldn't get him out, when I turned him loose and signaled them to stop," etc.

The last statement that he makes reads:

"When I first saw the boy, he was coming, turning around to where I was sitting on the train. He passed me, turning to catch on. I gave—I moved my feet so that he could get on, as I thought he was going to try to get on where I was, and, instead of catching on on that side, he ran across, in front of the engine, and turned out on the outside of the rail, before he turned to catch. The engine was running very slowly."

According to the last statement, then, the boy had crossed the track from the left (or fireman's) side, as the locomotive was headed, had reached the right (or engineer's) side, outside of the rail, and was there

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attempting to catch on, when his foot slipped, and the witness, seated on the left side, grabbed him. The engineer did not see him at all, and did not know that anything had occurred until he was signaled by a negro in a wagon. We fail to understand the situation, as described by the witnesses, but are of the opinion that it, at least, serves to show that the boy lost his life in a very earnest effort, however imprudent, to perform his duty to his employer, by getting on the train, in order that he might be carried to the place, in plain sight, where it seemed that he would be called on to render further service arising out of his employment.

[2] Defendant's learned counsel argue that the case should be governed by the provision of section 28 of the statute, to the effect:

"That no compensation shall be allowed for an injury caused * * * (3) by the injured employee's deliberate failure to use an adequate guard or protection, against accident, provided for him."

Our answer to the argument is that the provision invoked presupposes a specific danger, with an appropriate and adequate guard and protection against it; knowledge of both danger, and guard, brought home to the employee; and a "deliberate" failure on his part to make use thereof; and that it has no application to a case where no guard or protection has been provided against the danger the assumption of the risk of which has caused the accident, and where such risk has been assumed, not deliberately, but, under conditions which rendered it necessary for the employee to decide, instanter, as between two courses, either of which, so far as he was informed he was free to choose, the more efficiently, as he conceived, to perform his duty to his employer. The accident out of which this suit has arisen from the attempt of the decedent to board the train while it was in motion, and, for aught that appears, it may have been as dangerous for him to have made that attempt by way of the caboose, under the then existing circumstances, as by way of the locomotive; for, if the foreman is to be believed, there were 30 men at the side of the caboose awaiting his order to "load on," coincidently with which he signaled the train to move on; and it appears to us equally certain that the 30 could not all have got into the door at the same time, and that the train started as soon as the conductor received the signal.

The boy, therefore, being probably the youngest of the 30, may have found his prospect of getting into the caboose rapidly receding; and, not deliberately, but on the spur of the moment, and impressed with the feeling that he must be on hand, with others, for the work of clearing the track of the wrecked train ahead of them, decided to get on the engine, once aboard of which, so far as we are informed, he would have been as safe, for a slow ride of 100 yards, on a straight track, as in the caboose. It is true that getting on the pilot of a moving locomotive appears to us to be highly dangerous, but the decedent was a raw country boy, who had been in defendant's employ only 30½ days, and no one had ever told him how very dangerous it is; and no one who has spoken into this record tells us how dangerous, or how entirely impossible, it may have been for him at that time to have climbed into the door of the caboose. There could be no better evidence that, in choosing his course, under the circumstances, he was unconscious of violating any rule established by his employer than is to be found in the fact that what he did was done openly and under conditions which would seem to have made it impossible that he should not have been seen by every representative of the defendant who had anything to do with the enforcement of its rules. It was not the fault of the boy that the foreman did not see him, since he must have passed the foreman on the way to the front of the locomotive. the conductor did see him, and moved aside in order to make room for him on the front of the locomotive, and his final attempt to get on was made on the engineer's side of the locomotive,

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in plain view of, and but a few feet distant from, the engineer; and we find nothing in the testimony to suggest the idea that he was the kind of a boy who would deliberately, without provocation or reason, and, it may be said contemptously, defy the authorities under whom he was working. Under paragraph (7) of section 8 of the act of 1914, as amended and re-enacted by act 243 of 1916, p. 515, plaintiffs as surviving parents of decedent, are entitled, in default of a widow or child, to recover 50 per cent., during 300 weeks, of the wages that the boy was earning at the time of his death, amounting to $2,700, instead of $1,500, as awarded by the trial court.

It is therefore ordered that the judgment appealed from be amended by increasing the amount of the award in favor of plaintiffs, as therein made, from $1,500 to $2,700, the same to be paid as follows: The aggregate amount, at the rate of $9 per week from May 15, 1918, until the day upon which this judgment becomes executory, to be paid without further delay, and the balance to be paid weekly at the same rate until the expiration of a period of 300 weeks from said May 15, 1918, until final payment. It is further ordered that as thus amended said judgment be affirmed at the cost of defendant.

HELTON v. TALL TIMBER LUMBER CO. OF LOUISIANA, INC.

(No. 22861.)

(Supreme Court of Louisiana. Nov. 29, 1920.)

86 Southern Reporter, 729.

(Syllabus by Editorial Staff.)

1. MASTER AND SERVANT — EMPLOYER LIABLE UNDER COMPENSATION ACT FOR INJURY TO INDEPENDENT CONTRACTOR'S EMPLOYEE.

Under Workmen's Compensation Act, § 6, one employing an independent contractor was liable for the death of one working for the contractor, if the workman was an employee, and not himself an independent contractor.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

2. MASTER AND SERVANT — WORKER CUTTING LOGS FOR PAY BASED ON QUANTITY HELD "INDEPENDENT CONTRACTOR" AND NOT "EMPLOYEE" WITHIN COMPENSATION ACT.

Where a person clearing a railroad right of way employed a number of men to fell trees and saw them into logs, who worked independently of each other and were paid at so much per thousand feet of lumber, and were not employed for any fixed time nor any given quantity of work, and the employer furnished saws and axes and kept them in good order, but exercised no control over them or their work and no supervision, except to designate the place of cutting and to see that the stumps were left level with the ground, one of the men so employed was an independent contractor and not an employee, as he did not hire his services within Civ. Code, arts. 164 and 2745.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Employee; Independent Contractor.)

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Appeal from Thirtieth Judicial District Court, Parish of La Salle; F. E. Jones, Judge.

Suit under the Workmen's Compensation Act by Mrs. Fannie Helton against the Tall Timber Lumber Company of Louisiana, Incorporated. From a judgment for defendant, plaintiff appeals. Affirmed.

A. L. Burford, of Texarkana, Ark., and White, Holloman & White, of Alexandria, for defendant.

PROVOSTY, J. Plaintiff sues under the Workmen's Compensation Act (Act No. 20, p. 44, of 1914) for the death of her husband, who was killed by a falling branch while he and other men were at work clearing a right of way for a railroad to be constructed by the defendant company.

[1] Though plaintiff's husband's contract was with an independent contractor who had charge of this clearing, the defendant company is liable (under section 6 of said act), if plaintiff's husband was an employee, and not, as contended by defendant, an independent contractor.

[2] The work consisted in felling the trees and sawing them into logs. Sometimes only two men were on the work, and sometimes as many as fifteen; all independently of each other. They were paid at the rate of so much per thousand feet of the lumber contents of the logs. Their agreements were not for any fixed time. nor for any given quantity of work, so far as the record shows. Apparently they were at liberty to quit at any time and be paid for the quantity of work done. The contractor furnished the saws and axes with which the work was done and kept them in good order. He exercised no control whatever over the men or their work and no supervision, except that he would designate to each the section upon which to cut (the right of way was laid off into sections of 100 feet), and would see that the stumps were left level with the ground along the center of the right of way, a width of 16 feet, according to the specification of his own contract with the defendant company.

Under these circumstances, we are clear that plaintiff's husband was not an employee. He had not hired his services (C. C. arts. 164, 2745), but was working as his own master. He was at liberty to do the work when and as he pleased. He was not even being paid wages, but only for whatever work he chose to accomplish. A workman who in the manner of doing his work is under nobody's direction or control but his own cannot be classed as an employee, but is an independent contractor. Ann. Cas. 1913B, 574; 14 R. C. L. 67; 65 L. R. A. 447; Moffet v. Koch, 106 La. 371, 31 South. 40; Robideaux v. Hebert, 118 La. 1089, 43 South. 887, 12 L. R. A. (N. S.) 632; Clark v. Tall Timber, 140 La. 380, 73 South. 239; Young v. Fosburg L. Co., 147 N. C. 26, 60 S. E. 654, 16 L. R. A. (N. S.) 255.

Judgment affirmed.

CRAVER v. GILLESPIE. (No. 22868.)

(Supreme Court of Louisiana. Nov. 29, 1920.)

86 Southern Reporter, 730.

(Syllabus by Editorial Staff.)

1. MASTER AND SERVANT — CERTIFICATE OR AFFIDAVIT UNNECESSARY ON APPEAL IN COMPENSATION CASE.

On appeal from a default judgment in a proceeding under the Workmen's Compensation Act, where the motion for appeal was made in writ-

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ing in accordance with Code Prac. art. 573, neither certificate nor affidavit was necessary.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

2. MASTER AND SERVANT—JUDGMENT FOR COMPENSATION HELD NOT TO HAVE BECOME FINAL BEFORE APPEAL.

Where judgment in a proceeding under the Workmen's Compensation Act was rendered February 14th, and defendant, having moved for appeal March 6th, excepted to the jurisdiction of the court to consider plaintiff's subsequent motion to vacate the appeal, and the appeal was then lodged with the Court of Appeal, which transferred the cause, the appeal will not be dismissed on the ground that judgment became final before any appeal was made.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

3. MASTER AND SERVANT — ORDER FOR APPEAL IN COMPENSATION CASE HELD NOT TO HAVE BEEN VACATED.

Order allowing appeal *held* not to have been vacated; the minutes showing that the case was transferred to the Court of Appeal, etc., after defendant excepted to the jurisdiction of the court to hear plaintiff's motion to vacate the appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

4. MASTER AND SERVANT — APPEAL BOND UNNECESSARY IN COMPENSATION CASE.

Under Employers' Liability Act. § 19. an appeal may be prosecuted by either employer or employee without furnishing an appeal bond.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

6. MASTER AND SERVANT—STATUTE HELD NOT IN FORCE AT TIME OF COMPENSATION CLAIMANT'S INJURY.

Act No. 243 of 1916, amending the Employers' Liability Act (Act No. 20 of 1914), was not approved until July 6, 1916, and was not published until July 22, 1916, and so did not become a law outside of Baton Rouge until 20 days after publication; hence it was not in effect August 7th in Caddo parish, and one then injured in such parish cannot recover for permanent facial disfigurement by virtue of the amendatory act.

(For other cases, see Master and Servant, Dec. Dig. § 349.)

Appeal from First Judicial District Court, Parish of Caddo; J. R. Land, Judge.

Proceeding by R. O. Craver against George S. Gillespie under the Employers' Liability Act for personal injuries. From a judgment for plaintiff, defendant appeals. Plaintiff's motion to dismiss having been denied, the judgment was annulled, and judgment entered in favor of Mrs. Ida Gillespie, dative testamentary executrix, substituted defendant.

J. E. Smitherman of Shreveport, for appellant.

Barret & Files, of Shreveport, for appellee.

On Motion to Dismiss Appeal.

SOMMERVILLE, J. Plaintiff and appellee moves to dismiss the appeal herein for the reasons:

"1. That there is no certificate or affidavit attached to the motion for appeal.

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"2. Judgment in the trial court had become final before any appeal was made.

"3. There was no order for appeal herein, the original order having been vacated by judgment of the trial court.

"4. There was no appeal bond filed in the trial court."

[1] I. The motion for appeal herein was in writing, made in open court, and it was granted, without bond. This was all done in accordance with article 573, C. P., and the Workmen's Compensation Act, and appellee has failed to point to any law requiring that the motion of appeal should be accompanied by certificate or affidavit.

[2] 2. We fail to understand what is meant in the second ground for dismissal, to the effect that the judgment in the trial court had become final in the trial court before any appeal was taken. The judgment was rendered February 14, 1917, and the motion for appeal was made March 6, 1917. It is noticed that plaintiff filed a motion to vacate the order of appeal, and defendant, appellant, excepted to the jurisdiction of the trial court to try or consider the motion to vacate and rescind its order of appeal, on the ground that the said cause had been lodged in the Court of Appeal. This appears from the reading of the minutes, although the minutes may be somewhat confused.

The appeal had been taken to and lodged in the Court of Appeal, which court transferred the case to this court, as the amount involved exceeded the limit of the jurisdiction of that court.

[3] 3. This ground for dismissal is:

"There was no order for appeal herein, the original order having been vacated by judgment of the trial court."

This point was disposed of under paragraph 2, which says that the minutes of the court show that the order of appeal had not been vacated, but that the exception to the jurisdiction of the court to try the motion to vacate had been sustained.

[4] 4. Appellee says:

"There was no appeal bond filed in the trial court."

This is true. But reference to section 19, Act 20 of 1914, p. 57, which is the Employers' Liability Act, provides that:

"Such appeal may be prosecuted by either employer or employee without the necessity of furnishing an appeal bond, and shall suspend the operation of the judgment appealed from."

The motion to dismiss is denied.

On the Merits.

This suit is by an employee, who alleges that the defendant is indebted to him in the sum of $2,650 under the Employers' Liability Act, "No. 243 of the General Assembly of 1916, p. 512, amending the Employers' Liability Act, No. 20 of 1914." And he alleges with reference to the injuries received by him in the course of his employment:

"That on or about August 7, 1916, while in the employment of said defendant, your petitioner was injured by having his face terribly lacerated and his jaw broken and injured to such an extent that a great portion of it had to be removed, leaving him seriously permanently disfigured about his face and head and that he received other injuries that will be shown on the trial hereof.

"That your petitioner received a weekly wage amounting to $50 per week, and that under the act hereinabove referred to petitioner is entitled to receive 50 per cent. of this weekly wage for a period of 100 weeks, aggregating the sum of $2,500, and that in addition to said sum of $150, the amount allowed under said act for physicians' and medical bills."

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Defendant failed to answer, for reasons stated on the brief, and there was judgment by default, which went beyond the scope of the petition, reading as follows:

"It is ordered, adjudged, and decreed that the plaintiff, R. O. Craver, do have and recover judgment against the defendant, George S. Gillespie, in the full sum of $130 being for total disability at $10 per week for 13 weeks from August 7, 1916, and for the further sum of $150 for medical and hospital services and for medicine, due to injuries received by the plaintiff, and which was paid by the plaintiff, and in the further sum of $1,000 for permanent disfigurement of face and head payable at the rate of $10 per week for 100 weeks, beginning January 19, 1917."

The petition contains no allegation of total disability, and no claim was therein made therefor. No damages could therefore be allowed in the judgment for such total disability.

[5] The evidence taken in proving up the default could not have the effect of enlarging the pleadings, because defendant was not present consenting thereto. Louisiana State Bank v. Senecal, 9 La. 225; Lockett v. Toby, 10 La. Ann. 713.

[6] As to the claim for serious permanent disfiguring about his face and head on August 7, 1916, there can be no compensation awarded for the reason that the Employers' Liability Act of 1914 contained no provision for such injury or accident.

In the act amending the act of 1914, No. 243 of 1916, p. 512, provision is made in section 8, paragraph 1, subsec. (d), where an "employee is seriously permanently disfigured about the face or head or where the usefulness of a member or any physical function is seriously permanently impaired," and he may recover for such injury.

But, in the "Titles of Acts and Concurrent Joint Resolutions passed by the General Assembly of the State of Louisiana, at the Regular Session of 1916, with Date of Their Approval and Publication," it appears that Act 243 was approved July 6, 1916, and was published July 22, 1916. As that act did not become a law outside of Baton Rouge until 20 days after its publication, it was not a law and had no effect on August 7, 1916, in Caddo parish when plaintiff suffered the injury complained of. Plaintiff, therefore, shows no cause of action under that act for the injury alleged to have been suffered by him.

This matter was very thoroughly considered and passed upon in Boyer v. Crescent Paper Box Factory, 143 La. 368, 78 South. 596. We there say, in part:

"The act before it was amended (No. 20 of 1914) strictly provided for compensation for personal injuries suffered by the employee while in the performance of services arising out of and incidental to his employment, by compensating him for loss of earning power alone the sole basis for compensation.

"The amendment (of 1916) may include the personal injury to plaintiff, but it was adopted subsequent to the time of the accident, and it is therefore without application here. The injury to Effie Boyer may have caused the adoption of the amendment.

"The original act provides compensation for every injury producing temporary total disability to do work of any reasonable character,' for 'injuries producing temporary partial disability,' and for 'every injury producing permanent partial disability,' in section 8. We repeat that only those personal injuries resulting in disability 'to do work of any reasonable character' are covered by the act. And those disabilities are enumerated, such as the loss of a thumb, finger, arm, etc., which may disable an employee to do work; in other words, those injuries which impair the earning power of the employee."

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Plaintiff does not complain of any injury enumerated in the act of 1914, and he cannot recover compensation thereunder. His claim is made under the act of 1916; but he cannot recover thereunder, because that act was not a law in Caddo parish when he suffered his injury.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided and reversed, and that there now be judgment in favor of Mrs. Ida Gillespie, dative testamentary executrix, substituted defendant, rejecting plaintiff's demand, at his costs.

O'Niell, J., concurs in the decree.

IN RE SOUTHERN COTTON OIL CO. (No. 24321.)

(Supreme Court of Louisiana. Oct. 15, 1920. Rehearing Denied Nov. 29, 1920.)

86 Southern Reporter, 656.

(Syllabus by Editorial Staff.)

CONSTITUTIONAL LAW — MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT UNCONSTITUTIONAL IN REQUIRING TO DETERMINE EMPLOYER'S SOLVENCY.

Employers' Liability Act, § 22, as amended by Acts 1920, No. 247, § 22, requiring the district court of the employer's domicile, if it appears there is reasonable room for uncertainty as to the financial responsibility of the employer against whom liability for compensation has accrued, to order the employer to furnish bond, etc., *held* violative of Const. art. 96, providing no functions except such as are judicial shall ever be attached to the district court or the several justices or judges thereof; determination of the solvency of an employer not being judicial.

(For other cases, see Constitutional Law, Dec. Dig. § 74; Master and Servant, Dec. Dig. § 347.)

Application for mandamus by the Southern Cotton Oil Company against Hon. Fred A. Middleton and Hon. John E. Fleury, Judges of the Twenty-Eighth Judicial District Court for the Parish of Jefferson. Alternative writ recalled, and application denied.

Miller, Miller & Fletchinger, of New Orleans, for applicant.

J. C. Henriques, of New Orleans, amicus curiæ.

SOMMERVILLE, J. The Southern Cotton Oil Company, an employer of labor in the parish of Jefferson, asks that a mandamus issue directed to Hon. Fred A. Middleton and Hon. John E. Fleury, judges of the Twenty-Eighth judicial district court for the parish of Jefferson, commanding and ordering each of them to receive and enter relator's petition asking that it be declared solvent, after considering the evidence and exhibits to be adduced by relator in proof of its solvency, and to enter an order excusing the relator from taking out insurance and furnishing bond, as is provided by section 22 of Act 247 of 1920, amending section 22 of Act 20 of 1914, known as the Employers' Liability Act.

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The said section as amended provides:

"That on or before November 1, 1920, any employer who now comes under the provisions of this act and any employer who may come under the provisions of this act on or before October 1, 1920, and within thirty days after coming under the provisions of this act any employer who may come under its provisions subsequent to October 1, 1920, shall file with the clerk of this district court of the employer's domicile, proof that, in accordance with the provisions of this act, such employer has taken out insurance against all liability that might arise under this act, or shall furnish a bond with good and solvent surety, conditioned for the faithful payment of all liability that might arise under this act, unless excused by the court from taking out such insurance or furnishing such bond upon proof of financial solvency. Any employer failing to comply with the provisions of this section shall, if liable for compensation under this act, be so liable at twice the rate fixed by this act, and shall be liable, to pay in a lump sum to any injured employee entitled to compensation under this act, or to the dependent of any such injured employee such payment as, together with the amount already paid, if any, will aggregate twice the compensation due under this act for such injury.

"2. If it should be made to appear to the satisfaction of the court that there is reasonable room for uncertainty as to the financial responsbility of an employer against whom liability for compensation has accrued, and that such employer has not taken out insurance against his liability under this act, or has not furnished a bond as in this section provided, the court may order such employer to forthwith furnish a bond with good and solvent surety, conditioned for the faithful payment of all liability that has arisen or might arise under this act."

The respondent judges have replied that relator is not entitled to have the question of its solvency determined by them vel non in their capacity as judges of the Twenty-Eighth judicial district court, for the reason that article 96 of the Constitution provides that no duties or functions shall ever be attached to the district court or to the several judges thereof, except such as are judicial; and respondents show that that the determination of the solvency vel non of relator for the purpose of the administration of the Workmen's Compensation Act is an executive, and not a judicial, function; that it is beyond the province of the court to examine or verify the books, records, accounts, or statements of relator, and that the Constitution and statutes of the state have not provided the courts with the necessary machinery or assistance for such work.

They further answer that the act which the relator seeks to compel respondents to perform does not tend to determine what the law is and what the rights of the parties are with reference to transactions that have been had, and does not tend to determine any question of rights or obligations, and is not an exercise of the judicial power.

The return of the respondent judges has been given in full, and it appears that the act sought by relator to be performed by them is in contravention of article 96 of the Constitution, in that it is not judicial in its nature; and a mandamus therefore will not lie to compel them to perform that act.

Article 96 says in part:

"Except as herein provided, no duties or functions shall ever be attached by law to the Supreme Court, Courts of Appeal, or district courts, or to the several justices, or judges thereof, except such as are judicial," etc.

The determination of the solvency of the relator under the compensation act cannot be said to be judicial in its nature; and the respondent judges are forbidden to perform such act.

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The alternative writ of mandamus issued herein is recalled, and this application is denied, at the cost of relator.

O'Niell, J., concurs in the result.

THISTLE MILLS, INC., v. SPARKS. (No. 14.)

(Court of Appeals of Maryland. Nov. 17, 1920.)

111 Atlantic Reporter, 769.

1. MASTER AND SERVANT—INJURY IN COURSE OF EMPLOYMENT WITHIN WORKMEN'S COMPENSATION LAW HELD QUESTION FOR JURY.

Whether autobus driver for factory was killed in course of employment while taking home on a Friday night, for the second time in the week, a musician employed to instruct on Thursday nights a band organized by employees of the factory, *held* for the jury.

(For other cases, see Master and Servant, Dec. Dig. § 409½, New, vol. 7A Key-No. Series.)

2 MASTER AND SERVANT — INFERENCE THAT INJURY TO AUTOBUS DRIVER AROSE OUT OF EMPLOYMENT WITHIN COMPENSATION LAW NECESSARY IN VIEW OF INJURY IN COURSE OF EMPLOYMENT.

Where the employee of a factory was injured in the course of his employment as an autobus driver under circumstances bringing the accident within the class of hazards incident to the operation of motor vehicles, the inference that the injury arose out of his employment is necessary in view of Workmen's Compensation Law (Code, art. 101) § 32, characterizing the operation of motor vehicles as extrahazardous.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

3. MASTER AND SERVANT—VALIDITY OF WIDOW'S CLAIM FOR DEATH OF HUSBAND NOT CONTINGENT ON NEGLIGENCE OF EMPLOYER.

The validity of the claim for compensation of the widow of an employee killed in the course of his employment was not contingent on the existence of negligence on the part of the employer in reference to providing the employee, an autobus driver, with a safe car in which to render his service; the risks of the autobus driver's occupation which made it extrahazardous under the Workmen's Compensation Law not being confined to those arising from conditions over which the employer had control.

(For other cases, see Master and Servant, Dec. Dig. § 372.)

Appeal from Superior Court of Baltimore City; Henry Duffy, Judge.

"To be officially reported."

Proceedings under the Workmen's Compensation Law by Laban Sparks, committee of Fannie Lynch, for compensation for death of John P. Lynch, the employee, opposed by the Thistle Mills, Incorporated, the employer. Compensation was awarded by the State Industrial Accident Commission, the award affirmed by the superior court, and the employer appeals. Judgment of the superior court affirmed.

Argued before Boyd, C. J., and Briscoe, Thomas, Pattison, Urner, Stockbridge, Adkins, and Offutt, JJ.

George Ross Veazey and Vernon Cook, both of Baltimore, for appellant.

Daniel S. Sullivan, of Baltimore (Laban Sparks, of Baltimore, on the brief), for appellee.

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URNER, J. The Thistle Mills, Incorporated, appeals from a judgment of the superior court of Baltimore City affirming an award of the State Industrial Accident Commission in favor of the widow of John P. Lynch, who was fatally injured while driving an autobus belonging to the appellant and intended for the transportation of its employees. In opposition to the award it is contended that Lynch was employed to operate the autobus only for the purpose just mentioned, and that on the occasion of the accident he was not engaged in that service, and therefore his injury did not arise "out of and in the course of the employment" within the terms of the Workmen's Compensation Law. This theory was presented at the trial below in the form of prayers which were rejected and which are set forth in the only bill of exceptions in the record. No evidence was offered upon any controverted issue in addition to that produced before the State Industrial Accident Commission.

The accident occurred at night while the autobus was being used by Lynch for the purpose of taking home a musician who had been engaged by the appellant to train a band which its employees had organized. As the autobus was being driven toward a railroad crossing from a road parallel with the track it collided with the end of a lowered safety gate, and Lynch sustained the injury from which he shorty afterwards died.

[1] When the appellant employed the band instructor it was agreed that he should be furnished transportation to his home on the occasions of his visits to the plant in that capacity. It was his custom to instruct the band every Thursday night, but the visit from which he was returning at the time of the accident was on Friday night and was the second one in that week. He had come on that occasion for the purpose of assisting the band at a picnic which was being held on the appellant's grounds. According to his testimony he was not limited to one visit a week under the terms of his engagement. He was paid by the appellant for the visit made on the night of the accident. The proof shows that it was part of Lynch's duty to take the bandmaster home in the autobus. The appellant's manager testified that nothing was said to Lynch about the use of the car on the night of the accident, but that he "accepted it" as a part of the duty to which he had been assigned. In its report of the accident to the State Industrial Accident Commission, the appellant stated that Lynch was injured in the course of his employment. The contention to the contrary is based upon the theory that the bandmaster was in fact employed to serve on a single night each week, at which time alone it was Lynch's duty to take him home, and that the injury to Lynch was not sustained in the course of his employment because it occurred when he was not performing his specified duty. The court below submitted this theory to the jury by an instruction granted at the appellant's request, but its refusal to rule as a matter of law that the accident did not occur in the course of the employment of the injured man, as proposed by the appellant's second prayer, was entirely proper.

It was further urged that even if the injury should be considered to have occurred in the course of Lynch's employment, yet it must be held not to have arisen out of his employment, within the meaning of the Workmen's Compensation Law, because it "could not fairly be traced to his employment as a contributing proximate cause apart from the usual risks of driving on the public road." On this ground the appellant's first and third prayers sought to have the case withdrawn from the jury.

[2] In view of the effect, as to presumptive correctness, given by the statute to the decisions of the State Industrial Accident Commission and of the burden of proof placed upon the appellant in such cases (Code. art. 101, § 56), the court below would not have been justified in directing a verdict for the appellant on the ground that it had successfully borne the burden thus imposed. Jewel Tea Co. v. Weber, 132 Md. 178, 103 Atl. 476; Coastwise Shipbuilding Co. v. Tolson, 132 Md. 203, 103

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Atl. 478; Beasman v. Butler, 133 Md. 382, 105 Atl. 409; Harrison v. Central Con. Co., 135 Md. 170, 108 Atl. 874. But in our opinion the evidence does not support the conclusion to which the appellant's first and third prayers were directed. Upon the theory, which the jury adopted, that Lynch was injured in the course of his employment as an autobus driver, and there being no dispute as to the circumstances of the accident, which were such as to bring it within the class of hazards incident to the operation of motor vehicles, the inference that the injury arose out of his employment is not merely permissible, but it would appear to be necessary. By the Workmen's Compensation Act the operation of motor vehicles is characterized as extrahazardous. Code, art. 101, § 32. In the case of American Ice Co. v. Fitzhugh, 128 Md. 382, 97 Atl. 999, Ann. Cas. 1917D, 33, the act was construed as applying also to the service of of those employed as drivers of horse-drawn vehicles. The injury to such an employee in that case was occasioned by his fall from the wagon which he was driving on one of the streets of Baltimore. In defining as extrahazardous the operation of motor vehicles, the Legislature must have had in mind the class of perils to which the drivers of such vehicles are exposed, among which is the danger of collision at night with unseen obstacles. If such an injury as the one sustained in this case must be regarded as not having arisen out of the employment, it would be difficult to determine what class of accidents to autobus drivers could properly be held to have so originated. The statutory definition as extrahazardous of the specfic service being performed at the time of the injury relieves the present question of any possible doubt. The prayers which would have instructed the jury that the injury did not arise out of the employment were rightly refused.

[3] The fourth prayer of the appellant contained the proposition that if the accident was found to have occurred while the autobus was being driven on the public highway, and was caused by collision with a railroad safety gate, neither the highway nor the gate being under the appellant's control, and that the injury was not caused by any defect in the autobus, then the verdict should be for the appellant. Such an instruction would have improperly limited the dependent widow's right to compensation. The validity of her claim was not contingent upon the existence of negligence on the part of the employer of her husband in reference to providing him with a safe car in which to render the service for which he was employed, and the risks of his occupation, which made it extrahazardous, were not confined to those arising from conditions over which his employer had exclusive control.

The fifth prayer offered by the appellant is the one heretofore referred to as having been granted.

[4] The appellant's sixth prayer was to the effect that if the injury occurred in the course of the employment, but resulted from a hazard to which the driver of the autobus, "in common with other members of the public, was equally exposed apart from his employment," and the injury "could not fairly be traced to his employment as a contributing proximate cause apart from the usual risks of travel on the public road," then the appellant was entitled to a verdict in its favor. The rejection of this prayer was proper, since there was no evidence legally sufficient to support the suggested finding that the injury resulted from a hazard common to the public and was not fairly traceable to the employment under consideration.

The seventh and last prayer of the appellant, which was also refused, included the statement that in order for the injury to be found to have arisen out of the employment it must appear that there was a "causal connection between the conditions under which the work was required to be performed and the resulting injury." This instruction was open to

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the objection that there was no evidence legally sufficient to sustain its hypothesis that there was no causal relation between the employment and the injury for which the pending claim is preferred.

The two prayers offered by the appellee were not questioned in the argument. They correctly instructed the jury as to the issue to be decided by the verdict and as to the burden of proof.

Judgment affirmed, with costs.

COLLINS v. ALBERT A. ALBRECHT CO. ET AL. (No. 39.)

(Supreme Court of Michigan. Dec. 21, 1920.)

180 Northwestern Reporter, 480.

MASTER AND SERVANT—CARPENTER DEPRIVED OF 75 PER CENT. OF VISION ENTITLED TO COMPENSATION AWARD FOR "LOSS OF EYE," AND NOT FOR TOTAL DISABILITY.

Carpenter, previously blinded in his left eye, whose injured right eye retained 25 per cent. vision, so that he could get around the city, read signs, and locate offices and office buildings, though the remaining sight was insufficient to enable him to work at his trade, *held* to have lost an eye within the meaning of the Workmen's Compensation Law, to entitle him to the specified award therefor, and not to award for total disability.

(For other cases, see Master and Servant, Dec. Dig. § 385[9].)

(For other definitions, see Words and Phrases, Loss of Sight.)

Certiorari to Industrial Accident Board.

Proceedings for compensation under the Workmen's Compensation Law (Laws 1912 [Ex. Sess.] No. 10) by Alex Collins, the employee, opposed by the Albert A. Albrecht Company, the employer, and the General Accident Fire & Life Insurance Corporation, the insurer. Compensation was awarded, the award affirmed by the Industrial Accident Board, and the employer and insurer bring certiorari. Award set aside and record remanded for further proceedings.

See, also, 207 Mich. 627, 175 N. W. 134.

Argued before Moore, C. J., and Steere, Brooke, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

Kerr & Lacey, of Detroit, for petitioners.

Douglas, Eaman, Barbour & Rogers, of Detroit, for appellee.

BIRD, J. Plaintiff is a carpenter by trade. Defendant Albrecht Company is a contractor engaged in construction work. While employed by defendant in September, 1917, plaintiff suffered a serious injury to his right eye, due to a flying nail which came in contact with it. Having some years previously lost the sight of his left eye, he was practically blind for a time. Since his recovery it is found that he has lost 75 per cent. of vision of the injured eye. Following the injury the defendant insurance company voluntarily paid him a weekly award equal to that specified in the statute for the loss of an eye, and this it continued to do for a period of 99 weeks. It then refused to make further payment, whereupon plaintiff applied for arbitration. This was granted, and after

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a hearing the arbitrators made an award of $10 a week during disability. From this award the defendants appealed, and the matter was passed upon and affirmed by the Industrial Accident Board.

It is the contention of defendants that the testimony does not justify this award, that the maximum allowance which could be awarded is $10 a week for 100 weeks, the statutory allowance for the loss of an eye. Counsel further express doubt as to whether any award could be legally made.

Plaintiff's counsel argue in support of the award on the theory that plaintiff has not lost an eye; that he still has 25 per cent. vision in the injured eye, but is incapacitated for work in the employment in which he was engaged.

After considering with some care the testimony bearing on the loss of vision of plaintiff's injured eye, we have concluded that plaintiff has lost an eye within the meaning of the Compensation Law. While the testimony shows that he has yet 25 per cent. vision in the injured eye and can get around the city, read signs, and locate offices in office buildings, it also shows that the remaining vision is insufficient to enable him to work at his trade. This is shown by the testimony of Dr. Waldeck, who testified that he examined plaintiff on December 6, 1918, and found him "totally bind in his left eye; that his right eye showed a dense white scar on one side of it. A portion of his iris had been removed by a kind of operation; also an immature cataract was formed. Without glasses he had twenty-eightieths vision, and with glasses he was with difficulty able to read a newspaper, and his sight will diminish; he has 25 per cent. vision now." He also testified that he would not be able to work on a ladder or scaffold. That as a carpenter he had lost practically the use of his vision.

Having reached the conclusion that plaintiff has lost an eye within the meaning of the Compensation Law, the question as to whether he shall receive the specified amount fixed by the statute for the loss of an eye, or an award for total disability, is one that is settled by the case of Weaver v. Maxwell Motor Co., 186 Mich. 588, 152 N. W. 993, L. R. A. 1916B, 1276, Ann. Cas. 1917E, 238. Upon a like state of facts it was there said:

"In the instant case the loss of the first eye was a partial disability for which, if our Workmen's Compensation Law had been in existence, the then employer would have been liable, and for which disability the present employer was in no degree the cause. The loss of the second eye, standing by itself, was also a partial disability, and of itself did not occasion the total disability. It required that, in addition to the results of the disability occasioned by the accident of seven years ago, there should be added the results of the partial disability of the recent accident to produce the total disability. The absence of either accident would have left the claimant partially incapacitated. We think it clear the total incapacity cannot be entirely attributed to the last accident. It follows that the compensation should be based upon partial incapacity."

We think this case must control the present one, and that plaintiff should be awarded the statutory allowance for the loss of an eye. The award made by the Industrial Accident Board will be set aside, and the record remanded for further proceedings agreeable to this opinion. No costs will be allowed either party.

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DOCHOFF v. GLOBE CONST. CO. ET AL. (No. 98.)

(Supreme Court of Michigan. Dec. 21, 1920.)

180 Northwestern Reporter, 414.

1. MASTER AND SERVANT—LIMITATION IN COMPENSATION ACT AFFECTS RIGHT AS WELL AS REMEDY.

Under Workmen's Compensation Act, §§ 15–17, requiring claim for compensation to be made within six months, the limitation affects the right as well as the remedy.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

2. MASTER AND SERVANT — LETTERS FROM INDUSTRIAL ACCIDENT BOARD NOT SUFFICIENT NOTICE OF COMPENSATION CLAIM; "IN HIS BEHALF."

Under Workmen's Compensation Act, § 16, requiring notice to the employer to be signed by the person injured or a person "in his behalf," letters from the Industrial Accident Board to the employer calling attention to its failure to report the accident and to the insurer asking that prompt attention be given to the matter were not signed by the board in behalf of the claimant where it had furnished blanks to his attorney for giving notice of claim.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

3. MASTER AND SERVANT—NOTICE OF CLAIM TO COMPENSATION INSURER INSUFFICIENT.

The insurer is not the agent of the employer to receive notice of claim for compensation for injuries to the employee.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

4. MASTER AND SERVANT—PROVISIONS OF COMPENSATION ACT AS TO NOTICE OF CLAIM CANNOT BE VARIED BY CONSTRUCTION.

The plain terms of the Workmen's Compensation Act, requiring claim for compensation to be made within six months, cannot be varied by judicial construction.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Certiorari to the Industrial Accident Board.

Proceedings under the Workmen's Compensation Act by Nick Dochoff for compensation for injuries, opposed by the Globe Construction Company, employer, and the General Accident Fire & Life Assurance Corporation, insurer. Compensation was awarded by a committee of arbitration, but denied by the Industrial Accident Board, and the claimant brings certiorari. Affirmed.

Argued before Moore, C. J., and Steere, Brooke, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

R. E. Hofelich, of Detroit, and Miller, Miller, Brady & Seeley, of Toledo, Ohio, for appellant.

Kerr & Lacey, of Detroit, for appellees.

STEERE, J. Under provisions of the Workmen's Compensation Act Nick Dochoff, plaintiff herein, was on October 7, 1919, awarded compensation by a committee of arbitration at the rate of $10 per week for 100 weeks for the loss of an eye.

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Defendants appealed therefrom to the Industrial Accident Board, denying liability for the following reasons:

"(1) That the applicant was not in the employ of respondent at the time of the alleged accident.

"(2) There was no accident within the meaning of the act arising out of and in the course of the employment.

"(3) There was no disability as result of the accident.

"(4) No claim for compensation was made within six months.

"(5) That, if there was loss of an eye, it was not occasioned by the alleged accident.

"(6) Respondent did not have notice or knowledge of the accident within three months."

On review the Accident Board reversed the decision of the committee on arbitration, on the ground that claim for compensation was not made upon the employer within six months from the date of the accident, as required by section 15, p. 2, of the act (2 C. L. § 5445).

There was testimony showing or tending to show that on October 6, 1918, Dochoff was in the employ of the Globe Construction Company, in the city of Flint, as a common laborer engaged in putting cement into a mixer, and when so doing a small piece of cement got into his eye, which so hurt and irritated it that within three days thereafter he had it treated by a physician in Flint to whom he was directed to go by his foreman or "straw boss." His eye grew worse, and he went to the University Hospital at Ann Arbor for treatment, but he eventually became totally blind in that eye as a result of the injury sustained on October 6, 1918.

The questions of whether the accident arose out of and in the course of plaintiff's employment and whether it resulted in the loss of his eye were issues of fact with abundant evidence to sustain the finding of the committee of arbitration. The Accident Board apparently so assumed in its decision, but held plaintiff was not entitled to an award upon the sole ground that his claim to the employer was not made within the six-month limitation fixed by the statute. It is conceded that no written notice of the injury appears to have been given to the employer. There was evidence to support the claim that the employer's actual knowledge of the same was within the 90-day limit.

Plaintiff was a foreigner unable to speak the English language. The next thing shown of him after he left the Ann Arbor hospital was a letter from Messrs. Miller, Miller, Brady & Seeley, a firm of attorneys in Toledo, Ohio, who wrote the Industrial Accident Board as his legal representative stating the facts and result of the injury as claimed by him, asking for blanks on which to make a claim for compensation under the Michigan law, and inquiring in that connection whether the Globe Construction Company was operating under the Michigan act. This letter was received by the Industrial Accident Board on February 6, 1919, and answered under date of February 14, 1919, inclosing blanks and stating that the Globe Construction Company was insured under the act by the defendant Assurance Corporation, giving some directions as to filling out the blanks and concluding:

"On receipt of said claim blanks, we will notify the proper parties. You should mail one of these claim blanks to this office and to each of the respondents. Please try and give us the correct name of the employer."

On March 4, 1919, the Toledo attorneys mailed to the Industrial Accident Board claim for compensation made out upon the blanks which had been provided for that purpose, and setting out the name and address of claimant and employer, date of accident, nature of the injury, etc., stating in the accompanying letter:

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"We are also taking this matter up directly with the Globe Construction Company and presume that they will turn the matter over to the General Accident Assurance Corporation for adjustment.

This letter and application for compensation were received and filed by the Industrial Accident Board on March 5, 1919. The record does not show that any copy of the notice of claim on application was mailed by the attorneys to the defendants as directed by the board until over six months after the accident.

On March 31, 1919, the Industrial Accident Board sent the defendant Globe Construction Company the following letter:

"We are advised that an accident occurred October 6, 1918, in which Nick Dochoff was injured while in your employ while you were building roads on contract for the Flint county road commission. We will ask that this accident be reported on forms 5–A and 6, or 5–B and 6, as the case may warrant. Form 5–A should have been filed within 10 days after the accident. Form 5–B should have been filed, if this man could have returned to work within fourteen days after the accident, but if he could not have returned to work on the fifteenth day, then you should have filed form 6, and as these reports are now past due. we will ask that you give this matter prompt attention. There is a fine of $50 which can be imposed on employers who do not give prompt reports of their accidents. We are inclosing blank forms for your use."

This was received by the Globe Construction Company shortly after its date.

On the same date the Industrial Accident Board mailed a letter to the defendant Assurance Corporation as follows:

"In re Nick Dochoff v. Globe Construction Co., 10/6/18. We are in receipt of notice that an accident occurred to Nick Dochoff, the plaintiff in the above-entitled case, on October 6, 1918, and he has filed form 5, 'Notice to Employer of Claim for Injury' to cover same.

"As this accident occurred some time ago, we will ask your prompt attention, proper adjustment or a definite statement of your position in the matter.

The defendant Assurance Corporation replied to this under date of April 3, 1919, as follows:

"Re Globe Construction Co., N. Dochoff, 10/6/18. We are in receipt of your letter of March 31, and wish to advise you that this accident has not been reported to this office. We have written to the assured for a report and as soon as same received it will have our attention."

This communication was received by the Industrial Accident Board on April 4, 1919. The letter from the Assurance Corporation to the Globe Construction Company mentioned therein was not produced.

On April 10, 1919, the Globe Construction Company answered the letter it received from the Industrial Accident Board dated March 31, 1919, as follows:

"Replying to your recent letter relative to Nick Dochoff, who claims injury on October 6, 1918, this man was not working on the date claimed but was on our pay roll the following two days. We are investigating this matter and will write you more fully later."

The Industrial Accident Board received this letter on April 11, 1919. There is no evidence of any further report made by the Globe Construction Company. The treasurer of said company, who had charge of the correspondence, testified that the first knowledge which came to her of any claim by plaintiff for compensation was about May 1, 1919, in a letter with notice of claim inclosed received from the Toledo attorneys.

It appears from an examination of this correspondence that but one of these communications to defendants which were sent within six months

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after the accident makes mention of any claim for compensation. All the others refer to notice of the accident only. In its letter of March 31, 1919, to the Assurance Corporation the Industrial Accident Board states it is in receipt of notice of an accident which occurred to Dochoff upon October 6, 1918, while in the employ of the Globe Construction Company, and that he had "filed form 5, 'Notice to Employer of Claim for Injury' to cover same." Aside from that statement, the record is barren of any evidence of a communication to the employer from the employee or any one in his behalf giving notice of a claim for compensation within six months of the occurrence of the accident.

The material sections (Comp. Laws 1915) are as follows:

"(5445) Sec. 15. No proceedings for compensation for an injury under this act shall be maintained, unless a notice of the injury shall have been given to the employer three months after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employee, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity.

"(5446) Sec. 16. The said notice shall be in writing, and shall state in ordinary language the time, place and cause of the injury; and shall be signed by the person injured, or by a person in his behalf, or, in the event of his death, by his dependents or by a person in their behalf.

"(5447) Sec. 17. The notice shall be served upon the employer or an agent thereof. Such service may be made by delivering said notice to the person on whom it is to be served, or leaving it at his residence or place of business, or by sending it by registered mail addressed to the person or corporation on whom it is to be served, at his last known residence or place of business."

[1] This six-month statute of limitations affects the right as well as the remedy of the injured employee. In Schild v. Pere Marquette R. Co., 200 Mich. 614, 166 N. W. 1018, this court said in an opinion by Chief Justice Ostrander:

"The judicial power does not extend to setting aside the plain terms of the law. The proceeding is special. The condition of giving notice of a claim for compensation, controlling the right to demand the same, is clear. There is no room for construction, and the difficulties attending upon a judicial variance from the legislative rule are obvious. Perhaps the legislative rule ought to be changed—a question for the Legislature. * * * But if a right under the Michigan law is claimed, notice of the claim must be given within six months after the injury is received."

[2] It is obvious that neither the person injured nor his attorneys who represented him in the matter either signed or "served upon the employer or an agent thereof" any notice of claim for compensation within the statutory limit. The Industrial Accident Board had furnished plaintiff's attorneys with appropriate blanks and instructed them how and upon whom they should serve notice of claim for compensation. Certainly the Industrial Accident Board held no brief for plaintiff nor can it be said to have represented him in any partisan sense in the proceeding before it. Neither can it be assumed that the board designedly signed "in his behalf" the letter of March 31 to the Assurance Corporation as a notice of his claim for compensation, in discard of its own form for that purpose which it had prescribed for others to use. The board had received word from other sources of an accident to one of the Globe Construction Company's employees which occurred several months before, and which it was the company's duty to report to the board within 10 days thereafter. The manifest object in writing the two letters of March 31 to defendants was to stimulate prompt action on the part of a delinquent employer in furnishing a belated report.

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[3] But, assuming the letter was a proper notice of plaintiff's claim for compensation signed by the Industrial Accident Board "in his behalf," it was not sent to or served upon the employer, but upon the General Accident Fire & Life Assurance Corporation, Limited, a foreign corporation authorized to do business in this state. Plaintiff's counsel contend that, being the insurer, it was, for the purpose of receiving notice of claim for compensation, an agent of the Globe Construction Company. The latter is a domestic corporation organized under the laws of this state. These two corporations had no representative relations or connection with each other in the conduct of the respective lines of business for which they were incorporated and in which they were engaged. so far as shown. Their only business relations were as insurer and insured. There is nothing in the act either expressly recognizing such relation as creating the insurer an agent of the insured for the purpose of being served with such notice, nor inferentially impressing upon the insurance company in which an employer may hold a policy the representative character and derivative authority which are the distinguishing features of an agent. Under the act the liability of the employer to the employee is direct and positive. The latter is not relegated to seek compensation from an insurance company because it may be holden by contract with the employer to indemnify him or it from loss. The insurance is but added security that the employer will pay the determined compensation to the injured employee Mackin v. Detroit-Timkin Det. Axle Co., 187 Mich. 8, 153 N. W. 49.

[4] The provisions of the act directing the manner and fixing the time in which the injured party must proceed to establish his right to an award set the statute of limitations in plain terms. They are not open to variations by judicial construction. Plaintiff's claim for compensation was not made upon his employer within six months from the date of the alleged accident.

The order of the Industrial Accident Board denying compensation is affirmed.

JONES v. ST. JOSEPH IRON WORKS ET AL. (No. 80.)

(Supreme Court of Michigan. Dec. 21, 1920.)

180 Northwestern Reporter, 374.

1. MASTER AND SERVANT — LETTER HELD SUFFICIENT CLAIM FOR REVIEW OF ARBITRATION OF CLAIM FOR COMPENSATION.

After the board of arbitration has denied compensation to an employee, his letter, written to the Industrial Accident Board, requesting blanks and information as to procedure, since he desired to appeal, is a sufficient claim for review under Comp. Laws 1915, § 5461, as amended by Pub. Acts 1919, No. 64, which requires the claim to be filed within seven days, but requires no formality in the claim.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT—INDUSTRIAL ACCIDENT BOARD CANNOT SET ASIDE ARBITRATION AWARD AND RESUBMIT.

While the Industrial Accident Board performs quasi judicial duties, it is not possessed of judicial power, but can exercise only the authority

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granted by statute, and it is not authorized to set aside the findings of the arbitration board denying compensation and order resubmission to a new board.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

3. MASTER AND SERVANT — COMPENSATION CLAIMANT NOT ENTITLED TO TRANSCRIPT FURNISHED BY INSURER.

An employee is not entitled to a transcript of the evidence before the arbitration board to be furnished by the insurer so that the insurer is not to be deprived of the benefit of the decision of the board because the stenographer employed by it had destroyed her notes of the testimony before the board so that it could not be sent to the Industrial Accident Board for review, but that fact might induce the Industrial Accident Board to consider fully all testimony taken under provisions of Comp. Laws 1915, § 5464.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Certiorari to the Industrial Accident Board.

Proceedings under the Workmen's Compensation Act by Claude E. Jones, employee, against St. Joseph Iron Works, employer, and Michigan Mutual Liability Company, insurer. After an order by the Industrial Accident Board setting aside a finding of the Board of Arbitration denying compensation and ordering a new arbitration, employer and insurer bring certiorari. Order vacated, and case remanded for further proceedings.

During the month of May, 1918, applicant claims to have sustained an accidental injury while in the employ of St. Joseph Iron Works. September 29, 1919, a properly constituted board of arbitration denied him compensation, and their finding was duly filed with the Industrial Accident Board. On September 30 he sent to the board the following letter:

"Grand Rapids, Michigan.
"September 30, 1919.

"Industrial Accident Board, Lansing, Michigan.—Gentlemen: Dear Sirs: Please, forward blanks for appeal of my case of Claude E. Jones v. Saint Joseph Iron Works & Michigan Mutual Liability Insurance Company, of Detroit, and full information as to procedure, as I desire to appeal the case upon my own behalf without my attorney.

"I remain, respectfully yours, Claude E. Jones, 130 Jefferson Av., Grand Rapids, Mich., formerly of Benton Harbor, Mich."

The blanks were promptly mailed, but did not reach applicant until some days later, and his formal claim for appeal made out on such blanks was not filed with the board until October 11. The insurance company had employed a stenographer to take the testimony before the arbitrators for its use. Applicant had not. Being informed by the board that he would be required to file a transcript of the testimony, applicant tried to obtain it from the company's stenographer. Many letters appear in the record showing such effort on his part; efforts of the board and the attorneys for the insurance company to the same end also appear, as does a letter from the stenographer, saying that she was informed by applicant's attorney that there would be no appeal, and had destroyed her notes. Finally, and on March 16, 1920, the board made an order, which, after reciting the inability of applicant to obtain a transcript of the testimony, contains the following:

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"Now, therefore, it is hereby ordered by the Industrial Accident Board that the matter stands as though the case had never been set for arbitration and no attempt at hearing same had been made, and that the said case should be and it is hereby reset for arbitration; all the interested parties will be given notice and have the right to again choose arbitrators and have a complete arbitration of the case, all interested parties to present any testimony they may have to the said arbitration committee hereafter to be formed, as though the case had never been heard, so that this board may have before it for its review the testimony so taken, so as to enable them to pass upon the merits of the matter."

We allowed this writ of certiorari to bring up this action for review.

Argued before Moore, C. J., and Steere, Brooke, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

Beaumont, Smith & Harris, of Detroit (Hal H. Smith and Albert E. Meder, both of Detroit, of counsel), for appellants.

H. Monroe Dunham, of Grand Rapids, for appellee.

FELLOWS, J. (after stating the facts as above). While other questions are argued, we are impressed that but two questions are presented upon this record for determination at this time. They are: (1) Was applicant's letter above quoted a sufficient claim for review of the decision of the arbitrators? and (2) has the board the power to set aside the award of the board of arbitration and order a new arbitration? We are persuaded that the first question must be answered in the affirmative and the second in the negative.

[1] 1. The statute (section 5461, C. L. 1915, amended by Act 64, Public Acts 1919) requires no formality in the claim for review, and this court has on numerous occasions recognized the summary character of these proceedings. Strict rules of pleading are not required. In Kalucki v. American Car & Foundry Co., 200 Mich. 604, 166 N. W. 1011, where this section of the statute was under consideration, this court said:

"It may be noted in passing that a bare statement in writing of plaintiff's claim for review, which could be written in two or three lines, would, if filed with the board within the seven days, have preserved right of review under the provision of the statute."

And in Brunette v. Quincy Mining Co., 197 Mich. 301, 163 N. W. 1013, where it was urged that time was needed to prepare the claim for review and assignments of error, we said:

"The act only requires a claim for review to be filed within the seven days which can be quickly prepared and transmitted. Assignment of errors and grounds for review which counsel urge take time to prepare are not required by the act to be then stated."

While the language found in the letter does not strictly follow the language of the statute, we think it was sufficient.

[2] 2. While the Industrial Accident Board performs quasi judicial duties, it is not possessed of judicial power. It was created by statute, and to the statute it must look for its authority. The general scheme of procedure in contested claims contemplates a submission to arbitration of the questions of liability and compensation, a review of the award of the arbitrators by the full board, a review of the board's action by this court on certiorari. When the arbitrators make their award either for or against the applicant, that award fixes the rights of the parties, and these rights are in the absence of fraud irrevocably fixed, unless the board on review, hearing the case de novo, upon the testimony already taken,

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and such additional testimony as the parties may submit. reaches a different conclusion. In this way and this way alone may the award of the arbitrators be set aside. There is no power in the board to direct the submission to a second set of arbitrators and vacate the steps already regularly taken. In Pocs v. Buick Motor Co., 207 Mich. 591, 175 N. W. 125, and Diebel v. Spitzley, etc., Const. Co., 207 Mich. 618, 175 N. W. 126, this court held that the board had no authority to grant rehearings of matters already decided by it. Manifestly if it may not grant a rehearing upon its own action and of questions which it has decided it may not grant a rehearing before another set of arbitrators of matters once finally decided by a board of arbitrators chosen under the statute. It would be a strange rule which would take from one of the parties the benefit of an award by the arbitrators solely because the other party, either through his own neglect or otherwise, was unable to comply with the request of the board.

[3] We know of no rule of law or of practice which requires a party to furnish his adversary with a transcript of testimony taken by his own stenographer. While the board or any member thereof may make examinations of books and papers of the parties to a dispute (section 5456, C. L. 1915) this does not entitle a party to a transcript obtained at the expense of the other party. As a matter of courtesy between attorneys it is frequently furnished, and in the instant case the attorneys for the insurance company apparently made a good-faith effort to obtain it for the applicant. The notes, however, had been destroyed and it was therefore impossible to produce it. This fact might induce the board to consider fully all testimony taken under the provisions of section 5464, C. L. 1915, but it did not authorize the action taken.

The order made by the Industrial Accident Board, vacating the award of the board of arbitration and resetting the matter for another arbitration, must be vacated, and the case remanded for such proceedings as may be had not inconsistent with this opinion.

KLING v. NATIONAL CANDY CO. ET AL. (No. 18.)

(Supreme Court of Michigan. Dec. 21, 1920.)

180 Northwestern Reporter, 431.

1. MASTER AND SERVANT — CANDY MIXER, OFFERED BETTER WAGES, HELD "COMMON LABORER" NOT "TOTALLY DISABLED."

Where an employee's hand was injured while he was operating candy mixing machine, but recovered to the extent that his employer petitioning for discontinuance of compensation payments had offered him employment at bigger wages than he was receiving at the time of the injury, he was not "totally disabled" within Workmen's Compensation Act, though it was impossible for him to work as a candy mixer, since such employment is "common labor," a term signifying unskilled manual labor.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

(For other definitions, see Words and Phrases, Common Labor; Second Series, Totally Disabled.)

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2. MASTER AND SERVANT—INDUSTRIAL BOARD'S ORDER, UNSUPPORTED BY EVIDENCE, REVIEWABLE.

In proceedings under Workmen's Compensation Act, where order of the Industrial Board has no evidential support, it is reviewable by the Supreme Court on certiorari.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Certiorari to Industrial Accident Board.

Proceedings under Workmen's Compensation Act (Acts 1912, Extra Sess. No. 10) by Arthur R. Kling for compensation for injuries, opposed by the National Candy Company, employer, and the Ætna Life Insurance Company, insurer. Employer and insurer filed petition with Industrial Accident Board for discontinuance of payments under compensation agreement, and to review order of the board for employee, the employer and insurer bring certiorari. Order set aside.

Argued before Moore, C. J., and Steere, Brooke, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

Travis, Merrick, Warner & Johnson, of Grand Rapids, for appellants.

Willis B. Perkins, Jr., of Grand Rapids, for appellee.

BROOKE, J. Certiorari to the Industrial Accident Board. The applicant, at that time a young man of 17 who had completed his third year in high school, was employed during vacation on August 7, 1917, by the respondent and set to work running a lozenge mixer. This machine was about 5 feet long, 3 feet wide and 18 to 20 inches deep and its base stood about two feet from the floor. On the inside of this trough-like box two spiral screw about 10 inches in diameter revolved slowly (20 to 22 revolutions per minute) in opposite directions. Into this receptacle several hundred pounds of sugar, a certain quantity of glucose, gum, coloring matter, and flavoring matter were dumped, and the machine set in motion. It required about 15 minutes of operation to so mix the composition as to render it ready for the next operation. It then became the duty of the operator to remove the mixture from the machine.

It is the claim of the claimant (denied by the respondent) that he was never instructed to stop the machine for this operation, and that he and the other operators on like machines habitually and necessarily—if the work was to be performed with celerity—took the candy dough from the machine while it was in operation. Whatever the facts may be with reference to his instructions, on the 28th of August (after he had been at work on the machine exactly three weeks) claimant, in endeavoring to remove some small pieces of dough from the lower part of the machine with his left hand, was caught and that member was quite severly lacerated and crushed.

In the first report of the accident to the Industrial Accident Board, as well as in the second report, the following appears: "Occupation of injured employee—candy mixer." On February 2, 1918, an agreement was entered into for compensation at the rate of $6.50 per week during total disability and at the proper rate per week during partial disability, if disability should become partial. At the time of his injury, claimant was receiving $13 per week, which was about the average paid for such labor in respondent's factory at the time. Claimant's hand healed substantially within four months after the accident, but his injury resulted in a loss of a portion of his index finger, some loss of motion of the third and fourth fingers and the stiffening of the little finger—taken together, quite materially reducing the efficiency of the left hand.

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Compensation was paid under the agreement without question until July 15, 1919, a period of 98 weeks. About this time, the agent for the insurance company carrying the risk inquired of the employing respondent whether employment could be furnished claimant, and, if so, at what wage. Being advised in the affirmative, a letter was written to claimant on July 8th, advising him of the fact that he could secure employment with his former employer at a larger wage than he was receiving at the time of his injury. Claimant, however, was at this time attending Junior College in the city of Grand Rapids, and he paid no attention to the offer, nor did he seek employment after his injury and recovery therefrom, either with his former employer or elsewhere.

Thereupon defendant filed a petition with the Industrial Accident Board, asking that payment be discontinued. The hearing on said petition was had, at which testimony was taken and an order was ultimately made by the board in the following terms;

"(a) That said applicant has been since the date of the accident, August 28, 1917, and is at the present time, totally incapacitated for work in the employment in which he was engaged at the time of the accident, viz., that of a candy mixer;

"(b) That compensation should be continued from the time payments thereof were stopped, July 15, 1919, during applicant's period of disability resulting from the accident, in accordance with the terms of the agreement in regard to compensation approved by the board on March 29, 1918.

"It is therefore ordered and adjudged that said petition should be and the same is hereby denied, and that said applicant is entitled to receive and recover from said respondents compensation from the end of the period covered by the last payment thereof, July 15, 1919, up to and including December 19, 1919, the date of hearing herein, a period of 22½ weeks, making a total amount of $146.25, which shall be paid forthwith and receipt therefor filed with the board, and that subsequent to the last-mentioned date compensation shall continue in the case in accordance with the terms of the approved agreement and the provisions of the Workmen's Compensation Act."

This order is now reviewed in this court upon writ of certiorari.

The sole question for determination upon this record is whether the board was justified in holding that claimant was entitled to compensation because of his total incapacity "for work in employment in which he was engaged at the time of the accident, namely, that of a candy mixer." As bearing upon the character of the work in which the applicant was engaged at the time of his injury, the following testimony of respondent's superintendent was introduced by respondent:

"Q. What did he work at while he was there, Mr. Schroth? A. At mixing lozenges.

"Q. Whether or not you would call that skilled labor? A. Not necessarily.

"Q. Why not? A. Well, for the reason that we can take almost any ordinary man and have him in position to mix these goods within practically a week or two weeks' time.

"Q. As I understand it, you would denominate it as common labor? A. I would, yes. * * *

"Q. whether or not you would say it takes a man of some particular intelligence to run a machine of that kind? A. Why, I wouldn't say it takes a man of any intelligence to run it, no.

"Mr. Perkins (counsel for applicant): Objected to as leading.

"Q. Couldn't you put most any man, or couldn't you put any of your men on this machine and do the work?

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"Mr. Perkins: That question does not really ask a question. I object to it as being double.

"Q. Whether or not, so long as you have observed it, they have been able to do the work? A. Yes; we have done it.

"Q. Whether or not you would claim that working on a machine of that kind is an employment in itself, that is what I mean. I will explain my question. Certain men are known as electricians, other men as molders, other men as machinists, skilled machinists. Would you term a man working on a machine like that—would he have learned anything in particular that he can follow as a trade? A. No, he wouldn't."

And on cross-examination:

"Q. In answer to Mr. Kelley's question here a moment ago with regard to electricians, and so forth, If I understand you correctly, what you mean is a man has not learned a specfic trade there in a period of two weeks that he learns to run that machine; that is what you mean by answering that question? A. Well, I took his question to mean, would it make him a skilled man in any profession, which I don't think it would.

"Q. That is whether he had learned a trade in that period of time? A. Because he really in that period of time, or a longer period, wouldn't learn the trade, because there is more attached to it."

And on redirect:

"Q. Whether or not Mr. Kling was what is known as a helper at the time he was injured? A. Well, we term them all practically as helpers, but designated some of them in different positions, such as this would be, we would term this a mixer. We have that, and then I would say in another department we would call a man a machine runner, or something like that, you see. Still, when it is all summed up, they are classed about the same as helpers. Our business is really different than some others. We have, as a rule, one man in charge of a department, who is the candy maker of a department; he requires this help to turn out the output.

"Q. Whether or not you would say he is the only skilled man that you had in this department? A. Well, now I—we usually have one skilled man and another man who is learning or beginning, so that he will be a good man to fall back on, and a second man to take the place of the other man if something should happen to him, so we wouldn't have in any of the departments much over two men that we could term as skilled.

"Q. All the other men in this department are simply common laborers? A. They are."

And no evidence was introduced on the part of the claimant to the contrary.

[1, 2] Claimant lays stress upon the fact that in the two reports of the accident, the respondent employer used the language, "Occupation of injured employee—candy mixer;" and the further fact that, under the evidence, from one to two weeks training was required to enable claimant to properly perform his duties as such mixer. It is the further claim of counsel for claimant that the board's finding that claimant was at the time of the accident in an "employment," namely, that of candy mixer, is a finding of fact, and therefore not reviewable in this court under our authorities. We are of the opinion that counsel overlooks our decision in the case of Leitz v. Labadie Ice Co., 211 Mich. 565, 179 N. W. 291, where this identical question arose, and the finding of the board was reversed. As has been noted by this court in Miller v. S. Fair & Sons, 206 Mich. 360, 171 N. W. 380, and Leitz v. Labadie Ice Co., supra, the question presented is not without difficulty. In the latter case, speaking through Mr. Justice Steere, we said:

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"While, as suggested in that opinion, an exact definition of common labor, exclusive and inclusive, is not readily formulated, we think it may safely be said that, as generally used and understood, it signifies that kind of unskilled manual labor, with or without simple tools, which is commonly done by the masses of working people in lines of employment necessitating no special trade or previous training, before engaging in them, beyond what can be quickly learned and effectually performed by the laborer while employed at regular wage under direction of those in charge, as distinguished from that class of skilled and less common manual labor to perform which previous experience, apprenticeship, study, practice, or manual training in some special calling, handicraft, or trade is required."

In the case at bar, it is uncontradicted that claimant is now able, if willing, to earn a sum much larger than that of which he was in receipt at the time of the accident at what may be denominated "common labor" in the factory in which he was employed; and we are constrained to hold, under the evidence quoted, that his employment at the time of the accident was in the nature of common labor, and therefore that the order of the board finds no evidential support in the record. The cases of Foley v. D. U. R., 190 Mich. 507, 157 N. W. 45, and Jameson v. Newhall, 200 Mich. 514, 166 N. W. 834, relied upon by claimant, have been considered, but in our opinion are not controlling.

The order of the board must be set aside.

SMITH v. I. STEVENSON CO. ET AL (No. 36.)

(Supreme Court of Michigan. Dec. 21, 1920.)

180 Northwestern Reporter, 384.

MASTER AND SERVANT — EMPLOYER HELD ENTITLED TO RELIEF FROM COMPENSATION PAYMENTS.

Where a common laborer in a logging camp suffered internal injuries which necessitated several operations, and on his request a lump payment under the Workmen's Compensation Act for an additional operation was made, but he failed to allow performance of such operation, though it was advised by eminent physicians, the employer should be relieved from further payments where at the time of the application for relief the employee at manual labor was making more than he had ever made before.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Certiorari to Industrial Accident Board.

Proceedings by John Smith, employee, against the I. Stevenson Company, employer, and the Standard Accident Insurance Company, insurer, for compensation under the Workmen's Compensation Law (Acts Ex. Sess. 1912, No. 10). After various payments of compensation, employer and insurer petitioned the Industrial Accident Board for relief from further payment, and relief having been denied, they bring certiorari. Order reversed, and case remanded.

Argued before Moore, C. J., and Steere, Brooke, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

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Keena, Lightner, Oxtoby & Hanley, of Detroit, for appellants.
S. M. Matthews, of Escanaba, for appellee.

STEERE, J. John Smith, above named, suffered injuries in an industrial accident on February 16, 1915, while employed in defendant I Stevenson Company's lumber camp north of Escanaba helping to load logs. He had been working at that camp 45 days, for about 7 days on roads and the rest of the time helping at log loading. He was a native of Finland, over 30 years of age, unmarried, and had been in the United States several years. His wages were $16 per month and his board. The highest pay he testified to ever having received before his injury was $30 per month and board. His account of the accident is: "I was walking up to hand a chain, and the logs were rolling from the skidway, and I got caught." Though no bones were broken, he proved to be badly hurt, and was taken on that day to St. Francis Hospital at Escanaba for medical care and attention.

Dr. Kitchen, who was called to attend plaintiff, testified he found him seriously injured internally, his condition at first being so low as to preclude operating for a time but he rallied from the shock about the second day, and, obstruction of the bowels being manifest, the doctor operated, finding the intestines seriously ruptured and peritonitis. The conditions found rendered necessary that an opening in his side should be maintained for a time with a tube inserted for discharge and drainage, which was kept open until his functions became normal and he was able to be up and around. The doctor testified that plaintiff was under his care about 8 months; that about 3 months after the first major operation he performed a minor operation, closing the opening in his side, and there yet remained a bulging area or flat hernia on the right side of his abdomen "known as an incisional hernia" which he advised plaintiff required an operation to cure and offered to perform it. Plaintiff would not, however, consent, stating that he did not want any more operations. The doctor testified his operations proved successful, plaintiff made a good recovery, and his physical condition became perfect, with the exception that he yet had the incisional hernia, and in witness' opinion he could do any kind of work except such as might require heavy lifting.

Shortly after plaintiff was injured the accident was duly reported by his employer to the Industrial Accident Board, followed by appropriate proceedings under its jurisdiction which resulted, by agreement of parties approved by the board, in an award of compensation to plaintiff at the rate of $4 per week during disability, commencing March 25, 1915. This was paid by defendant for 237 weeks, or over 4½ years, and up to September 1, 1919.

In May, 1918, plaintiff petitioned the Accident Board for an order requiring of defendants an advance payment of $250 in a lump sum, stating in his petition as reason therefor:

"That he is a single man and no one depending upon him for support; that he has had two operations, but still needs another operation for the purpose of curing the rupture, in order to be made entirely well; that he is advised by doctors that such operation will cure him, and that he is quite helpless in his present condition; that he has no funds for this purpose; and that an advanced lump sum payment would enable him to secure the needed operation and, as he is advised, would be a great service and advantage to him."

Defendants signified their willingness to make such payment in form and amount prayed for in the said petition, and it was so ordered by the board. Plaintiff then went to Rochester, Minn., to consult the Mayo Bros. Of this he was asked and answered as follows:

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"You went there for an operation? A. Yes. Q. About when did you make the trip? A. August, 1918. Q. Did the Mayo Bros. tell you to have an operation? A. Yes. * * * Q. You went to Rochester to have an operation, did you not? A. I went down to see the brothers. Q. Why didn't you have an operation at Rochester? A. I don't want any more operations."

On December 5, 1919, defendants filed a petition with the Industrial Accident Board for relief from further payment, denial of which is now here for review.

On February 16, 1920, when plaintiff's testimony was taken upon this petition for release from further payment, he testified that he had been working for the Escanaba Pulp & Paper Company since the 1st of the preceding April, beginning at 30 cents an hour, his wages being later increased to 45 cents an hour; that he first worked at a pulp machine taking away the pulp and putting it on the truck, and had also worked at piling pulp on cars, which was the nature of his employment at the time his evidence was taken; that his duties were to pick up the slabs of pulp from where they had been piled and put them on a car, the slabs which he had to lift weighing about 40 pounds. G. F. Germanson, a foreman for the Escanaba Pulp & Paper Company, testified plaintiff had been working under him as a common laborer attending machines at the pulp mill and working on the pulp pile; that he was always able to keep up his end of the work with other men, had been working quite steadily, and witness always found him a good man to work.

The price per hour and amount of wages paid plaintiff by the Pulp & Paper Company were shown without dispute, and it appeared that between April 1 and December 31, 1919, he had earned a total of $926.73, receiving in the month of April $103.80, in May $127, and so on in varying amounts, his average wages being over $100 per month.

Following the hearing on said petition, on February 16, 1920, the Industrial Accident Board found that plaintiff "was still totally disabled in his employment as a woodsman, as a result of the injuries he sustained February 16, 1915," denied defendant's petition, and ordered weekly payments to be made from September 1, 1919, and continued thereafter "in accordance with the agreement in regard to compensation and the provisions of the Workmen's Compensation Act."

The board's conception of what constitutes a "woodsman" is not altogether clear, but inferably under the testimony it was used as meaning any one who was working in the woods or employed at a lumber camp. While it might almost be assumed as a matter of common knowledge that most of the men employed at lumber camps are in the fullest sense common laborers, plaintiff's own testimony makes plain his status as a common laborer. He was working in a lumber camp for $16 a month and his board, part of the time on the roads used in connection with the woods operation there, and part of the time helping to load logs under a top loader whom he was assisting in putting a wrapper chain on the load when injured. He had never, so far as shown, earned over $30 per month and board in any employment. When this petition for relief from further payment was filed he was, and had been for several months, earning more at unskilled manual labor than he had ever been able to earn before.

This case under the undisputed facts falls within the principles of and is controlled by Miller v. Fair & Sons, 206 Mich. 360, 171 N. W. 380, and the recent case of Leitz v. Labadie Ice Co., 179 N. W. 291, filed.

The order of the Industrial Accident Board is reversed, and the case remanded for such further proceedings in harmony with this opinion as parties may apply for and the board determine within statutory limitations.

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WARD v. HETH BROS. ET AL. (No. 19.)

(Supreme Court of Michigan. Dec. 21, 1920.)

180 Northwestern Reporter, 245.

1. MASTER AND SERVANT — EVIDENCE HELD TO SUPPORT ORDER DENYING RELIEF FROM FURTHER COMPENSATION PAYMENTS.

Evidence in a proceeding under the Workmen's Compensation Act *held* to support an order denying an application for relief from further payments on the ground that the claimant was no longer disabled by the injury.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

2. MASTER AND SERVANT—FINDINGS SUPPORTED BY EVIDENCE IN COMPENSATION CASE BINDING ON REVIEWING COURT.

When findings of the Industrial Accident Board in a workmen's compensation proceeding are supported by facts or inferences from testimony, they must be taken as true, and the Supreme Court will not weigh the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT — INSANITY OF COMPENSATION CLAIMANT DOES NOT TERMINATE LIABILITY.

Where liability to pay compensation under the Workmen's Compensation Act had been fixed by agreement approved by the Industrial Accident Board, the subsequent insanity of the claimant did not relieve the employer and insurer of further liability.

(For other cases, see Master and Servant, Dec. Dig. § 393.)

Certiorari to Industrial Accident Board.

Proceedings under the Workmen's Compensation Act (Pub. Acts Ex. Sess. 1912, No. 10) by Herbert Ward against Heth Bros., employer, and Ocean Accident & Guaranty Corporation, insurer. An application by the defendants to be relieved from further payments was denied by the Industrial Accident Board, and they bring certiorari. Affirmed.

Argued before Moore, C. J., and Steere, Brooke, Fellows, Stone Clark, Bird, and Sharpe, JJ.

Vandeveer & Foster, of Detroit, for appellants.

Corwin & Norcross, of Grand Rapids, for appellee.

STONE, J. Heth Bros, the employers of the claimant, and one of the defendants in this proceedings, were engaged in the business of hardware and installation of heating apparatus in Grand Rapids, on February 12, 1916, and on that day were installing a furnace in a garage which was in the course of construction. The claimant, while assisting in the installation, and while engaged in lowering the furnace into the basement, received an injury to his right ankle joint, as the result of the giving way or collapse of the floor that he was standing on, and from which the furnace was being lowered. He fell into the basement, and the injury was caused by a timber falling on his ankle.

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In due season an agreement in regard to compensation was entered into by and between the claimant and the Ocean Accident & Guaranty Corporation, Limited, insurer of the defendant Heth Bros. and likewise a codefendant in this proceeding. Under the terms of that agreement, claimant was to receive $7.425 per week during his period of disability. Subsequent thereto, and on January 27, 1917, a supplemental agreement was entered into whereby the claimant was to receive $3.425 per week during disability. The reason that the compensation was diminished was due to the fact that when the original agreement was entered into claimant was totally disabled, and subsequently only partially disabled. Both of these agreements were approved by the Industrial Accident Board.

On April 23, 1919, the claimant was declared insane by the probate court of Kent county and was ordered confined in the Kalamazoo State Hospital, and said order was carried into effect. Thereafter, and on November 25, 1919, George S. Norcross was duly appointed guardian of the claimant by the said probate court. On December 19, 1919, the defendant Ocean Accident & Guaranty Corporation, Limited, prepared and filed a petition with the Industrial Accident Board praying that as insurer of the defendant Heth Bros.' it be relieved from making any further or additional payments to the said claimant, or his duly authorized guardian, stating the following as reasons therefor:

After stating that claimant had been declared insane and committed to the state hospital, the further reason was stated as follows:

"Your petitioner states that the claimant is not now, and has not been from April 23, 1919, suffering from any disability due to his accident of February 12, 1916, and that said accident and the consequence thereof are in no wise to blame for his physical incapacity to do and perform work at this time, but that his present disability is due to his confinement from a diseased condition of the brain."

Testimony was taken on behalf of said defendant in support of its petition, and on behalf of claimant. After oral argument, the Industrial Accident Board, on March 27, 1920, made an order denying the relief prayed for by the said defendant in its petition. The case is here on writ of certiorari to review the said action of the board.

[1] It is both defendants' claim that they have fully performed and met the obligation imposed upon them under the statute and under the agreements in the instant case. We call attention to the following extracts from the testimony: Dr. William A. Stone, a witness sworn on behalf of the defendants, testified that he had been a practitioner for some 35 years, being a specialist in nervous and mental diseases, after having been for 24 years in state institutions for the insane. He testified that he had had experience in treating many cases of locomotor ataxia and mental paresis. His examination of the claimant was made on July 23, 1919, three months after the committal to the state hospital. Speaking of the condition of the claimant at that time, the witness testified as follows:

"Physically, the nature of the organic disease was in the nature of locomotor ataxia with cerebral involvement. I just mentioned a cerebral involvement, but in addition, there was paralysis of the left side of his face. His pupils were tightly contracted. He had Argyll-Robertson pupils, Rhomberg symptoms. The left eye had an internal strabismus; the muscles of the outside being paralyzed, turning the eye in. The tongue, when protruded, did so to the right slightly, showing the paralysis of the left side of the tongue. He showed the other usual symptoms of locomotor ataxia. The knee reflexes were absent and he had incontinence of the bladder, could not hold his urine; clothes were all wet, and there was general anemia accompanying such conditions. He had a slight slurring of his speech so that he could not pronounce certain difficult words.

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"Q. How about his gait, Doctor? A. It was ataxic. He did not have control of the muscles of his legs; he would wobble.

"Q. Rather shuffling? A. Yes, ataxic gait. He couldn't tell where his legs were going without watching the floor.

"Q. Did you make an examination of his right leg particularly? A. We did. That was the instruction we had, to examine his legs, feet, and ankles as to his injury.

"Q. Just what did you find? A. We found that the motions of his feet and ankles were perfect and devoid of any contraction or restrictions in any way as the result of his injury. There was a slight lack of flexion in the right foot, but no more than in the other; both were alike, although not as good as in a normal individual in prime health. But inasmuch as it was the same in both feet, the loss could only be attributed to the nervous disease.

"Q. How old a man was Mr. Ward? A. That I don't know.

"Q. Would you be able to estimate his age at all? A. Perhaps in the 40's.

"Q. Is it not true, Doctor, that in a great percentage, from 90 to 99 per cent., of the cases of locomotor ataxia and this dementia, from which Mr. Ward was suffering are the result of a disease? A. Yes, it is.

"Q. And would it be possible, Doctor, even in the highest realms of speculation, in any way to say that the injury in 1916 incited into action any germs which might have been lying dormant and thus bring about this condition which he is now in, the condition in which you found Mr. Ward? A. I do not think so.

"Q. In other words, it is not even probable? A. The two situations are entirely divorced and have no relation to each other.

"Q. From your examination would you say that Mr. Ward had entirely recovered from his injury of 1916? A. I should think he had.

"Q. That is, your examination showed no disability to the right foot or ankle which would be in any way caused by his injury of three or four years ago? A. Nothing that I could determine.

"Q. And any disability which might still exist in the right foot is to the same extent in the left foot, and is apparently attributable to the result of the nervous disease? A. Yes, to the nervous disease.

"Q. Have you ever heard, Doctor, of a case of mental disturbance such as Mr. Ward is suffering from, resulting from a broken leg?

"Counsel for Claimant: We will concede that his mental condition was not in any way the result of his injury in 1916, that is a case of general paresis no doubt.

"Counsel for Defendants (continuing): The record indicates that Mr. Ward was a laborer in 1916, doing general laboring work. There was nothing skilled in his occupation. He was told to do certain things, helping move furnaces or whatever might come along in the laboring line. In 1918 he was employed by a hotel as a porter doing general laboring work. Would you say, Doctor, in your opinion, that if Mr. Ward was not suffering from his general condition of paresis and locomotor ataxia and this mental disturbance that he would be able to do general laboring work? A. Oh, yes.

"Q. That is, the injury to his ankle does not in any way stop him, or hinder him from performing a general laborer's, work? A. I would not think so."

On cross-exaimnation Dr. Stone testified among other things, as follows:

"Q. Are you prepared to swear that, were it not for his organic nervous disease and its accompanying mental and physical disability, he would be able to perform his work at this time as well as he did before this accident in 1916? A. Well, perhaps nearly as well. I would grant you this. No man ever yet had a broken bone or suffered from any dis-

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ease—pneumonia or anything else—that left him in the prime condition he was prior to any such accident or disease. You could have pneumonia and recover and still not be quite the same man you were.

"Q. The fact that this ankle was badly broken and possibly badly treated on the start has, as a matter of fact, left him in a worse condition than he was before the accident, has it not? A. Speaking in general yes. That would be my testimony regarding any fracture, but he would be able to perform his duties. Thousands of men do that after fractures, and, unless the disability has been a gross fracture and grossly treated, it leaves usually a broken bone in such condition that a man can do his ordinary labor or work without any difficulty; but, as I said before, no fracture ever leaves the conditions precisely as they were before.

"Q. One of the results of this fracture of this ankle would logically be to weaken the ankle, would it not? A. Logically, so, I might say to supplement that, that in this particular case we could not determine any difference. * * *

"Q. I don't want to impose on you, Doctor, but let us wipe out the fact that he has general paresis, and, assume that so far as that condition is concerned it does not exist, you are not prepared to say that, if this man were out where he was required to perform hard manual labor for 8 or 10 hours a day, he might not still have difficulty in performing that work because of the condition of his ankle? A. No, I wouldn't be prepared to say that he might not. sometimes they do, and sometimes they don't.

"Q. You don't know what his condition was just prior to the disease having progressed to a point where he was committed to the state hospital? A. That is coincidental with the injury."

Dr. Dan H. Eaton, who had practiced his profession for more than 15 years, having been sworn as a witness on behalf of the defendants, and who assisted Dr. Stone in making his examination of the claimant on July 23, 1919, at the Kalamazoo State Hospital, testified among other things, as follows:

"Q. As a result of your examination of July 23, 1919, the condition of his ankle as compared with his left ankle and as compared with the normal foot and as compared with persons who have suffered fractures of a similar nature and have recovered, would you say that Mr. Ward had recovered from the injury to his ankle which was occasioned in 1916? A. Judging from our examination, both from the physical examination of the part and inspection and from what the man showed us that he could do, I would say that his recovery was as complete as you could expect from an injury of that sort, and that his functions, except from a slight restriction in flexing the joint, were as good as results from any fracture.

"Q. The record indicates that in 1916 Mr. Ward was a common laborer, not a skilled workman, doing general laboring work, whatever the work happened to be, whether it happened to be to move furnaces, if it was carrying building materials, he did that; just a general laborer. That has been his work, and in 1918 he was employed by a hotel for some time as a porter doing general porter work. Nothing skilled in the work, just laboring, working about a hotel. Would you say, Doctor, in your opinion that Mr. Ward had recovered physically sufficiently so that he could return to a general laborer's duties? A. Yes, judging from my examination.

"Q. Upon your examination, Doctor, you found that he was suffering from other physical and mental troubles, did you not? A. Yes, sir.

"Q. And your answers so far have been regarding the injury to his foot and not taking into consideration the general physical condition of Mr. Ward? A. Yes, sir.

"Q. In your opinion, Doctor, does that general physical condition result in any way from the injury he received in 1916? A. No, sir.

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"Claimant's Counsel: We will concede that to shorten it up.

"Q. So that if it was not for his insanity and the condition of locomotor ataxia which is present, Mr. Ward, in your opinion, would he be capable of performing a general laborer's duties? A. Yes, sir.

"Q. You examined his foot and ankle carefully? A. Yes, sir.

"Q. And you found the condition of the bones as good as could possibly be expected in the case of a fracture? A. Yes, sir.

"Q. The movement of the foot was perfectly normal to the extent of lateral motion? A. The flexion of the foot was somewhat restricted. but it was about the same in the other foot, so that, when we had him move the foot in different directions, the right foot was about the same as the left.

"Q. So that, if there is any restriction in the right foot, practically the same is present in the left? A. Yes.

"Q. And would probably result from the same cause? A. Yes, from the organic disease from which he is suffering.

"Q. Did he seem to be suffering from any pain in the foot at the time of your examination? A. He claimed not. He said he had not suffered from any pain since having received some injections shortly after his commitment to the hospital.

"Q. In just what way did he indicate to you that he was suffering no pain? A. He walked on his toes and the balls of his feet and danced.

"Q. How far did he walk that way? A. Around the roof; in a fairly good sized room.

"Q. Did he seem active when he did that? A. Yes, he danced up and down on his feet.

"Q. Did he swing his foot in a circular way? A. He demonstrated that he had all motions; he sat in a chair and whirled his feet around, and we put his feet through all the motions that we could expect.

"Q. Did he rise on his toes. A. On the balls of his feet. * * *

"Q. He danced around and whirled his foot in a circular way and went through all the motions that a normal foot would naturally move? A. Yes, with one exception of flexion of the foot, and that was restricted about the same in both feet.

"Q. What percentage below normal? A. I wouldn't attempt to say now. We could notice that that foot movement was restricted and asked him to put the other foot through the same movement and the restriction was about the same.

"Q. Do you attribute that restriction to his ataxic or mental or general physical condition? A. To the nervous disease. * * *

"Q. In your opinion, what is causing Mr. Ward's physical condition to-day? A. Locomotor ataxia with cerebral involvement.

"Q. Contributed to in any way by the injury to his ankle? A. No, sir." (This is a part of the direct testimony of this witness.)

Upon cross-examination he testified, in part, as follows:

"Q. Earlier in your testimony, Doctor, you said this ankle was not in as good condition as you would expect an ankle to be that had been broken or injured such as this one was? A. Yes.

"Q. Just what do you mean by that? A. I mean that you take an ankle joint or a fracture near any joint, and although the X-ray might show perfect results, I couldn't swear that such a joint would be perfect in its functions without having seen the man work with it and be on it.

"Q. In other words, although you say there had been a complete recovery or complete union, the flexions might thereafter be permanently impaired or the articulation (I think you call it) be impaired and be a permanent weakness there? A. It is possible without doubt, but our examination of an hour and a half did not disclose it.

"Q. A portion of which time at least you were devoting your time to something else? A. Yes.

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"Q. You don't know the condition of this ankle when Mr. Ward was admitted to the hospital? A. No, sir.

"Q. You had never seen him before July 23, 1919? A. No, sir.

"Q. It is altogether probable, is it not, assuming that an injured ankle has recovered as nearly as can be, that he might be able to do small jobs of porter work around a hotel, and yet might be entirely unable to do hard manual labor, such as moving furnaces and carrying heavy iron and steel bars and work of that sort? A. Well, of course, following any injury of that sort we advise that they do light work and gradually work up to their regular work. My statement was, I believe, that as far as anything we saw, it is my opinion that there is not any reason that the man should do his regular work, but I wish to add that, if he has never worked to any extent on that ankle, he could not do regular work without working up to it. * * *

"Q. But it is entirely probable, is it not, that although there is as complete a recovery as can be expected in cases of this sort, that the ankle may have been so impaired and weakened that, while he is able to do porter work around a hotel, he is not able to go out and do hard manual labor? A. I would consider that he would be as capable on his ankle as from the rest of his physical condition.

"Q. Assuming that his physical condition is all right and has been all right? A. I would say at this time he could do regular work on his ankle if his general physical condition had been good and he had been gradually working up to it. * * *

"Q. A fractured joint in a person 40 years of age or more is generally weakened thereafter, is it not? A. It is never as good as before it was fractured.

"Q. Never as good as before? A. Never 100 per cent. normal."

Dr. S. Porter Tuttle was examined at Grand Rapids on behalf of the defendants. He had been appointed by the probate court to examine and determine as to the insanity of the claimant. He testified that he had been in the practice for 20 years and was a graduate of the University of Michigan. This witness had examined the claimant immediately after the injury in 1916. He testified, in part, as follows:

"Q. Just what was the injury, Doctor? A. The injury consisted of a fracture of the os calcis or prominent bone forming the heel, sometimes spoken of as the heel bone.

"Q. Any other injury that you found present there? A. No, sir; that was the only injury, was the fracture. He claimed to have some injury to the joint, but the only injury we could discover at that time was the fracture by a careful examination and taking X-ray plates. (The plates referred to were marked Exhibits 1 and 2.)

"Q. Do you recall having taken those X-ray pictures? A. Yes, sir.

"Q. You did it yourself, Doctor? A. Yes, sir.

"Q. I show you one and ask you what your reading of that plate would be? A. That shows the fact that there was no injury to the joint structures or to the bones of the leg or foot, and the dark picture here shows the injury to have been of the os calcis, here. It also does not show any other injury here; but this is another picture and shows that there was no injury to those bones there, or to the bones here, but this does show the injury here.

"Q. The place of the injury? A. Right here, the os calcis.

"Q. The frayed edge there? A. Yes, sir.

"Q. It shows no injury to the ankle joint? A. No, sir.

"Q. At the time you made your examination in 1916, Mr. Ward, as I understand it, was walking at that time with a cane? A. Yes, sir.

"Q. Did you find any evidence of falling arches? A. Yes, he had both fallen arches; both feet were flat. In other words, he was flat footed, both feet.

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"Q. Were there any other evidences of any general debilitated condition at that time? A. Yes, he was a very much debilitated man. The uninjured ankle, or the left ankle, was really in the worst condition, in a worse condition, so to speak, than the right, and there was less motion in the left ankle than there was in the right.

"Q. As to subjective symptoms, did he give any subjective symptoms of a debilitated condition or general run down condition? A. Yes, sir; he was run down and generally debilitated.

"Q. Did he complain of any pains? A. He complained of severe pains in the legs.

"Q. What was the nature of those pains? A. Sharp lancinating pains.

"Q. From the hips down to the feet? A. From the hips down to the feet.

"Q. That in your opinion indicated what? A. The sharp lancinating pains in his legs, together with other symptoms which he had and tests which I made, led me to make a diagnosis of locomotor ataxia. (After describing the symptoms the witness added:) Those were all symptoms of locomotor ataxia; he had every one of them."

The witness' last examination of the claimant was on March 5, 1918. Referring to that examination, he testified as follows:

"Q. At that time did you make a careful examination of Mr. Ward's right ankle? A. Yes, sir.

"Q. What did you then find was the condition of his ankle at that time; that is, if there was any evidence of an injury there? A. Very slight indeed; it seemed to me that there was not enough evidence there of injury to cause the disability claimed by the injured.

"Q. Did you make an examination of the union of the broken bones? A. Yes, sir.

"Q. Was that union as complete as would naturally be found in the average individual? A. Yes, sir.

"Q. In other words, his recovery from the fracture was a normal recovery? A. I should consider it was, yes. * * * "

In the course of his cross-examination this witness testified, among other things, as follows:

"Q. Do you know that at that time the ankle, if he used his foot for any length of time, the ankle would swell to such as extent that he would have to get off his feet? A. I know that he made that statement, but I was never able to discover any swelling myself.

"Q. You never did see his ankle when it was swollen? A. I think the first time I saw it it was slightly swollen, which might have been due and probably was due to rheumatism rather than the injury.

"Q. You don't know then that at the very time he was brought into the detention hospital the ankle was badly swollen and caused him considerable trouble, that right ankle I am referring to? A. That might have been the case, and still be due to either the rheumatism or the disease from which he was found to be suffering.

"Q. It might also have been caused by this fracture, might it not? A. There is a bare possibility, but it is so remote and so late that I would almost say it would not be; it was too far advanced.

"Q. Isn't it a fact people many times have trouble for years to come from fracture of a joint or union? A. That is in a case where there is an ununited fracture, but this had united, and also this fracture was the outer portion of the os calcis, which does not articulate with any other bone. If it had been directly in the joint, then I would have to say 'yes' to your question; but this being on the outer portion of the bone, it probably would not have a great deal of influence on the joint itself.

"Q. This bone, however, with the bones in the front portion of the foot, carries the load of the body, does it not? A. Yes, sir. * * *

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"Q. Isn't it also possible that he might have trouble from this heel at this date, or let us date it back to April 23, 1919? A. Well, there is a bare possibility, yes.

"Q. You wouldn't want to say that he might not have trouble with it? A. No, I wouldn't want to say that, because anything might occur.

"Q. Going on the premises that many times a fracture of this sort does materially interfere for many years to come? A. Yes."

Dr. George H. Baert of Grand Rapids was also sworn to testify on behalf of the defendants. He made his only examination of the claimant on June 14, 1918. He testified among other things, as follows:

"Q. Did you make an examination of the injury to the right foot? A. I did.

"Q. At that time did you find any swelling in the right foot? A. There was no swelling there.

Q. Was there any swelling in the left foot? A. I examined, of course, both feet, and I found that the right foot, the one that had been injured, appeared to be more nearly normal than the left foot.

"Q. Anything abnormal about the foot was of what nature? A. The man had flat feet.

"Q. That condition existed— A. And the left foot was a little worse than the right. * * *

"Q. Did you have him move his foot through the various motions? A. Yes, in every direction; yes, sir.

"Q. You found those motions in what condition? A. If anything, the motion of the right foot—well, it was just as good as the left, but the left foot seemed to be a little more flat than the right.

"Q. Did you have him walk around the room? A. Yes, had him stand on one foot and then on the other.

"Q. Did you make an examination of the ankle and the various parts of the foot? A. Yes, with my hands, a manual examination.

"Q. What did your examination disclose? A. I could find nothing more abnormal in one foot than in the other, excepting that the left foot was a little more flat than the right, and I thought that the right foot was the better foot of the two."

Upon cross-exaimnation this witness testified, in part, as follows:

"Q. You are not prepared to say that that one examination would reveal to you beyond question that he might not have trouble from that ankle or that os calcis if he went into hard manual labor? A. No, I couldn't say that. If one has had any injury to any part—if they should have rheumatism, it might affect them more in such parts than any other.

"Q. It always attacks the weakest part? A. Yes, sir.

"Q. Isn't it perfectly possible that this man's ankle joint might have been injured? A. Yes, that is quite possible.

"Q. And that it might cause him trouble periodically at frequent intervals even? A. Yes.

"Q. And might at the particular time that you examined him have given no evidence and be perfectly normal? A. Yes, that is right. that is correct.

"Q. It might be perfectly possible and altogether probable that this joint was injured? A. Yes.

"Q. And was causing him trouble from time to time frequently, and still you might not have detected it upon your one examination in June, 1918? A. That is true. * * *

"Q. You are not prepared to say that he would not be having trouble with this ankle today? A. No. * * *

"Q. It is possible that that ankle might have been injured so as to cause him trouble without actually having been fractured, is it? A. Oh, yes.

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"Q. The X-ray taken of it would reveal no fracture? A. No injury to the synovial membranes or ligaments."

The only other testimony in the case was that of the son of the claimant, and that of an attendant at the detention hospital at Grand Rapids, where the claimant had been taken care of for a number of days before he was taken to Kalamazoo. The son, a young man 24 years old, testified to having been with his father a number of times each week after July, 1917, and to have observed the condition of his right ankle at that time. He testified that at the time his father was taken to Kalamazoo, and for a short time prior to that, his right ankle was badly swollen and he could not lace his shoe, and could not get up and down stairs alone; that he would work a week and then be obliged to "lay off" on account of the trouble with his right ankle.

The attendent testified to the swollen condition of the claimant's right ankle; that he complained of it as bothering him at the time he was taken away; that he himself bathed the ankle on a number of occasions. The witness, when asked to give the best description he could of it, said:

"Well, it was swollen pretty bad and bothered him. He was only there a couple of days. I think he was there from the 21st to the 23d.

"Q. Did you observe him when he stepped upon the ankle, when he put his weight upon it? A. He was lame.

"Q. Did it appear to hurt him? A. I suppose it did. * * *

"Q. What was the appearance, what did you observe? A. Just as I told you, I saw the ankle was swollen. Of course, it was a swollen ankle, and you know it must surely hurt a man.

"Q. What did you observe when he got out of bed about his ankle? Did he step on it freely? A. Why, no, he didn't.

"Q. How did he handle himself? A. He didn't handle himself very good; he couldn't; the ankle was so sore and swollen."

By the petition to be relieved from further payments, the issue is presented whether claimant was at the time of the hearing, and had been since April 23, 1919, suffering from any disability due to his accident of February 12, 1916.

It is the claim of appellants that the disability from which the claimant was suffering on April 23, 1919, and has suffered since that date, was due to disease and not accident, and counsel to their brief say:

"It is admitted that claimant was suffering from a disease at the time of his accident, and that his confinement to the hospital was the result thereof. Even if claimant was suffering from the slight effects of an accident still, his inability to work is due to his insanity and consequent confinement. All of the witnesses agree that, notwithstanding the happening of the accident, the claimant would have become mentally unbalanced and confined, and that his present mental condition and confinement can in no wise be traced to the accident, nor is it directly or indirectly attributable thereto."

Counsel for claimant, after reviewing the testimony, urge that it is clear that there was evidence of a contradictory nature to the allegation of the petition and also positive testimony that right up to the time of the commitment of the claimant to the state hospital he was still suffering from the injury of February, 1916. They say:

"Defendants' own witnesses, on cross-examination, all concede that he might still have trouble from the foot and ankle. Claimant's son and the attendant at the detention hospital testified that he did have trouble and was still suffering from the effects of the injury at the time of the commitment. The fact that, up to the time claimant was committed to the Kalamazoo State Hospital, defendant insurer never made any effort

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to have the supplemental agreement set aside, or to be released from its liability thereunder, is conclusive evidence that it considered claimant still entitled to compensation up to that date."

It is urged that, from its order denying the petition, the board must have found that at the hearing, and at the date of admission to the hospital, the claimant was suffering from the injury of February, 1916, and that there was competent legal testimony of a substantial nature to support this finding. The following authorities are cited by claimant. Section 5465, Comp. Laws 1915; Rayner v. Sligh Furniture Co., 180 Mich. 168, 146 N. W. 665, L. R. A. 1916A, 22, Ann. Cas. 1916A, 386. Bayne v. Riverside Storage Co., 181 Mich. 378, 148 N. W. 412; Hills v. Blair, 182 Mich. 26, 148 N. W. 243; Holnagle v. Lansing Fuel & Gas Co., 200 Mich. 132, 166 N. W. 843; Homan v. Electric Light & Power Co., 200 Mich. 206-208, 166 N. W. 860; Jacobs v. Glasser & Hoffman, 200 Mich. 473, 166 N. W. 867.)

In the Homan Case, Justice Fellows, speaking for the court, said:

"If the finding of the ultimate facts upon which the award is based finds support in the testimony, it is our duty to accept such finding as final, in the absence of fraud"—citing cases.

This holding has been announced by this court, in similar but varying language many times, and has been held applicable where there was conflicting testimony as to a continuing disability from an injury.

[2] We are unable to say that there was no testimony in support of the finding of the board, and we do not think that it is our duty to weigh the evidence, under the statute, and our rulings interpreting it. Findings of the board which are supported by facts or inferences from testimony must be taken as true.

[3] Counsel for claimant discuss the question whether the defendants are released from liability to pay compensation because of the supervening insanity of the claimant; and they urge in argument that, after the liability to pay compensation has become fixed, no supervening infirmity or insanity of claimant will relieve the employer or his insurer from the liability to continue paying compensation according to the terms of the award as originally made, and the following cases are cited: Eaves v. Bloenslydash Colliery Co., 2 K. B. (1909) 73; Harwood v. Wyken Colliery Co., 3 K. B. (1913) 605; McNally v. Furness Withy Co., 3 K. B. (1913) 605; In re Walsh, 227 Mass. 341, 160 N. E. 496, 6 A. L. R. 567.

We doubt if defendants really claim that, simply, the intervening insanity would relieve them from liability. We understand their real position to be that the disability from which claimant has suffered since April 23, 1919, was due to disease and not the injury of February 12, 1916.

However, we are of the opinion that the position of claimant upon that subject is fully sustained by the authorities cited. In other words, that the supervening insanity of the claimant does not justify defendants in stopping payment of compensation.

The order of the board in denying defendants' petition is affirmed, with costs.

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WILLIAMS v. MISSOURI BRIDGE & IRON CO. ET AL. (No. 70.)

(Supreme Court of Michigan. Dec. 21, 1920.)

180 Northwestern Reporter, 357.

1. MASTER AND SERVANT — DEATH FROM FALL DUE TO CAISSON DISEASE HELD TO "ARISE OUT OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Where, on an attack of caisson disease, an employee fell and was killed and the disease came on suddenly because of the negligence of a coemployee in decompressing the air too fast, the injury arose out of the employment within Workmen's Compensation Act and not from some inherent physical defect.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT — DEATH FROM FALL DUE TO CAISSON DISEASE HELD NOT CAUSED BY "OCCUPATIONAL DISEASE" PREVENTING COMPENSATION.

Where, on an attack of caisson disease, an employee fell and was killed, and the disease did not develop by a slow process, but suddenly, as a result of decompressing the air too fast, the injury did not result from an "occupational disease" so as to prevent compensation.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

Appeal from Industrial Accident Board.

Proceedings under the Workmen's Compensation Act (Pub. Acts, Ex. Sess. 1912, No. 10) by Mary Lee Williams for compensation for the death of her husband, Claude Williams, opposed by the Missouri Bridge & Iron Company, employer, and the Maryland Casualty Company, insurer. Compensation was awarded and the employer and insurer appeal. Affirmed.

Argued before Moore, C. J., and Steere, Brooke, Fellows, Stone, Clark, Bird, and Sharpe, JJ.

Stevens T. Mason, of Detroit, for appellants.

Emil W. Colombo, of Detroit (John F. Kennedy, of Detroit, of counsel), for appellee.

BIRD, J. During the year 1919 defendant Missouri Valley Bridge & Iron Company, was engaged in constructing a bridge over the River Rouge for the Michigan Central Railroad Company. In constructing the concrete piers it was necessary to use a caisson. Plaintiff's husband, Claude Williams, was employed by defendant to work in the caisson. At the time of the accident hereinafter referred to the caisson extended between 70 and 80 feet below the surface. At that depth the men in the caisson worked under an air pressure of from 37 to 40 pounds. When a shift was made the men on duty were brought to the top of the caisson by means of a ladder, where they entered an air tight locker, 12 feet in diameter and 24 feet in height. After the men entered the locker it was closed and the air pressure slowly reduced, usually at the rate of a pound a minute. It was shown that if the air pressure is reduced more rapidly than a pound a minute it is likely to result in what is called "caisson sickness" among the men. This is dizziness, accompanied with partial

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paralysis of the limbs. On the early morning of July 4th Williams was coming out of the caisson with his companions. They had entered the airtight compartment and the air was being released. Williams stood on the ladder leading out of the locker. By inattention or neglect Eaton, the employee who had charge of the valve, allowed the air to escape too rapidly, with the result that Williams became affected with "caisson disease," and released his hold on the ladder and fell on the head of the man below him, striking on his stomach and chest, and later striking his head against the side of the shaft. He was removed from the locker and given medical aid, but survived only a few hours.

Counsel for defendants concedes that plaintiff's intestate met his death through accidental means, but argues that the award is invalid because the fall which produced the injury was caused by conditions peculiar to the industry in which he was engaged. Effort is made to classify the present case among those cases, to which Van Gorder v. Packard Motor Co., 195 Mich. 588, 162 N. W. 107, L. R. A. 1917E, 522, belongs. It is also sought to bring it within the "occupational disease" cases, of which the lead poisoning case of Adams v. Acme White Lead Co., 182 Mich. 164, 148 N. W. 485, L. R. A. 1916A, 283; Ann. Cas. 1916D, 689, is an example.

[1] 1. We are not persuaded that the present case falls within the first class mentioned. The reason why recovery has been denied in the first class named is because of some inherent physical defect which was the proximate cause of the injury and which had no causal connection with the employment. Such, however, was not the situation in the present case. The thing which caused the death of plaintiff's intestate was not inherent. It was a condition which came on suddenly and was caused by the inattention and neglect of a coemployee in permitting the air to escape from the locker too rapidly. The locker was decompressed at the rate of two pounds a minute, whereas it should have been done at the rate of one pound a minute. This produced in Williams what is termed "caisson disease." Herein lies the distinction between this and the Van Gorder Case. In that case epilepsy caused the fall. In the present case caisson disease caused it. The epilepsy had no causal connection with the employment. The caisson disease was directly due to it. It, therefore, arose out of the employment.

[2] 2. Neither are we persuaded that the case should be classed among the occupational diseases. It is true that testimony establishes the fact that caisson disease develops by the slow process, the same as occupational diseases usually do. Had Williams contracted caisson disease in this manner and his injury and death had resulted therefrom, the argument of counsel would have great force, but the caisson disease, which was responsible for this accident, developed in a few moments as the result of the inattention and neglect of another. In this inattention and neglect we find the unusual thing—the happeing—the accident.

3. Objection is raised to the award because plaintiff did not establish her right to it. We think the testimony showing the marriage and support was ample to authorize the award which the board made in the premises.

Being impressed that the board reached the right conclusion, their award will be affirmed, with costs to the plaintiff.

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HYETT v. NORTHWESTERN HOSPITAL FOR WOMEN AND CHILDREN. (No. 21930.)

(Supreme Court of Minnesota. Dec. 24, 1920.)

180 Northwestern Reporter, 552.

(Syllabus by the Court.)

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT EXCLUDES OTHER REMEDIES.

The Workmen's Compensation Act of this state, in so far as it provides compensation to an employee accidentally or otherwise injured in the course of his employment, is exclusive of all other remedies.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

2. MASTER AND SERVANT — INJURED EMPLOYEE LIMITED IN HIS RELIEF TO THAT GIVEN BY WORKMEN'S COMPENSATION ACT.

Where a particular injury results in part in a temporary or permanent disability, and in part in the disfigurement of the person of the employee, or other injury not amounting to a disability, the employee is limited in his relief to that given by the act, and an action at law for the injury not amounting to a disability cannot be maintained.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

Appeal from District Court, Hennepin County; John H. Steele, Judge.

Action by Ernest M. Hyett against the Northwestern Hospital for Women and Children. From an order sustaining a demurrer to part of its answer, defendant appeals. Order reversed.

Briggs, Weyl & Briggs, of St. Paul, for appellant.
Arthur O. Edwards, of Minneapolis, for respondent.

BROWN, C. J. Plaintiff was in the employ of defendant, a Minnesota corporation, in the capacity of fireman in charge of its heating plant. Both were within and subject to the Workmen's Compensation Act (Gen. St. 1913, §§ 8195–8230). Plaintiff was injured while engaged in his employment, by reason of which he was disabled for a brief period from the discharge of his duties. in adjustment of which there was paid to him the sum of $44. There were, as we understand the matter, no compensation proceedings, but that is not of special importance. At the time of the accident resulting in the disability stated plaintiff received an additional independent injury, but not amounting to a disability to perform his work, for which the Compensation Act makes no express or other provision for compensation. The additional injury was to his left pudic nerve, totally destroying the functions thereof, rendering him permanently impotent. Finding no remedy under the Compensation Act for the particular injury, plaintiff brought this action at law to recover therefor, alleging that it was caused by the negligence of defendant. Defendant interposed in defense, among other things, that the parties were within the Compensation Act, and that the remedy there provided is exclusive. Plaintiff demurred to that part of the answer, and defendant appealed from an order sustaining the same.

[1, 2] The only question presented is whether an employee, within the Compensation Act, who suffers an injury in the course of his employment which results (1) in a disability, temporary or permanent, for

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which compensation may be had under the act; and (2) an associate injury not amounting to a disability, either temporary or otherwise and for which no compensation is provided, may maintain an action at law for the latter injury on the ground that it was occasioned by the negligence of the employer. We answer the question in the negative.

The question is of first impression in this state, though it has come before the courts of other jurisdictions. It is important, for a decision thereof will determine whether our Workmen's Compensation Act, as heretofore generally understood, furnishes the exclusive relief of an injured employee, or whether, in addition to the relief thus provided, he may resort to a common-law action for injuries not amounting to a disability. Every personal injury causes pain and suffering, measured in degree by the character of the injury; some result in the disfigurement of the person—the loss of a hand or other member of the body, an eye, scalds and burns upon the hands or face, all of which must be carried through life to the mental distress of the victim. And in given cases, like that at bar an injury, accidental or otherwise, may impair and totally destroy some function of the human body not of a character to incapacitate the employee from his usual employment, or affect his earning capacity, therefore not within the letter of the Compensation Act. Matters of that character are proper elements of damage in the negligence action, but our Compensation Act makes no provision for a consideration thereof in the award to an injured employee, even though they may constitute his major or principal grievance.

In some of the jurisdictions of this country, and in England, situations of the kind are expressly covered by statute. Bradbury, Compensation Acts (3d Ed.) 874. But not by the statute of this state. The whole scheme of our statute is one of reciprocal concessions by employer and employee, from which benefits and protection fall to each which without the law neither could demand or recover; of benefit to the employee for he is thereby given protection for injuries impairing his earning capacity, without regard to the culpability of the employer, when without the statute he would be remediless. In consideration of this insured compensation and protection by the acceptance of the act he by necessary implication relinquishes his common-law remedies, and thus places a limit on his rights to that measured and granted by the Compensation Act. Section 8204, G. S. 1913. In return for the required payment of compensation for the accidental injury, for which the common law furnishes the employee no relief, the employer is protected from the suit at law for the negligent injury. Thus we have the reciprocal yielding and giving up of rights existing at common law for the new and enlarged rights and remedies given by the Compensation Act. That this comes about by force of compulsory legislation (section 8204) in no way alters the legal character of the relation of the parties. That the Legislature was within its authority in so enacting, in the interests of the general welfare and in regulation of rights, duties, and obligations between employer and employee as a class has been affirmed by all the courts where compensation acts have been sustained. Mathison v. Minneapolis Street Railway Co., 126 Minn. 286, 148 N. W. 71, L. R. A. 1916D, 412. Jensen v. Southern Pacific Railway Co., 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276.

[3] That the remedy so given and provided is exclusive of all others seems to be the prevailing opinion of the courts where the question has received attention. Shanahan v. Monarch Engineering Co., 219 N. Y. 469, 114 N. E. 795; Gregutis v. Waclark Wire Works, 86 N. J. Law, 610, 92 Atl. 354; Peet v. Mills, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916A, 358, Ann. Cas. 1915D, 154; King v. Viscoloid Co., 219 Mass. 420, 106 N. E. 988, Ann. Cas. 1916D, 1170. Connors v. Senet-Solway Co., 94 Misc. Rep. 405, 159 N. Y. Supp. 431, in which it was said that Shinnick v.

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Clover-Farms Co., 169 App. Div. 236, 154 N. Y. Supp. 423, holding to the contrary had been overruled by Jensen v. Southern Pacific, supra. If the case was not in effect there overruled, it clearly was so disposed of by the later decision of the Court of Appeals in the Shanahan Case above cited. The case of Boyer v. Crescent Paper Co., 143 La. 368, 78 South. 596, takes the other view of the Louisiana Compensation Act and supports plaintiff in the case at bar. But to follow that rule would in a large measure be destructive of the main purpose and scheme of the statute, and deprive the employer of a right expressly granted him in return for his concession of liability for the nonactionable injury. It would result also in opening wide the door to double litigation in a great majority of the compensation cases. With the opportunity presented the discovery of negligence in some respect contributing to a particular injury would not be difficult, and thus the employer exposed to a second suit in which recovery could be had for pain and suffering, disfigurement of person, in addition to a recovery of compensation for actual disability under the Compensation Act. A personal injury received at the hands of a wrongdoer constitutes but one right of action. It cannot be divided into several parts to accord with the elements of damages recoverable therefor. It presents a single controversy to be settled in a single action. Dunnell's Dig. 5167. That is elementary, and it is manifest that there was no intention on the part of the Legislature to change or abrogate it by the Compensation Act; and no such intention should be presumed by the court. On the other hand, it is clear that the intention of that body was to present to the employers and employees of the state a comprehensive act embracing their exclusive rights and remedies for accidental or other injuries suffered by the employee. Morris v. Muldoon, 190 App. Div. 689, 180 N. Y. Supp. 319. If the compensation so provided is deemed inadequate, or that the act should be made to include all or any of the common-law elements or ingredients of relief found in the negligence law, the change should come about by legislation and not by rule of court.

For the reasons stated the demurrer to the answer should have been overruled, and the order sustaining it is accordingly reversed.

KOUBEK v. GERENS. (No. 21966.)

(Supreme Court of Minnesota. Dec. 17, 1920.)

180 Northwestern Reporter, 219.

(Syllabus by the Court.)

MASTER AND SERVANT—INJURY WHILE RETURNING FROM WORK NOT ONE "ARISING OUT OF EMPLOYMENT" WITHIN COMPENSATION ACT.

As a general rule, an injury sustained by an employee while on his way home, after completing his day's work, does not arise out of his employment, so as to entitle him to compensation under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

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Appeal from District Court, Ramsey County; Olin B. Lewis, Judge.

Action by Frank Koubek against W. S. Gerens, as the Junior Meat Market. Verdict for plaintiff, motion for judgment notwithstanding the verdict denied, and from judgment thereafter on the verdict defendant appeals. Affirmed.

A. G. Briggs and Charles H. Weyl, both of St. Paul, for appellant.

T. P. McNamara, of St. Paul, for respondent.

QUINN, J. In June, 1919, plaintiff was in the employ of the city of St. Paul, as foreman of one of its street flushing crews. The city has seven street flushers. Each consists of a large water tank mounted on wheels, drawn by horses. At the rear of the tank is a four-horse gasoline engine, to propel water from the tank through a pipe set close to the ground. There were two crews, a day and a night crew, each made up of six men and a foreman. Plaintiff was foreman of the day crew, and and it was his duty to see that the gasoline engines on the flushers were in order. The foreman of the night crew was privileged to call on him for assistance.

On the day of the accident the plaintiff started to work at 7 o'clock in the morning and quit at 4 in the afternoon, having worked eight hours. He then went to a drug store to get a magazine, conversed for some time with a friend about a proposed fishing trip, then started home. On his way he stopped and gave some checks to a driver, to be delivered to a third party, then recrossed the street and stood on the corner, talking to a grocer until an hour had passed after quitting work. A flusher on which he had repaired the engine passed by. Plaintiff stepped into the street, placed his hand on the moving flusher, and followed it about 50 feet, listening to the working of the engine, when an autotruck, owned by the defendant and operated by one of his employees, came from the rear and struck the plaintiff, fracturing his left leg above the knee.

This action was brought by the plaintiff against the defendant to recover for such injury alleged to have been caused by the negligence of the defendant and his employees. Plaintiff had a verdict. Defendant moved for judgment notwithstanding the verdict, which was denied. This appeal is from the judgment thereafter entered.

The sole question here presented or argued is whether the plaintiff's injury arose out of and in the course of his employment, under such circumstances that he is governed by the Workmen's Compensation Act.

It is alleged in the complaint that, while plaintiff was walking upon Ramsey street by one of the street flushing wagons inspecting and examining the working motor thereon, defendant negligently ran one of its autotrucks at a high, dangerous, and unlawful rate of speed upon and against the plaintiff, thereby injuring him, etc. In the answer defendant alleges that plaintiff was guilty of contributory negligence; that his auto at the time of the accident was operated by an employee of his whose duty it was to drive said auto and make deliveries. that said employee was operating said auto in the course of his employment; and that the accident arose out of and in the course of his employment. He further alleges that he and the city of St. Paul are employers subject to the provisions of the Workmen's Compensation Act, and if there is any liability on the part of the defendant to plaintiff the amount of said liability is fixed and determined by said act. The reply is a general denial of all new matter set forth in the answer.

Section 8230, G. S. 1913, subd. (1) provides:

"Personal injuries arising out of and in the course of employment" shall be held "not to cover workmen except while engaged in, on, or about the premises where their services are being performed, or where

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their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen."

The burden is upon the defendant to show that the plaintiff was performing services for his master at the time of the accident, within the scope of his employment. Otto v. Railway Co., 138 Minn. 316, 164 N. W. 1020.

It is not disputed but that an hour had elapsed after the plaintiff had completed his day's work when the accident occurred, unless his mere stepping into the street and listening to the working of the engine on the passing flusher renewed his duties and extended his day's work. We do not think so. Such an act could hardly be said to amount to overtime, as suggested by appellant. It merely shows the plaintiff's interest in his work. He had repaired the engine shortly before, and, as he explained, he undertook, out of curiosity, to ascertain whether it was working well. He was not duty bound so to do at that particular time. It was a voluntary act on his part for which he could not expect to be reimbursed in wages. It could have required but a few seconds of time.

It is well settled by recent decisions of this court that an employee is not, as a general rule, within the Compensation Act while on his way home after completing his day's work. Otto v. Railway Co., supra; Erickson v. City Railway Co., 141 Minn. 166, 169 N. W. 532; Podgorski v. Kerwin, 144 Minn. 313, 175 N. W. 694; State ex rel. v. District Court, 144 Minn. 259, 175 N. W. 110; Nesbitt v. Foundry Co., 177 N. W. 131. We think the trial court was right; that under the circumstances in this case the plaintiff was properly permitted to recover in this action.

Affirmed.

DIBELL, J. I concur in the result. There was a verdict for the plaintiff. There was a motion for judgment notwithstanding, but no motion for a new trial. With the record so the defendant can have a reversal only in the event that it conclusively appears that the plaintiff was in the course of his employment by the city at the time of his injury. The opinion holds that as a matter of law he was not in the course of his employment. A holding that the evidence does not require a finding that the plaintiff was in the course of his employment is enough to sustain the judgment. The opinion necessarily concludes another employee, having the situation of the plaintiff, upon a claim that it might be found as a fact that he was in the course of his employment at the time and entitled to compensation from his employer under the compensation act. I prefer that such a claim be left undecided here, and that it be met when it is necessary to the decision of a controversy.

PEER v. BABCOCK ET AL.

(Court of Appeals of New York. Nov. 30, 1920.)

129 Northeastern Reporter, 224.

1. MASTER AND SERVANT—VERDICT FOR ALLEGED NEGLIGENT SERVANT RELEASES MASTER.

Where the theory of an action was that the relation of master and servant existed between defendants, and that the master was liable by reason of negligence of the servant, a verdict in favor of the servant and holding the master guilty of negligence relieved not only the servant, but the master, from liability.

(For other cases, see Master and Servant, Dec. Dig. § 333.)

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2. MASTER AND SERVANT — TRUCKMAN HELD TO BE CARRIER FOR HIRE, AND NOT EMPLOYEE OF COAL DEALERS.

A truckman hauling coal for coal dealers and using his own team and wagon in making deliveries to their customers at his own pleasure at a certain rate per ton, the places being indicated on delivery slips given to him, *held* to be a carrier for hire, and not an employee, for whose negligence, causing a collision, the dealers would be liable.

(For other cases, see Master and Servant, Dec. Dig. § 316[1].)

Pound, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Andrew B. Peer against Charles H. Babcock and another, impleaded with Guiseppe Pizzo. From a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (174 N. Y. Supp. 914) affirming a judgment for plaintiff entered upon a verdict, defendants appeal. Judgment and order reversed, and new trial granted.

George A. Benton, of Rochester, for appellants.

Glenn L. Buck and Charles F. Doehler, both of Rochester, for respondent.

HOGAN, J. This action was brought by plaintiff against the defendants above named to recover damages for personal injuries resulting to him by reason of an accident that occurred in the city of Rochester July 30, 1917. Defendants Babcock and May are copartners engaged in the coal business in the city of Rochester under the firm name of H. H. Babcock & Co. As bearing upon the nature of the action and the basis of an alleged right to recover herein, it is essential that reference be made to the complaint, which contains the following allegations:

"That the said defendants Babcock and May are engaged in the business of selling (and delivering) coal in the said city of Rochester, and have and maintain for the purpose of said business a coalyard situated at No. 505 North street in said city of Rochester, and that the said defendants Babcock and May, also have, maintain, control, and operate for the purpose of said business teams of horses, wagons, and drivers; that one of the drivers that the said defendants Babcock and May have, control, and maintain is the defendant Guiseppe Pizzo.

"That on or about the 30th day of July, 1917, at about 9:30 o'clock a. m., while this plaintiff was seated in a wagon drawn by a horse, which was being driven by a person other than the plaintiff, and who was driving the said horse and wagon in a careful and prudent manner in a southerly direction on the west side of the said North street, and was about to pass the entrance of said defendants Babcock and May's coalyard at No. 505 North street in said city of Rochester, through the negligence, fault, and carelessness of these defendants herein, and without any fault, negligence, and carelessness of this plaintiff, a team of horses attached to a wagon belonging to the defendants ran into and struck the wagon in which the plaintiff was riding, throwing the plaintiff out of the wagon onto the pavement and crushing him between the said wagon and the pavement. * * *

"That by reason of the plaintiff's said injuries, caused wholly and entirely by negligence, fault, and carelessness of the defendenats as aforesaid, this plaintiff was obliged to and did incur large expenses * * * did suffer pain," etc.

The answer of defendants Babcock and May denied that they have maintained, controlled, and operated for the purpose of their business

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teams of horses, wagons, and drivers, and that defendant Pizzo was a driver controlled and maintained by defendants, and affirmatively alleged that Pizzo was an independent contractor, and was not the servant or agent of said defendants.

The defendant Pizzo answered separately, and by a denial of the allegations of the complaint above quoted put the same in issue.

Substantially all evidence offered by plaintiff before he rested had reference to the circumstances surrounding the accident and the extent of the injuries he sustained. The only evidence adduced by him upon the subject of the relations between Babcock and May and Pizzo was the testimony of Mr. Roberts, an employee of Babcock and Co., who testified that he had a record of a load of coal that "was on Pizzo's wagon about 9:30 the morning of the accident." "A regular delivery slip kept by the Babcock Company." The slip was offered and received in evidence, marked Exhibited, and reads:

"H. H. Babcock & Co. Scranton Coal. General Office 106-107 Wilder Building, No. 89,065. Rochester, N. Y., 7—30—1917. Deliver to E. L. White at 97 Alliance, 4 tons stove, driver Pizzo, received by ——. Please report at the office any rudeness or negligence on the part of the drivers."

The plaintiff having rested, counsel for defendants Babcock and May made a motion to dismiss the complaint, and urged in support thereof:

"That there is absolutely nothing here to show any connection between this driver (Pizzo) and this accident and the defendants Babcock and May. There is no connection showing that Babcock and May had any jurisdiction over the driver. They have failed completely to establish any relation of master and servant.

"The Court: Except this ticket here. About the only evidence here is this ticket which has just been put in evidence. I think there is just enough to call on you to make your proof. Motion denied, exception."

The evidence bearing upon the subject of the relations between the parties is substantially as follows:

The defendant Pizzo was called as a witness in his own behalf, and upon direct examination testified that he had been in the coal business about six years; that he was a driver of a team and coal wagon. The remainder of his direct examination was confined to the circumstances surrounding the accident. Upon cross-examination he identified the slip Exhibit No. 1, which the trial justice held was prima facie evidence of a relation of master and servant, and testified that the slip was not delivered to him until after the accident happened, and up to the time he received the same had no knowledge as to where the load of coal on his wagon was to be delivered; that he had drawn coal for the H. H. Babcock & Co. the first time for three years; he then went to work for the Drake Coal Company; afterwards, and about three months prior to the accident, returned to Babcock & Co. On the day of the accident he arrived at the yard about 9 o'clock in the morning. He saw Mr. Roberts in the office, and the latter told him to put on four tons. He always delivered a load of coal at such places as he was told as indicated on a slip.

Upon redirect examination he testified that he was paid by the ton for delivery of coal and any helpers required by him he employed and paid. Aside from the place of delivery of coal, no directions were given to him as to the route he should take. When he got work he worked every day, but in the event that he failed to report for work, he did not receive any compensation. He owned the team and wagon. Neither his name nor the name of Babcock & Co. appeared on the wagon. Other people were delivering coal from the same yard in the manner he employed.

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The evidence of Mr. Roberts was to the effect:

That drivers, including Pizzo, are paid for delivery of coal by the ton, 60 cents per ton shoveled off, 90 cents per ton carried in. There are a number of teamsters engaged in drawing coal. They come there to the yard and are told what to load, and after putting on a load "we give them delivery slip and tell them where delivery is to be made. No other instructions are given them, and we have no jurisdiction of them after they leave the yard. The men drawing coal are paid for the work performed at the end of the week upon presentation of delivery slips. As to any specified time when they are to report for work we cannot govern them in that sense; they come when they want to and go when they want to. Pizzo has no hours whatever. When he comes we give him work. I engaged Pizzo and agreed to pay him by the ton. I told him where coal was to be delivered. A number of people are drawing coal when we have coal. I do not tell teamsters what time to get there in the morning. I have no restrictions on them. I have no control of their actions at all after they leave the yard. The Babcock Company does not own or have any interest in the team or wagon of Pizzo. Had Pizzo taken coal otherwise than as directed, we would hold him responsible for the coal. A duplicate of the slip is delivered to the purchaser. Had Pizzo insulted a purchaser and it had been reported, any redress I would have would have been to discharge him. By discharging him I mean discontinue our relations, not give him more work. If we had coal and orders for same and Pizzo did not show up until noon, I don't know that I would have something to say about it. That is a condition that you cannot regulate with a class of men like coal drivers. You are glad to get them whenever you can."

At the close of the case defendants-appellants' counsel renewed the motion made at the close of plaintiff's case to dismiss the complaint, which motion was denied and exception noted.

The sole theory of the action as framed by the complaint was that the relation of master and servant existed between the defendants Babcock and May and the defendant Pizzo. The trial justice in his charge to the jury correctly stated:

"The defendant who is directly charged with the alleged negligent act is the defendant Guiseppe Pizzo, and the defendants Babcock and May are made parties on the theory that they were his employer, and that they are therefore liable for his wrongful act or omission. The claim here is that Pizzo was employed by Babcock and May, and that what he did or omitted to do was done in the performance of his duties as such employee. and therefore Babcock and May are responsible for his acts."

Later in the instructions to the jury the trial justice charged:

"That as matter of law the relation between Pizzo and Babcock and May was that of master and servant, and that for any wrongful act of Pizzo constituting negligence during the performance of his duties as a servant of Babcock and May they would be liable equally with him, * * * so that you will approach the case with the rule laid down for you that Pizzo was the employee of Babcock and May, and that, if he was guilty of negligence and the plaintiff was free from contributory negligence, Babcock and May as well as Pizzo would be responsible, and if there was no negligence on the part of Pizzo, or if there was contributory negligence on the part of Peer, then there can be no recovery."

The exception taken to the charge was sufficient to challenge correctness of the same.

[1] The jury reported a verdict in favor of plaintiff against Babcock and May and in favor of defendant Pizzo, thus exonerating plaintiff and defendant Pizzo of negligence and holding Babcock and Co. guilty of negligence. The effect of the verdict under the law of the case as

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charged by the trial justice would be to be relieve not only Pizzo, but Babcock & Co., from liability. Pangburn v. Buick Motor Co., 211 N. Y. 228, 105 N. E. 423.

[2] The charge above quoted was not only erroneous, but a review of the record leads to a conclusion that the evidence was as matter of law insufficient to establish as between Babcock and May and Pizzo the relation of master and servant.

In Wyllie v. Palmer, 137 N. Y. 248, 257, 33 N. E. 381, 384 (19 L. R. A. 285), this court, speaking through Judge Finch, commended the rule laid down in Shearman & Redfield on Negligence (4th Ed.) p. 259:

"He is to be deemed the master who has the supreme choice, control, and direction of the servant, and whose will the servant represents, not merely in the ultimate result of his work, but in all its details. The payment of an employee by the day, or the control and supervision of the work by the employer, though important considerations, are not in themselves decisive of the fact that the two are master and servant."

Again, in Butler v. Townsend, 126 N. Y. 105, 108, 26 N. E. 1017, 1018, the same judge, writing for the court, said:

"The relation exists where the employer selects the workman, may remove or discharge him for misconduct, and may order not only what work shall be done, but the mode and manner of performance."

The facts adduced upon the trial of the instant case are not within the principles of law as stated by this court. Babcock & Co. in their business as coal dealers had numerous orders for coal. They did not own or maintain trucks, horses, or wagons by which delivery of coal could be made. A number of truckmen, including Pizzo, were in the habit of making deliveries of coal to customers of Babcock & Co. They were free to make such deliveries at their pleasure and were not subject to the directions of Babcock & Co. in respect of the time they should work or the manner in which the same should be accomplished. They were at liberty to work for whomsoever they pleased and for such length of time as suited them. Babcock & Co. were powerless to prescribe hours of employment for the truckmen. The latter came to the coalyard at such times as they were not otherwise employed and were disposed to work, and when they worked it was only for such length of time as they desired so to do. If helpers were necessary in the delivery of coal, they were selected and paid by the truckman, whose compensation was by the ton. On the morning in question Pizzo was told to load four tons of coal. He had no information as to the place of delivery until after the accident. The practice was to deliver to a truckman a slip indicating the place of delivery after the coal had been weighed, but no directions were given as to the route to be traversed to make a delivery, neither did Babcock & Co. have or exercise jurisdiction over them after they left the yard. Had Pizzo or any truckman delivered coal at the wrong address, he would be held personally responsible for the same. The name of Babcock & Co. did not appear on Pizzo's wagon.

The evidence is insufficient to establish that the relation of master and servant existed between Babcock & Co. and Pizzo. Rather does the evidence disclose that on the morning in question Pizzo was an applicant for work, and when told to put four tons of coal on his wagon he did so with the implied understanding that he would deliver the same in the usual manner and for the same compensation theretofore paid for a like service. Such employment clearly falls within that peculiar or special employment characterized in Murray v. Dwight, 161 N. Y. 301, 55 N. E. 901, 48 L. R. A. 673. In effect he was a carrier for hire, and Babcock & Co. was powerless to control and direct the work or the manner or method of doing the same. Moore v. Stainton, 80 App. Div. 295, 80 N. Y.

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Supp. 244, affirmed here on opinion of Appellate Division, 177 N. Y. 581, 69 N. E. 1127. To like effect is Hanatsek v. Wilson, 161 App. Div. 634, 146 N. Y. Supp. 1016.

Counsel for respondent seeks to have the judgment sustained upon the proposition that—

"The maintenance and operation by Babcock & Co. of their coalyard and scales immediately adjacent to the street in such a condition that the horses, having once started down the steep grade of the driveway, must instantly collide with any vehicle which was then in the street, was negligence for which Babcock & Co. are accountable, and in fact was the maintenance of a nuisance."

[3] We may safely assume that locus in quo and the facts surrounding the happening of the accident were well known to the plaintiff's attorney when he framed the complaint in this action. An examination of the complaint fails to disclose an allegation tendering an issue of the nature contended for, or any issue other than the one stated by the trial justice first above quoted. True, the complaint does allege that "through the negligence, fault, and carelessness of these defendants herein, and without any fault, negligence, and carelessness of the plaintiff, a team of horses attached to a wagon belonging to the defendants ran into and struck the wagon in which plaintiff was riding; * * * that by reason of the plaintiff's said injuries caused wholly and entirely by negligence, fault, and carelessness of the defendants as aforesaid. * * * "The language quoted from the fourth and fifth paragraphs of the complaint must be read in connection with the context of the complaint found in the second paragraph of the pleading, which alleges in effect that the injury to plaintiff was due to the negligence of Pizzo for which Babcock & Co. as master was responsible, and cannot be construed as alleging a primary liability of Babcock & Co. in the maintenance and operation of the coalyard and scales adjacent to the street and driveway in such negligent manner as to constitute a nuisance. No such issue was tendered by the pleadings. The action was not brought against the defendants as joint tort-feasors, but, as charged by the trial justice in the first instance, upon the theory that the relation between them was that of master and servant.

Counsel for respondent further contends that the primary negligence of Babcock & Co. was submitted to the jury, and that the verdict rendered established such liability. The trial justice instructed the jurors as follows:

"The case is based upon negligence, and the plaintiff is required to show by a fair preponderance of evidence that the defendant Pizzo or the defendants Babcock and May, if you find there was any negligence on their part in the manner of the construction and location of this scale, were guilty of negligence."

After argument of the motion for a new trial, the justice in an opinion denying the motion wrote that there was evidence in the case from which the jury might find that Babcock and May were negligent independently of their liability for the acts of defendant Pizzo. "The greater part of the charge relates to the liability of Babcock and May as employers, but there is a reference to their liability independent of this relationship," viz. the language above quoted.

[4] The trial justice had already charged the jury:

"The defendant who is directly charged with the negligent act is the defendant Pizzo, and the defendants Babcock and May are made parties on the theory that they were his employers, and that they are therefore liable for his wrongful act or omission. * * * The claim here is that Pizzo was employed by Babcock and May, and that what he did or omitted to do that day was done in the course of the performance of his duties as such employee, and that therefore Babcock and May are responsible for his acts."

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The plaintiff's counsel did not take exception to that portion of the charge. The defendants likewise acquiesced therein. The law of the case thus stated we approve. The later charge under consideration was inconsistent with the law governing the case already charged. If, as stated by the justice, Pizzo was the defendant directly charged with the negligent act, and Babcock and May were made parties to the action on the theory that they were his employers—that is, in a derivative character—it is difficult to appreciate how such relationship was transformed into a primary liability on the part of Babcock and May, especially in view of the charge that, if Pizzo was not negligent, plaintiff could not recover. The absence of an exception to the portion of the charge under consideration prevents further comment upon the same.

The errors pointed out to which exceptions were taken are of substance and require a reversal of the judgment.

The judgment and order should be reversed, and a new trial granted, with costs to abide the event.

POUND, J. (dissenting). By the test adopted by the prevailing opinion, I think that Pizzo was as matter of law hired by Babcock & Co. as their servant to deliver the coal in question. If he had been called in by them for an occasional job, the case would have been different, but he was, and for three months prior to the accident had been, one of their teamsters regularly employed as such. He was in no sense an independent truckman serving the public generally.

No exception presents to this court the question of Babcock & Co.'s primary liability, which was obscurely submitted to the jury, but was, it would seem, the basis of their verdict. Accordingly I vote to affirm the judgment appealed from, with costs.

Hiscock, C. J., and Collin, McLaughlin, Andrews, and Elkus, JJ., concur.

Pound, J., reads dissenting memorandum.

Judgments reversed, etc.

ANTHUS v. RAIL JOINT CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 10. 1920.)

185 New York Supplement, 314.

3. MASTER AND SERVANT — COMPENSATION AWARD SUPPORTED BY STATEMENTS AND ADMISSIONS AS TO CAUSE OF INJURY.

A workmen's compensation award *held* sustained by deceased employee's statements regarding the injury, together with admissions by the employer when reporting the accident to the Industrial Commission.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from State Industrial Commission.

Workmen's compensation proceeding by Katherine Anthus, for the death of Paul Anthus, against the Rail Joint Company, employer, and American Mutual Liability Insurance Company, insurance carrier. From an award by the State Industrial Commission, employer and insurance carrier appeal. Affirmed.

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Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Clarence B. Tippett, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for State Industrial Commission.

HENRY T. KELLOGG, J. The deceased employee died as the result of an infection received through an opening in his right foot, which was caused by a traumatic injury. On the day when he last worked for his employer he was engaged with an iron bar in moving steel billets in a railway car.

[1-3] It is claimed that he received the injury which caused the infection by the falling of the bar or a billet upon his foot. In support of the claim a statement made in the employer's first report of injury is urged which reads as follows:

"Describe in full how the accident occurred: Unloading billets in yard, and one of the billets scratched his foot. He had the doctor on Sunday, December 14th, and reported the accident on Monday, the 15th. Doctor found blood poisoning, and had man sent to the Troy Hospital.'

The report is subscribed as follows:

"Rail Joint Company. [Signed] W. J. Bradley; Official Title, Superintendent."

The subscription was not made in the handwriting of W. J. Bradley, but was in fact written by Mary F. Brody, a clerk and stenographer in the employment of the Rail Joint Company. She testified as follows:

"Q. Have you charge of reporting all accidents sustained by employees of the company? A. Yes, sir. Q. Did you make out the accident report in this case to which I refer you? A. Yes, sir. Q. That is signed by W. J. Bradley; is that Mr. Bradley's signature? A. No; that is my signature. Q. Therefore Mr. Bradley had no knowledge of this report? A. No, sir."

Her assertion that she had charge of reporting all accidents was not contradicted by any officer of the company. The statement which Miss Brody gave must therefore be regarded as an admission of a fact of liability, made by the employer itself, through an authorized agent. It cannot matter that the bases of her statement were the declarations of the deceased. Since an admission of a party made out of court is in itself hearsay, receivable in evidence under a definitely recognized exception to the hearsay rule, its competency or relevancy cannot be affected by the question whether the party making it had personal knowledge or merely information as to the fact admitted. In other words, the law does not distinguish, for the purposes of admissibility and relevancy, between hearsay statements based on knowledge and hearsay statements based on other hearsay.

In this case, therefore, we have common-law evidence of the occurrence of an accident in the course of an employment, which arose therefrom, and are not compelled to rely solely upon the statements of the deceased person himself as to the cause of his injury. We think, therefore, that the commission was justified in making the award.

The award should be affirmed. All concur.

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JOHNSON v. UNITED STATES R. ADMINISTRATION ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 10. 1920.)

185 New York Supplement, 338.

1. MASTER AND SERVANT — EVIDENCE HELD TO SUSTAIN COMPENSATION AWARD FOR LOSS OF PERCENTAGE OF USE OF ARM.

In a proceeding under the Workmen's Compensation Law, evidence *held* to justify the State Industrial Commission in basing an award of compensation upon the estimated loss of 33⅓ per cent. of the use of claimant's arm, instead of a loss of 25 per cent., where such percentages were the estimates of medical witnesses.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

2. MASTER AND SERVANT—PERCENTAGE OF LOSS OF USE OF ARM MATTER OF ESTIMATE.

There is no method by which the percentage of loss of the use of an arm can be accurately determined; it is at best a matter of rough estimate and approximation.

(For other cases, see Master and Servant, Dec. Dig. § 385[10].)

Appeal from State Industrial Commission.

Claim by Leo Johnson for compensation under the Workmen's Compensation Law (Consol. Law, c. 67) against the United States Railroad Administration, Walker D. Hines, Director General of Railroads, and the Erie Railroad Company, employer and self insurer. From a decision and award of compensation by the Industrial Commission, the defendants appeal. Affirmed.

Moot, Sprague, Brownell & Marcy, of Buffalo (Bertha J. Strootman, of Buffalo, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondents.

HENRY T. KELLOGG, J. [1] The claimant broke his left arm at the elbow, sustaining "a fracture of the coronoid process of the left ulna, a fracture of the head of the left radius, with backward dislocation of the left forearm." Four physicians, named Carr, Downey, Brennan, and Mansperger, reported or testified that the claimant had sustained a loss of the use of his left arm to the extent of from 20 to 25 per cent. Dr. Grant reported that the loss of use was 33⅓ per cent. He testified as follows:

"Q. Is that 33⅓ per cent. loss of the elbow or the arm? A. In the elbow, because I believe that to be the arm. I think it is loss of use in the arm. Q. It is your contention that the loss of some use at the elbow is equal to the loss of 33⅓ per cent. loss of use of the arm? A. Yes. Q. With this condition of the elbow, he is no better off than if the ellow was completely useless? A. The elbow is not completely useless; it makes a difference in the loss of use of the arm when the elbow is disabled."

Dr. Grant had figured in his report that the extension loss at the elbow was 25 per cent., the flexion loss 15 per cent., the supination loss 5 per cent, and the pronation loss 90 per cent. This totals approximately a 33⅓ per cent. loss of mobility at the elbow. Dr. Grant also said in his report that this restriction in mobility at the elbow "in my

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judgment is equivalent to $33^1/_3$ per cent. loss of use in the arm." He was not alone in his use of this method of calculation, for the physicians Carr and Downey jointly reported that the claimant "has good function of joint with 75 per cent. motion in all directions," and thereafter testified that his loss of use of the arm was 25 per cent., thus treating the fractional loss of use of the arm as being exactly equivalent to the fractional loss of mobility at the elbow.

It is self-evident that a total loss of elbow mobility would not, for all the purposes to which an arm may be put, constitute a total loss of its uses, nor a 50 per cent. mobility loss occasion generally a 50 per cent. decrease in arm uses. On the other hand, in so far as perfect flexibility of all three of the joints of the arm might be required, it is clear that a percentage loss of elbow mobility would constitute an exactly corresponding loss in the use of the shoulder and wrist joints, and would therefore disqualify the entire arm to the same extent. Moreover, a percentage loss of elbow mobility in many cases might inadequately measure the loss of arm use. For instance, the mere loss of 10 per cent. of mobility at the elbow might constitute for many exercises of the arm a total loss of use, not only of the elbow, but of the arm, since for such purposes the arm would be rendered wholly useless.

[2] There is, of course, no method by which the percentage loss of the use of an arm can accurately be determined. It is at best a matter of rough estimate and approximation. It cannot be said, therefore, that physicians, who to a certain extent base their judgment of the loss upon a percentage loss of joint mobility, err in so doing. The question is one of fact for the Industrial Commission, to be determined by it upon such proof as physicians may give, in accordance, however, with its own experience, good sense and judgment We cannot say that the commi.ssion in this case has erred by placing the loss of the use of claimant's arm at $33^1/_3$ per cent. rather than at 25 per cent., and therefore think that the award should stand.

The award should be affirmed.

Award unanimously affirmed.

KNOCKS v. METAL PACKAGE CORPORATION ET AL.

(New York Supreme Court, Appellate Division, Third Department. November 18, 1920.)

185 New York Supplement, 309.

MASTER AND SERVANT — PROVOKED ASSAULT BY FOREMAN HELD NOT INJURY ARISING OUT OF EMPLOYMENT, WITHIN COMPENSATION LAW.

Where a factory oiler, upon being accused of using too much oil, called his foreman a liar, whereupon the foreman struck him, *held*, that the oiler provoked the assault, and was neither injured by his employment, nor within his employment when injured, and hence was not entitled to relief under the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

John M. Kellogg, P. J., and Cochrane, J., dissenting.

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Appeal from State Industrial Commission.

Proceeding by William George Knocks against the Metal Package Corporation, employer, and the American Mutual Liability Insurance Company, insurance carrier, for compensation under the Workmen's Compensation Law (Consol. Laws, c. 67). From an award to claimant for the total loss of the vision of the left eye, the employer and insurance carrier appeal. Reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Jeremiah F. Connor, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for Industrial Commission.

Henry T. Kellogg, J. The claimant was employed as an oiler in a factory of his employer to oil its machinery. One of the machines was running defectively, because of an oversupply of oil. The claimant testified that his foreman accused him of putting too much oil on the machine, and then frankly stated:

"I called him a liar. He looked up to see if any one was looking, and he hit me three times, first in the eye and in the jaw."

He again testified:

"Q. What did you call Mr. Smith? A. A liar. Q. What kind of a liar? A. Just a liar, when he accused me of breaking the die."

The foreman testified that he called the claimant over to the machine and showed him that excessive oiling had the effect of causing it to slip; that the claimant then complained that he had been accused previously of breaking another machine; that thereupon this conversation occurred:

"I said, 'Certainly you broke it.' He said, 'Mr. Smith, if you say I broke it, you are a God damn liar.' With that he had an oil can with a spout that long (indicating), he held it in his right hand. He made a movement and, as it looked to me, intended to strike me with the oil can."

The foreman further testified that he then threw up his hands and struck the claimant in self-defense. The witness Nichols testified that the foreman told the claimant that he put too much oil on the machine; that he was to blame, because he was the man who oiled it; that the subject of a similar trouble with a machine a few days previously was then brought up. She then gave this testimony:

"Mr. Smith said, 'Now that you brought this subject up, you were the one who handled the machine, and it was your fault.' So he called Mr. Smith a G—— d—— liar, and wanted to hit Mr. Smith with the oil can; he had the oil can pointing towards Mr. Smith's face, and Mr. Smith, to protect himself, it went against his face."

The claimant was injured by the action of his foreman, and has had an award as for an accidental injury arising out of and in the course of his employment.

The claimant argues that words will not justify an assault; that the foreman struck the first blow; that the foreman, not claimant, was therefore the aggressor. That argument, addressed to a jury in an assault action brought by claimant against the foreman, would doubtless call for a verdict in favor of claimant. It has no force here, where the claim laid is against an employer, duties to whom, owed by both the claimant and the foreman, may have been violated by both. The sole question is whether the claimant was injured by an accident arising out of and in the course of his employment. If claimant can be

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said to have instigated the altercation, then the resulting assault proceeded from a risk not originated by or arising out of the employment.

Moreover, in provoking the assault, if so he did, the claimant performed no duty for his master, but, on the contrary, deserted that duty for personal ends, and thereby stepped out of his employment. In Matter of Griffin v. Robertson & Sons, 176 App. Div. 6, 162 N. Y. Supp. 313, an employee named Griffin kicked his fellow servant, Cartright, who retaliated by shoving Griffin against a box, over which he fell; receiving injuries from which he died. A claim made for his death was dismissed by this court, with an opinion written by Mr. Justice Cochrane, in which it was said:

"When Griffin lost his temper and assaulted Cartright, he was not promoting or enhancing in any legitimate sense the interest of his employer; but he stepped outside the scope and sphere of his employment to serve a personal mental condition. * * * The injury was not a peril of the service, nor reasonably incidental thereto. It arose wholly from a voluntary act of Griffin, entirely unnecessary, and not in the protection or advancement of the master's interest, nor connected therewith. It was nothing more or less than the gratification of his personal feeling of animosity. * * * This seems to have been clearly an injury which did not arise 'out of the employment. It was rather outside of the employment and one which grew out of a situation inaugurated by the injured employee himself for his individual purpose."

In Matter of Verschleiser v. Stearn & Co., 229 N. Y. 192, 128 N. E. 126, a fellow servant of the claimant in fun dropped a piece of flesh down the claimant's neck when his back was turned. The claimant turned around and struck another fellow servant, supposing him to have been his tormentor. The man assaulted then kicked the claimant, causing him serious injuries. Notwithstanding the fact that, as between the two employees, the law of assault would have pronounced the claimant "the aggressor," an award to claimant was sustained. In the course of its opinion the court referred with approval to the decision in the Griffin Case, and to the words of Mr. Justice Cochrane contained in his opinion therein, and, among other things, said:

"If the servant had left his employment and was willfully pursuing designs of his own, he would not be entitled to compensation. The man who initiates an assault is doing a willful thing; but this cannot be said of the man who, surprised by physical assault or insult, reacts and in self-protection strikes another."

In Matter of Claim of Leonbruno v. Champlain Silk Mills, 229 N. Y. 470, 128 N. E. 711, Judge Cardogo, said:

"The test of liability under the statute is not the master's dereliction, whether his own or that of his representatives acting within the scope of their authority. The test of liability is the relation of the service to the injury, of the employment to the risk."

In our case the claimant called his foreman "a liar," while the foreman, acting in the line of his duty, was merely giving the claimant needed instructions. It was a word of insubordination, spoken in injury of his master's business, and destructive of his master's proper discipline. In speaking it the claimant created a risk not before existing, and thereby drew down upon himself precisely that which he should have expected. He thereby voiced his own personal animus, and did not intend to further the service of his employer. Even in the law of assault, the action of claimant in thus speaking would be regarded as constituting provocation sufficient to mitigate damages. For these reasons I think that the claimant provoked, instigated, and procured the assault, and therefore was neither injured by his employment nor was within his employment when injured.

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The award should be reversed, and the claim dismissed.
Woodward and Kiley, JJ., concur.
John M. Kellogg, P. J., and Cochrane, J., dissent.

O'CONNELL v. ADIRONDACK ELECTRIC POWER CORPORATION.

(New York Supreme Court, Appellate Division, Third Department. November 10, 1920.)

185 New York Supplement, 455.

MASTER AND SERVANT — EXCITEMENT, PRECIPITATING HEART TROUBLE, CAUSING DEATH, HELD NOT "ACCIDENTAL INJURIES," WITHIN WORKMEN'S COMPENSATION LAW.

The chief operator of the electrical system of an electric power company, who died from acute dilation of the heart, precipitated by mental effort, worry, nervousness or excitement while in his office, directing restoration of the current interrupted by storm damaging the wires, *held* not to have died from "accidental injuries" within the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series Accident—Accidental.)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Helen G. O'Connell for compensation for the death of her husband, John J. O'Connell, opposed by the Adirondack Electric Power Corporation, employer and self-insurer. From an award of the State Industrial Commission for claimant, the employer and self-insurer appeals. Reversed and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Brackett, Todd, Wheat & Wait, of Saratoga Springs (Sheridan P. Wait, of Saratoga Springs, of counsel), for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

HENRY T. KELLOGG, J. The deceased was chief operator of the electrical system of a corporation which generated electric power for transmission over many lines of wire to various consumers, among which were the United Traction Company and the Municipal Gas Company of Troy, N. Y. It was the duty of the deceased to observe fluctuations of current as shown upon electrical indicators, to telephone necessary orders to the various substations in relation to the maintenance of power supply, to receive messages as to breakdowns or other troubles on the electric lines, and to issue the necessary orders over the telephone to locate and remedy them. Breakdowns on the wires were not unusual or unexpected, occurring, as the proof shows they did, as many as five or six times a day, or five or six times a

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week. About 11 o'clock on the day of his death a breakdown occurred on the wires which carried the current into Troy, thereby shutting off power from the lines of the United Traction Company, so that the operation of its surface railway temporarily was suspended. The interruption of current lasted for about 11 minutes, during which time the deceased, sitting in his office chair, made numerous telephone connections on the switchboard before him, and gave and received many telephone messages to and from operatives on the company's lines. At the end of this period the current was restored, and for about 50 minutes thereafter the deceased busied himself in telephoning to various substations to check up the losses of current sustained through the breakdown by the many customers of his employer. He was in the act of telephoning at 12:05 when he fell back in his chair, and in a few minutes was pronounced to be dead. A post mortem examination disclosed that deceased's heart was twice its normal weight, and that he had been a sufferer from heart trouble for many years. Physicians testified that he died either from acute dilation of the heart or from a thrombosis, and that either of these conditions might have been precipitated by mental effort, worry, nervousness, or excitement, operating to increase the rapidity of the action of the heart. The Industrial Commission has held that the death was due to accidental injury, and have made an award therefor.

The interruption to the electrical current appears to have been caused by the parting or the confusion of wires occasioned by a violent windstorm. This, doubtless, constituted an accident to the wires; but it was not an accident which befell the deceased. The deceased was not present at that accident; he did not witness it, he did not suffer from it. Information of the breakdown came to the deceased through the electrical indicators, or over the telephone, and if his mind or nerves were in the least affected, it was by the news of the accident, rather than the accident itself. It would be a strange perversion to term the mental apprehension of news communicated an accident, or an occurrence to the mind or body of the person receiving such news. It would be particularly strange in such a case as this, where the news conveyed was of a kind neither infrequent, unexpected, nor alarming. To my mind it is self-evident that there was no happening of an accident which involved the deceased.

Moreover, in defining injuries which are compensable, the Workmen's Compensation Law (Consol. Laws, c. 67) uses the noun "injuries" qualified by the adjective "accidental," which would seem to indicate that there must be a concurrence of both injury and accident at one and the same time. If in this case we assume either that the accident to the wires or the communication of the news of that accident was an accident which occurred to the deceased, the immediate effect thereof did no more than to make the deceased nervous, apprehensive, or excited. Clearly a man has not sustained an injury whose mind has been made abnormally active, or whose nerves have been more than ordinarily excited. Consequently the accident, if one there was, was unaccompanied by any injury whatsoever. When the deceased's heart became affected, a full hour had elapsed between the so-called accident and the physical injury which then occurred; no injury whatsoever having meanwhile been done to his body or mind. There was, therefore, a complete disassociation between the so-called accident and the injury which caused the death, so that no accidental injury appears ever to have been inflicted upon the deceased. Doubtless his heart became affected through an acceleration of its action, due to mental activity or nervous excitement; but those were neither injuries nor accidents. In my view, the deceased sustained no injury arising from "external, violent or accidental means," and therefore

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no accidental injury. Richardson v. Greenberg, 188 App. Div. 248, 176 N. Y. Supp. 651. Consequently no award should have been granted.

The award should be reversed, and the claim dismissed.

Woodward and Cochrane, JJ., concur.

KILEY, J. (concurring). Claimant's intestate died on January 24, 1919. Physician's proof of death says the immediate cause was cardiac dilation; mitral regurgitation. "Cardia" means heart; "cardiac" means pertaining to the heart; "mitral" is applied to the value of the heart; "regurgitation" means an eructation or throwing back. and "eructation" means "belching." "Dilation" means, when applied to the heart. an increase in size of one or more of the heart cavities from weakening of the muscles. All of this is summed up in one word, viz. "endocarditis," which means heart trouble. An autopsy was had, and the heart was found to be twice the normal weight or size. He had a weakened and weak heart,afflicted with the foregoing specifics. His doctor says that his death was due to the condition of the heart found, hastened by unusual mental exertion alone. The evidence is to the effect that this condition may, or in this case might, come on in 6 months or 20 years. He says he had operated in 15 or 20 autopsies involving the question of heart trouble, and that this was the worse he had ever seen. He says the undue muscular strain put upon the heart by the work he was doing at that time—I suppose the occasion of the strain covering the whole period is meant—would cause death in the particular case of this deceased.

The Presiding Justice says this case comes within the provisions of the act, and cites London v. Casino Waist Co., 181 App. Div. 962, 168 N. Y. Supp. 1116. No opinion was handed down in that case; the facts, as briefly stated by the Presiding Judge, are that some one shouted "Fire" in the factory; others took up the refrain; a panic ensued; this girl fainted. It is possible there was some pushing or jamming; cannot tell. That case, in absence of evidence, is not of much value, it should not be applied outside of the facts of that particular case.

Justice Henry T. Kellogg dissents* in this case and cites Richardson v. Greenberg, 188 App. Div. 248, 176 N. Y. Supp. 651, in which he wrote a well-considered and able opinion. The ground of his dissent is that there was no accident incidental to and arising out of the employment; that while there was an accident to the telephone system, it was not to, and of course did not involve the deceased. I cannot find any case in which the opinion is published where compensation has been awarded for mental strain alone. The Attorney General recognizes this condition as new, when he says in his brief:

"We cannot see any distinction between a strain which is mental rather than physical, the effect upon the heart in either case is the same."

Of course, there is a distinction, and the court is right up against that distinction in this case; there can be no side-stepping or dodging it. The question is: Are we going to recognize mental strain, or mental hazard, alone, as productive of a compensation injury; if we are ever going to do so, this case contains all of the elements for affirmative action.

I am going to dissent to the report of the Presiding Judge upon another ground, which, so far as I can find, is also new. The commission upon a hearing duly had denied an award to this claimant. Some months after and after the personnel of the commission had partially changed the commission, as then constituted, without no-

* The dissenting opinion of Justice Henry T. Kellogg seems to have become the majority opinion by the concurrence of Justices Woodward and Cochrane.

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tice to defendants, or to any one, rescinded or reversed its former decision, and made the award from which this appeal was taken. I am not unmindful of the provisions of sections 22, 23, 74. of the Workmen's Compensation Law. I fail to find where such action, as here complained of, has been taken under the broad powers in these sections granted to the commision, without notice to the party affected by such change. Unless we are going to establish this commission as a separate and distinct entity, responsible to no other court or body, a machine self-propelled, self-oiled, and without brakes, or need for any, we must say so in this case, because, again to use a common, but illuminating, expression, we are up against the real thing.

The same principle, but on a different state of facts, was ruled upon in Matter of Sperduto v. N. Y. C. Ry. Co., 226 N. Y. 73, 123 N. E. 207. This Court of Appeals case dismissed an appeal taken from a decision of this court reported in 186 App. Div. 145, 173 N. Y. Supp. 834. The Court of Appeals went outside of the dismissal of the appeal and laid down the rule that, if the decision of the Appellate Division had been appealable, its decision would have been the same, because of the absence of notice. That rule should be applied here. Defendants should have their day in court.

I advise that the award be set aside and the matter remitted to the commission for a rehearing, with notice to all parties.

John M. Kellogg, P. J., dissents, but without filing any opinion for publication.

LUPOLI v. ATLANTIC TUBING CO. (No. 483.)

(Supreme Court of Rhode Island. Dec. 29, 1920.)

111 Atlantic Reporter, 766.

1. MASTER AND SERVANT—LEGAL EFFECT OF FACTS NOT QUESTIONED BY PARTIES IN COMPENSATION CASE REVIEWABLE ON APPEAL.

Where the only question before the trial court in a proceeding under the Workmen's Compensation Act was as to the legal effect of facts not questioned by either party, the decision of the court as to such question is one of law, which is subject to review on appeal (article 3, § 7).

(For other cases, see Master and Servant, Dec. Dig. § 412.)

2. MASTER AND SERVANT — BURDEN OF ESTABLISHING RIGHT TO LUMP SUM COMPENSATION IS ON MOVING PARTY.

On petition for payment of compensation under the Workmen's Compensation Act in a lump sum, the burden of establishing the right to make payment in such manner is imposed on the moving party; but the "odd lot" doctrine is not applicable on petition of the workman for commutation of future payments for permanent total disability.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

3. MASTER AND SERVANT—"ODD LOT DOCTRINE," APPLIED IN COMPENSATION CASES, DEFINED.

The "odd lot doctrine" is that, if the effects of an accident have not been removed, it is not sufficient, to entitle an employer to have a reduction in the weekly compensation ordered by the court under the Workmen's Compensation Act, that it appears the workman has the phys-

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ical capacity to do some kind of work different from the general kind of work which he was engaged in at the time of the accident, but it must also be shown that the workman, either by his own efforts or that of his employer, can actually get such work; that is, the burden is on the employer to show that the workman can get a job.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Appeal from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Proceeding by Luigi Lupoli under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the Atlantic Tubing Company, the employer. There was an award of compensation, payable in a lump sum, and the employer appeals. Decree modified.

William C. H. Brand and Joseph Veneziale, both of Providence, for petitioner.

William A. Gunning, of Providence, for respondent.

STEARNS, J. This is an appeal from the decree of the superior court in proceedings under the Workmen's Compensation Act (Pub. Acts 1912, c. 831). Petitioner, who was an unskilled laborer, while engaged in his regular work in operating a machine, on the 26th of October, 1918, caught his right hand in the machine, and as a result of the accident lost two phalanges of his second finger and part of his first finger. His wages were $18 a week. In accordance with a verbal agreement, respondent has been and still is paying petitioner as compensation under the act the sum of $9 per week, and in addition thereto has paid to him the sum of $9 per week for 12 weeks as special compensation for the loss of a finger.

On March 31, 1920, Lupoli filed in the superior court a petition under the Workmen's Compensation Act in the usual form, in which he alleges the matter in dispute between the parties is the nature and extent of the injuries and the duration of the time of incapacity. Petitioner claims he is unable to follow his former occupation, that of unskilled laborer, because he has no use of his right hand. that his lack of knowledge of the English language is such as to preclude him from filling any clerical position, and his physical condition is such as to preclude him from performing any manual labor; and that therefore he is totally incapacitated permanently. In the papers of the case there is also a petition for commutation of future payments. Section 25, art. 2. Although this latter petition has no file mark of the court thereon, it appears that respondent accepted service of both petitions on said March 31st, and presumably both petitions were filed on the same day. The two petitions were heard together by a justice of the superior court June 2, 1920. The petitioner testified in his own behalf and cross-examination was waived. The respondent then presented the testimony of but one witness, Dr. Jones, who examined petitioner March 1, 1920, at the request of respondent. Petitioner stated that he was still receiving from his employer his weekly compensation under the act; that he had been unable to work since the accident, because his injured hand was too weak; that the doctor who attended him at the time of the accident had operated on the hand; and that he felt some improvement in the hand, but not much.

Dr. Jones testified: That petitioner had lost a portion of some of his fingers on one hand and that the ring finger on the same hand was stiff and more or less useless. There was no injury to the arm. The hand could be improved by an operation, which was not serious, after which it would be four or five weeks before petitioner could use the hand very much again. That in a general way petitioner would have as a laborer s disability in the injured hand of about 50 per cent. The in-

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jured hand would not be good for ordinary hard labor, and petitioner would have to do some work where he could use his other hand more and the injured hand to a lesser degree. No question was raised as to the nature of the injury. The sole issue was as to the probable duration of the incapacity to work.

The trial justice ruled that, as there was no evidence before the court that the man could get a job anywhere, and as respondent had not furnished him with work, and had presented no evidence that it could furnish him with work, it followed that petitioner was one of the "odd lot" kind; that the burden was on the employer to procure a job for the man, and, having failed to do so, as far as the genereal labor market was concerned, on the evidence it was a case of total and permanent disability.

The trial justice did not file his decision in writing with the clerk of the court (article 3, § 6), but on June 11, 1920, by direction of the court, a decree was entered whereby it was adjudged and decreed that petitioner was permanently totally disabled; that he was entitled to receive of respondent for the statutory period of 500 weeks the weekly sum of $9 (less the time elapsed since the accident for which weekly payments had been made). that the payment of a lump sum in lieu of all future weekly payments would be for the best interest of petitioner, who therefore was entitled to receive from respondent $3,175, being the total sum of future payments payable to him in accordance with the act, capitalized at their present value. From this decree respondent appeals, on the ground that the finding that petitioner is permanently totally disabled is without any evidence to support it, is erroneous, and is against the law.

[1] We think the trial justice erred and the appeal should be sustained. As the only question before the court was as to the legal effect of certain facts which were not questioned by either party, it thus appears in this case that the question decided by the lower court was one of law, which is subject to review on appeal. Article 3, § 7; Jillson v. Ross, 38 R. I. 145, 94 Atl. 717; Collins v. Cole, 40 R. I. 66, 99 Atl. 830. The Compensation Act, by section 11, makes provision for compensation for injuries which result in partial incapacity for work. By article 2, § 10, as amended by Public Laws, c. 1795, provision is made for compensation for total incapacity for work, the duration of which is temporary or uncertain, and also for permanent total disability. At the hearing no question was raised in regard to the present and existing total disability of petitioner. That was admitted. The sole issue remaining was in regard to the permanency and duration of the total disability. On this issue petitioner presented no testimony, and the evidence of the physician tended to show the probability that the character of the disability might change from a total to a partial disability. If the disability is total and remains unchanged, compensation is given for a period not exceeding in any case 500 weeks from the date of the injury. Section 10, as amended by chapter 1795. If, however, the disability is partial, the rate of compensation is changed, and the limit of the period of payment is changed to 300 weeks from the date of the injury. Article 2, § 11. By section 10 it is provided that for the purpose of said section it shall be conclusively presumed that certain injuries enumerated therein resulted in permanent total disability. (The injuries of petitioner do not come within this latter class.) This is the only reference in the act to any presumption either of law or fact in regard to the duration of disability, either total or partial.

By section 25 it is provided that either employer or employee, after payments under the act have been made for not less than 6 months, may petition the superior court for an order commuting the future payments to a lump sum. To entitle the employee to such commutation on the basis of permanent total disability, it must be shown to the satisfaction of the court (1) that the total disability will probably continue for a

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period of not less than 500 weeks from the date of the injury; (2) that the payment of a lump sum will be for the best interest of the person or persons receiving or dependent upon such compensation. In the case of the petition of the employer; (1) That the continuance of weekly payments will, as compared with lump sum payments, entail undue expense or hardship upon the employer; (2) or that the person entitled to compensation has removed or is about to remove from the United States.

[2] On the petition for payment in a lump sum of employer or employee, the burden of establishing the right to make payment in such manner is imposed on the moving party. In the case at bar the burden of proof rested upon the petitioner. By continuing the weekly payments, as the employer is doing, he has the legitimate advantage arising from the expectation that the amount and duration of the payments may be reduced by the partial recovery of petitioner of a capacity for work. Petitioner claims a permanent and total disability. Having proven an existing and present total disability, as there is in this case no presumption of the duration thereof, the burden rests upon the person alleging it, in this case the petitioner. In the case at bar, had the employer sought to terminate or to diminish the weekly payments on the ground that the total disability of the employee had by the improvement in the condition of the employee now become only a partial disability, the legal principle often referred to as the "odd lot" in the labor market would have been applicable. Cardiff Corporation v. Hall, 1 K. B. 1009; Ball v. Coulthard & Co., Ltd., 12 B. W. C. C. 312.

[3] Broadly stated, this rule is that, if the effects of the accident have not been removed, it is not sufficient, to entitle an employer to have a reduction in the weekly compensation ordered by the court, that it appears the workman has the physical capacity to do some kind of work different from the general kind of work he was engaged in at the time of the accident; but it must also be shown that the workman, either by his own efforts or that of his employer, can actually get such work. In other words, the burden is on the employer, the moving party, to show that the workman can get a job. The respondent does not question this principle, and is now paying and is willing to continue for the time being the weekly payments. But as the employer is not seeking to change the existing status, the "odd lot" doctrine is not applicable on this petition of the workman for commutation of future payments, and it was error in the trial court to so apply it.

The decree appealed from is erroneous. Petitioner is entitled to have a decree entered for weekly payments based on the finding of the present total disability. As this court after hearing may affirm, reverse, or modify the decree of the superior court (article 3, § 11), petitioner may present a decree to this court for allowance on or before the 5th day of January, 1921, in accordance with our findings, with provision therein that said decree after entry may be from time to time reviewed by the superior court upon the application of either party, as provided by section 14 of the act.

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HINTON LAUNDRY CO. v. DE LOZIER.

(Supreme Court of Tennessee. Oct. 25, 1920.)

225 Southwestern Reporter, 1037.

MASTER AND SERVANT—INJURY WHILE DOING LAUNDRY WORK FOR COEMPLOYEE AFTER WORKING HOURS HELD NOT ONE "ARISING OUT OF AND IN COURSE OF EMPLOYMENT" WITHIN WORKMEN'S COMPENSATION ACT.

A laundry employee, injured while pressing a skirt for the accommodation of a fellow employee, after the regular working hours had ceased, on a day of the week when individual laundry work was forbidden by a rule, was not entitled to compensation as for a personal injury "arising out of and in the course of the employment," within Workmen's Compensation Act, § 2, subsec. (d).

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from Circuit Court, Knox County; Von A. Huffaker, Judge.

Proceedings under Workmen's Compensation Act by Florence De Lozier for compensation for injuries, opposed by Hinton Laundry Company, employer. Judgment for claimant and employer appeals. Reversed and suit dismissed.

Frantz, McConnell & Seymour, of Knoxville, for Hinton Laundry Co.

R. A. Cawood, of Dandridge, and W. S. Roberts, of Knoxville, for Florence De Lozier.

HALL, J. Florence De Lozier brought this suit in the circuit court of Knox county by petition filed on January 7, 1920, seeking to recover compensation provided for injured employees under the terms of chapter 123 of the Acts of 1919, known as the "Workmen's Compensation Act," the petitioner claiming to have been injured while in the employ of the defendant at its laundry operated by it in the city of Knoxville.

The case was heard before the circuit judge without the intervention of a a jury, and a judgment was rendered against the defendant for the sum of $5 per week, continuing for a period of 75 weeks.

From this judgment defendant appealed to this court, after its motion for a new trial had been overruled, and has assigned errors.

The petition alleges that plaintiff was employed by the defendant to do general laundry work in its steam laundry at a salary of $7 per week, and as a part of the terms of the employment she was given the privilege of having her individual laundry done at its plant free of charge, the defendant agreeing to furnish her all the necessary ingredients, machinery, and other apparatus for doing such laundry while petitioner was in its employ. that while so employed, on or about the 8th day of August, 1919, her hand was in some way caught in a pressing machine, whereby her fingers were so injured that their use was destroyed.

The petitioner prayed for a judgment for compensation as provided by the workmen's compensation statute above referred to.

The defendant answered the petition, admitting that petitioner was employed by it on August 8, 1919, and had been so employed off and on

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for a period of several years to do general work around its plant in the starch department and other departments of the plant, and that at the time of the injury complained of she was earning an average wage of $7 per week.

The answer denied, however, that in addition to the weekly wage paid to the petitioner there was included as a part of her compensation the privilege of having her individual laundry done free of charge, and that she was to be furnished any ingredients, machinery, and other apparatus in connection with the doing of her individual laundry.

The answer further averred that, at the time of the accident which resulted in injury to the petitioner, she was engaged in pressing a skirt belonging to one of the other female employees in the plant of defendant, and was using for this purpose a steam-pressing machine used by respondent in its business; that the act that petitioner was performing at the time was in no wise connected with the business of respondent, and had no connection whatever with the duties which petitioner had been employed to perform, and did not arise under and in the course of the employment of petitioner, but that petitioner was engaged in performing a personal act, wholly disconnected with her employment, and wholly as a matter of accommodation to a third person.

The answer further averred that there was no mutuality between respondent and petitioner with respect of the act which she was performing when injured, and that her hours of service had ceased, and that she was not authorized or directed by any agent or officer of respondent to perform this service.

The question presented for determination by the court is whether the service that was being performed by the petitioner was one contemplated by the employment, and one in which the employer had an interest, or whether it was simply a voluntary service being performed by petitioner as a matter of accommodation to one of her fellow employees, and therefore was not in the course of her employment.

Subsection D of section 2 of the Workmen's Compensation Act aforesaid provides that—

" 'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of employment, and shall not include a disease in any form except as it shall naturally result from the injury."

The proof shows that petitioner was earning $6.50 per week, and a bonus of 50 cents, provided she appeared promptly for her work each day during the week. This wage she received from the defendant whether she did her individual laundry at the defendant's plant or not.

The proof shows that under a rule of the defendant petitioner and other employees engaged in the defendant's plant were given the privilege of doing their individual laundry at the plant on Monday of each week; that day not being a busy day with the plant in doing the work of its patrons. The employees did not have the right to do their individual laundry on any other day of the week under the rule referred to.

The petitioner was injured on Friday while pressing a skirt for Margaret Bowling, a fellow employee, in violation of the rule of the defendant. She was pressing this skirt after her regular work hours had ceased, and at a time when she owed no duty to the defendant. Her act of pressing the skirt for Margaret Bowling was purely a voluntary one, and was being done by the petitioner as a matter of accommodation to her fellow employee. The evidence is uncontradicted that the defendant had no interest whatever in the service which was being performed by petitioner at the time of her injury.

The question presented for determination is discussed in L. R. A. 1917D, 117, 118, and in notes 7 and 8. It is there said:

"Compensation is not recoverable where an employee is injured while doing something solely for his own benefit. This rule has been applied

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in some cases where an employee on a vessel has been on shore for some purposes of his own, and is injured while on the dock on his way back to the vessel. So, too, there can be no recovery where an employee. at the time of his injury, was engaged in work for a third person, or was injured at a time when he had no duties to perform for the employer and was not required, or even expected, to be put on the employer's premises."

In Bayer v. Bayer (1916) 191 Mich. 423, 158 N. W. 109, it was held that an insurance company, who had insured an employer against injuries while acting as a contractor in constructing buildings, cannot be held liable for injuries to an employee while he was engaged with his employer's horse in carting material for the employer's brother, who was not connected with the employer in business, but who paid one-half of the expense of feeding the horse upon condition that he might have the use of it at certain times.

In another case it was held that a jobbing grinder, who pays a cutler so much per week for a room upon condition that he do all the work for the cutler, for which he receives the regular price, and, with the knowledge and acquiescence of the cutler, does work for others when the latter has no work for him to do, is not, while working for a third person, an employee of the cutler so as to hold him liable for compensation for an injury received while so working. Oates v. Turner [1916] W. C. & Ins. Rep. (Eng.) 335, 115 L. T. N. S. 166, L. R. A. 1917D, 32.

It has also been held that the death of a boy employed as a stable boy cannot be said to have arisen out of the employment, where it was caused by the kick of a horse as he was entering the stable with a halter in his hand, at a time when he had no duty to perform in the stable. Joy v. Phillips [1916] I. K. B. (Eng.) 849, 85 L. J. K. B. N. S. 779, [1916] W. C. & Ins. Rep. 67, 114 L. T. N. S. 577 [1916] W. N. 142, 9 B. C. W. C. C. 242.

It has also been held that where a servant girl was engaged in mending her own dress when the bell rang and she arose to answer it. and in some manner drove the needle into her knee, no compensation was recoverable, since the accident did not arise out of the employment. Griffiths v. Robins [1916] 10 B. W. C. C. (Eng.) 90.

The petitioner being injured in the manner and circumstances herein stated, she cannot recover of the defendant, because her injury did not arise out of her employment, or while performing any service for the defendant, or in any service in which it was interested. Upon the other hand, the uncontradicted proof shows that the service which petitioner undertook to perform, and which resulted in her injury, was purely voluntary, and was being performed for the accommodation of a fellow employee.

We do not think the Workmen's Compensation Act covers such injury. It results that the judgment of the court below will be reversed, and the suit dismissed, with costs.

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LUMBERMEN'S RECIPROCAL ASS'N v. BEHNKEN ET AL.
(No. 7952.)

(Court of Civil Appeals of Texas. Galveston. Nov. 11, 1920.
Rehearing Denied Dec. 16, 1920.)

226 Southwestern Reporter, 154.

1. MASTER AND SERVANT — "ARISING OUT OF EMPLOYMENT" AND "COURSE OF EMPLOYMENT," WITHIN WORKMEN'S COMPENSATION ACT, DEFINED.

The expression "arising out of the employment," as used in Workmen's Compensation Act, implies some causal connection between the conditions under which employee works and the injury, while the expression "in the course of the employment" refers to the time, place, and circumstances of the accident, and the two comprehend distinct and separate elements of the right to recovery.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT—CAUSAL CONNECTION BETWEEN EMPLOYMENT AND INJURY NOT REQUIRED BY WORKMEN'S COMPENSATION ACT; "COURSE OF EMPLOYMENT."

Under Workmen's Compensation Act. pt. 1, § 1 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—1), providing compensation for injuries sustained in the course of the employment and death resulting therefrom, without requiring that the injury arise out of the employment, and part 4, § 1 (article 5246—82), defining injuries sustained in the course of employment, no direct causal connection between the employment and the injury is required; it being sufficient that it had to do with and originated in the employer's business and that the employee at the time was engaged in or about the furtherance of the employer's affairs.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

3. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT CONSTRUED LIBERALLY.

Workmen's Compensation Acts are remedial measures and are given a broad and liberal construction in order that the humane purpose of their enactment may be realized.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

4. MASTER AND SERVANT — EMPLOYEE RETURNING TO WORK BY EMPLOYER'S PRIVATE WAY WHEN STRUCK BY TRAIN HELD INJURED IN "COURSE OF EMPLOYMENT" WITHIN WORKMEN'S COMPENSATION ACT.

Where an entire town, probably, including a railroad track running through it, was on the employer's land, and the only well-defined crossing over the railroad track was a more or less private way leading to the employer's various buildings, and an employee who had gone home for dinner, as was customary, was returning to his work by such private way in the usual routine of his service when struck by a train, the injury was sustained in the course of the employment, though the employer had nothing to do with such train.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

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5. MASTER AND SERVANT—COURT MAY AWARD LUMP SUM COMPENSATION, THOUGH QUESTION NOT PRESENTED TO BOARD.

In a compensation claimant's suit to vacate an award denying relief, the district court may award a lump sum, though no such settlement was was sought before the Industrial Accident Board, as under Workmen's Compensation Act, pt. 2, §§ 1, 2, 4, 4a, 5, 5a, and 10 (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—39, 5246—40. 5246—42, to 5246—45, 5246—51), the board is not a court, but an administrative agency, and a resort to the district court is not an appeal, but a substitution of its plenary power for that of the board upon a trial de novo.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

6. MASTER AND SERVANT — LUMP SUM COMPENSATION AWARD NOT REVIEWABLE UNLESS DISCRETION ABUSED.

Under Workmen's Compensation Act 1917, pt. 1, § 15 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—33), authorizing lump sum awards in special cases where manifest hardship and injustice would otherwise result, what constitutes such a special case is left to the determination of the board or district court, and the exercise of such discretion will not be reviewed where no abuse appears.

(For other cases, see Master and Servant, Dec. Dig. § 418[5].)

7. MASTER AND SERVANT — LUMP SUM COMPENSATION AWARD NOT ABUSE OF DISCRETION.

Where a deceased employee's widow was left without property of any kind and with seven small children not old enough to assist in earning a living, and four of whom were under five years of age, an award of a lump sum was not an abuse of discretion, especially where the oldest children would in a few years be able to increase the family earnings.

(For other cases, see Master and Servant, Dec. Dig. § 386[4].)

8. MASTER AND SERVANT—DISCOUNT OF LUMP SUM COMPENSATION AWARD AT RATE OF 5 PER CENT. NOT MISUSE OF AUTHORITY OR ABUSE OF DISCRETION.

Under Workmen's Compensation Act 1917, pt. 1, § 15a (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—34), implying that the Industrial Accident Board may allow some discount in case of a lump sum settlement, it was not a misuse of authority or an abuse of discretion for the district court to discount the weekly payments of death benefits at the rate of 5 per cent., according to a standing rule of the board, instead of 6 per cent., the legal rate of interest.

(For other cases, see Master and Servant, Dec. Dig. § 386[4].)

Appeal from District Court, Harris County; Ewing Boyd, Judge.

Proceeding under the Workmen's Compensation Act by Mrs. Josie Behnken and others for compensation for the death of L. Behnken, husband of the named petitioner, opposed by the Hartburg Lumber Company, employer, and Lumbermen's Reciprocal Association, insurer. Compensation was denied by the Industrial Accident Board, but granted by the district court, and the insurer appeals. Affirmed.

Andrews, Streetman, Logue & Mobley, and E. J. Fountain, Jr., all of Houston, for appellant.

Jas. A. Harrison, of Beaumont, for appellees.

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GRAVES, J. Mrs. Behnken for herself and children brought this suit in the court below to set aside an award of the Industrial Accident Board decreeing that they take nothing as a result of the death of L. Behnken, husband and father, respectively, of the claimants. Trial before the court without a jury was had upon an agreed statement of facts, the first six specifications of which in full are these:

"(1) The plaintiffs are Mrs. Josie Behnken in her own right and as next friend of Louise Behnken, age four years, Richard Behnken, three years, Carrol Behnken, age two years, and Thomas Behnken, age about two months. All of the plaintiffs reside in Newton county, Tex. The plaintiffs are the sole and exclusive beneficiaries of L. Behnken, deceased. The defendant is a reciprocal insurance association duly organized and existing under the laws of Texas and having its domicile and principal office in Houston, Harris county, Tex. The plaintiff Mrs. Josie Behnken was married to L. Behnken in 1915, and she and L. Behnken lived together continuously as man and wife until his death. As a result of this marriage plaintiff and L. Behnken had four children, Louise, Richard, Carroll, and Thomas Behnken, all of whom are minors.

"(2) On June 5, 1919, Hartburg Lumber Company was operating a sawmill at Hartburg, Tex. On this day Hartburg Lumber Company was a subscriber under the Workmen's Compensation Law [Laws 1917, c. 103 (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91)]; and had in full force and effect a policy of insurance with defendant herein, conditioned to pay to the employees and their beneficiaries, in case of death, of Hartburg Lumber Company, such compensation as is provided for in the Workmen's Compensation Law of Texas.

"(3) Hartburg Lumber Company employed at its plant at Hartburg about 75 men. The town of Hartburg consists of the plant, storehouse, office, boarding house, and residences for the employees of Hartburg Lumber Company. The railroad track of the Kansas City Southern Railway Company runs through the town so that the sawmill, store, boarding house, and some quarters for negroes and Mexicans are on the north side of the track, and the residences for the white employees are on the south side of the track. The property on the north side and the property on the south side of the track are in close proximity to each other, being only a few hundred feet apart. A dirt road running from Lemonville to Ruliff runs on the south side of the railroad track and in front of the house for white employees. There is a crossing off of this road, west of the store, over the railroad track, and leading to the various buildings making up the group of properties owned by the lumber company. The railroad track is not fenced, but the road crossing was the only crossing well defined over the track. It was an ordinary dirt road crossing.

"All of the residences in the town of Hartburg are controlled by the Hartburg Lumber Company and are rented to the employees of that company by the month for a cash consideration. All of the houses are on the company premises, and there are no houses and residences at Hartburg other than those owned and controlled by the Hartburg Lumber Company. The road, however, running in front of the houses and south of the railroad track, is a public road, but the crossing over the railroad track is more or less private, but is used by any member of the public desiring to go to any part of the mill, store, or boarding house.

"The employees of the Hartburg Lumber Company did not bring their dinner or other meals to their work; but it was customary for them to go to their homes or to the boarding house, according to the place at which they lived, for their meals. The white employees who occupied the residences south of the railroad track went to their home for their meals at the noon hour, and in so doing they necessarily had to cross the railroad track.

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"(4) On June 5, 1919, L. Behnken, the husband and father, respectively, quit his work at noon at the usual hour, went home to get his dinner, had dinner, and started back to his work where he was due at one o'clock. He started back at his usual time, and while crossing the railroad track at the dirt road crossing was accidentally struck and killed by a railroad train operated over the Kansas City Southern Railway Company's tracks. This train did not stop at Hartburg, and had nothing to do with the Hartburg Lumber Company.

"(5) In addition to the wife and minor children named above the plaintiff Mrs. Josie Behnken has three other children by a former husband, the oldest of whom is 14 years of age. None of these children are old enough or strong enough to work and assist in earning a living to support the family. In a few years these children will be able to increase materially the family earnings. Mrs. Behnken and children have no property.

"(6) The Hartburg Lumber Company and the Lumbermen's Reciprocal Association both had immediate notice and were duly notified of the injuries to and death of said L. Behnken, and the plaintiff for herself and minor children duly filed claim for compensation within the time required by law on account of the death of said L. Behnken, with the Industrial Accident Board, at Austin."

Then follow stipulations 7 to 9, inclusive, reciting that the Accident Board on September 26, 1919, entered its final ruling on the claim, holding that the deceased was not engaged in the course of his employment at the time he sustained the fatal injury; that the claimants had made a fair and reasonable contract to pay their attorney 30 per cent. of any recovery in case of a trial, and had, within the 20 days allowed by the Workmen's Compensation Law of 1917, given proper notice of their refusal to abide by the board's decision and filed this suit in court. Concluding, paragraph 10 of the statement is as follows:

"(10) L. Behnken was an employee of the Hartburg Lumber Company and worked six days every week as lumber grader at the sawmill exclusive of Sundays and worked on every Sunday generally as fireman, but sometimes doing other work for the company at the plant. The company paid him $3.50 per day for each day's work including Sundays. L. Behnken had been in the employ of the Hartburg Lumber Company three or four months, and was receiving the same pay as others received for the same class of work. On the day he was killed he was performing duties of lumber grader. The man who took his place after his death does not work as fireman on Sundays.

" 'Exhibit A' attached hereto shows the approximate location and relation of the premises involved herein."

The trial below, under a specific finding that Behnken received his injuries while in the course of his employment, resulted in a judgment for plaintiffs for the lump sum of $3,833, 30 per cent. of which was allotted to their attorney. The defendant Lumbermen's Reciprocal Association appeals.

Three contentions are presented here by appellant:

(1) That deceased's injuries were not received in the course of his employment.

(2) Even if the injuries were so received, the court erred in awarding compensation in a lump sum.

(3) If liable at all, and for a lump sum, appellant was at least entitled to a discount equal to the legal rate of interest in Texas upon the weekly payments, instead of a 5 per cent. discount under a rule derived from another state (New Jersey).

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The first of these suggestions embodies a question not without its difficulties. Our Compensation Law of 1917 provides its benefits "for personal injuries sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained." Acts of 1917, c. 103, pt. 1, § 1 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—1). This expression is thereinafter followed by a definition reading, in so far as applicable here, as follows:

"The term 'injury sustained in the course of employment' as used in this act, shall not include: * * * (4) An injury caused by the employee's willful intention and attempt to injure himself, or to unlawfully injure some other person, but shall include all other injuries of every kind and character having to do with and originating in the work, business, trade or profession of the employer received by an employee while engaged in or about the furtherance of the affairs or business of his employer whether upon the employer's premises or elsewhere." Acts 1917, c. 103, pt. 4, § 1 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—82).

By these provisions, therefore, must be determined the issue of whether the injuries in this instance were sustained in the course of Behnken's employment.

[1, 2] From the wording thus used it is quite apparent that our Legislature, unlike those of many of the states, declined to require that the injury must be one both "arising out of" and "sustained in the course of" the employment, thereby, and despite the definitive expression quoted, it seems to us, enlarging somewhat rather than restricting the risks our law was intended to cover. These two terms, "arising out of" and "in the course of," the first implying some causal connection between the conditions under which the employee works and the injury, the second having reference to the time, place, and circumstances under which the accident takes place, comprehend distinct and separate elements of the right to recover, and, under statutes coupling them together, it is held both must be concurrent and simultaneous. Sugar Co. v. Shraluka, 64 Ind. App. 545, 116 N. E. 330; Westman's Case, 118 Me. 133, 106 Atl. pp. 536, 537, pars. 9 and 10. Plainly here, then, by the direct language of the Texas act there need be no direct causal connection between the actual employment and the injury, the statute in this particular being satisfied if it be merely shown that the injury occurred in the course of the employment in the sense that it had to do with and orginated in the business of the employer, the only other requirement being that the employee be at the time engaged in or about the furtherance of his employer's affairs.

[3] These compensation acts are remedial measures, ours especially so in that one of its objectives was to give relief to all employees injured in industrial pursuits in this state as against probably less than 20 per cent. who were before provided for under the old common-law actions founded upon negligence. Batson-Milholme Co. v. Faulk, 209 S. W. at page 841. Such laws—indeed, the two specific clauses now under consideration when used therein—are accordingly given a broad and liberal construction by the courts in order that the humane purpose of their enactment may be realized. Sugar Co. v. Shraluka, 116 N. E. at page 331, par. 2, and cited authorities.

[4] In the light of these rules, we conclude the trial court did not err in finding that Behnken's injuries were received in the course of his employment. He was at the time—to all intents and practical purposes, at least—virtually upon the premises of the lumber company. True, the train had nothing to do with the company, but the dirt road upon which he was caught was more or less its private way, was the only well-defined crossing over the railroad track, and led to the various buildings making up the group of its properties; indeed, the legitimate inference from and the idea inheres in this agreed statement of the situation and surroundings, it seems to us, is that the entire town, including the rail-

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road track running through it, was located on the lumber company's land. The time was during the regular noon interval of but one hour, which was customarily utilized by the employees for the very purpose Behnken was using it to accomplish. The relation of employer and employee had in no proper sense ceased to exist during this brief respite from actual labor at the sawmill, but still subsisted. Behnken was not bent on his own rest or refreshment, nor on any business for himself, but was following with methodic regularity the usual routine of his service at that particular place for his master. The very conditions and environments of his employment, calling for his continuous and frequent crossing of the railroad—established and sponsored by his employer, as they in fact had been—created a special hazard to which he was necessarily and constantly exposed in performing the service he was expected to render. The risk and danger—being peculiarly imminent as to employees, in consequence of their having so often each day to cross and recross the track—were therefore not one to which the general public was in like manner and degree subjected, but were in truth an incident of the employment itself; and, if the risk was one inherent in or incidental to the employment, the injury which matured it naturally and necessarily "had to do with and originated in" the business.

As we understand the current of decision touching the spirit of such laws as this, the employee does not have to be actually performing some specific duty of his employment at the precise time of the injury before it can be said to have been received "in the course of his employment," but it is quite generally held that, if he is doing something incidental to his service while on the premises of the master, the injury under such circumstances meets the requirements and is compensable. See Sugar Co. v. Shraluka and Westman's Case, supra; also, Carter v. Rowe, 92 Conn. 82, 101 Atl. 491; Milwaukee Fuel Co. v. Commission, 159 Wis. 635, 150 N. W. 998, par. 3; Rainford v. Ry. Co., 289 Ill. 427, 124 N. E. 643.

There may be cases in which a different view is taken, but this court prefers the liberal construction indicated in those herein cited.

We think the case is to be distinguished upon the facts from American Indemnity Co. v. Dinkins, 211 S. W. 949, decided by our own Court of Civil Appeals at Beaumont, upon which appellant relies. There the employee had quit work for the day, had registered off at the gates of the refinery plant under a system provided for the purpose, had left entirely the premises of his employer, and about three-fourths of a mile distant, while on his way home along a route he himself had selected late at night, for the purpose of securing rest and sleep, was killed by a passing automobile on one of the main public roads in that vicinity, which was not the only one leading to and from the plant of his employer. Obviously, it is thought, this does not parallel the situation here presented.

[5] The second contention, that error was committed in awarding a lump sum, rests partly upon the claim that the trial court could only determine such matters as had been passed upon by the Industrial Accident Board, and the record did not disclose that any such settlement had been sought before that body. These assignments are thought to be without merit and are overruled. The Accident Board is not a court, nor is it governed by the rules of pleading or evidence as administered by the courts, but is an administrative agency which acts along lines of procedure of its own selection. It is therefore not considered an appeal when a claimant, being unwilling to abide by the final ruling of the board, resorts to the courts; but thereupon the plenary power of the court, subject only to the qualification that the rights and liability of the parties shall still be determined by the provisions of the act, is substituted for

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that of the board upon a trial de novo. Employers' Liability Act of 1917, pt. 2, §§ 1, 2, 4, 4a, 5, 5a, and 10 (Vernon's Ann. Civ. St. Supp. 1918, arts 5246—39, 5246—40, 5246—42 to 5246—45, 5246—51).

[6, 7] In this connection appellant further argues that the intention of the law is to require payment of compensation on a weekly basis, and that the evidence here failed to disclose a case justifying the award of a lump sum. On the contrary sections 15, pt. 1, of the 1917 Act (article 5246—33) expressly provides that the insurer may be compelled to redeem its liability in a lump sum "in special cases where in the judgment of the board manifest hardship and injustice would otherwise result." Moreover what constitues that character of special case is left to the determination of the board, or of the trial court, as in this instance, and it has been held that the exercise of that discretion below will not be reviewed on appeal where no abuse of it has been made to appear. Ins. Ass'n v. Boudreaux, 213 S. W. 674. That no abuse of the power is shown here is plainly apparent. Mrs. Behnken was suddenly deprived of her means of support, left a widow without property of any kind, and with seven small children to raise and care for. None of them were at that time old or strong enough to work and assist in earning a living for the family, the oldest being only 14, and four of them running in a sort of stepladder fashion from a maximum of 4 years down to about 2 months.

Surely, under these affirmatively stated and agreed facts, an appellate court could not be expected to hold that a trial court, vested with full authority to exercise a sound discretion, had abused it in requiring the sum found to be justly due paid now instead of being doled out in small monthly dribbles over a period of years. especially so, in view of the further stipulation that in a few years the three oldest children would be able to materially increase the family earnings.

[8] There only remains the claim that the legal rate of interest of 6 per cent. should have been allowed as a discount instead of the 5 per cent. applied.

This court is unable to so hold. Our Compensation Law does not provide that a discount must be allowed when the liability is redeemed in a lump sum, and it would be entering the legislative field for a court to undertake to read that requirement into the statute. The only reference to a discount at all found in the act is that appearing in section 15a, pt. I, act of 1917 (article 5246—34,) which in full is as follows:

"*Increasing Amount of Weekly Installments.*—In any case where compensation is payable weekly at a definite sum and for a definite period, and it appears to the board that the amount of compensation being paid is inadequate to meet the necessities of the beneficiary the board shall have the power to increase the amount of compensation by correspondingly decreasing the number of weeks for which the same is to be paid allowing such discount to the company increasing such payments as is applicable in cases of lump sum settlements."

This at most appears to contemplate that the Accident Board may in the exercise of its discretion allow some discount in cases of lump sum settlement, and it is made to appear here that the board has so construed the law and as a standing rule for its administration has adopted for such cases the 5 per cent. rate. The trial court in this instance, having the same authority, followed that rule. Beyond the insistence that the interest rate of 6 per cent. should be substituted as a matter of law, there is no attempt here to show that the 5 per cent. rate applied was in fact unreasonable arbitrary, or unjust. There is, of course, a mathematical difference between interest and discount, and if the former is not enjoined by law and the use of the latter is not shown to have been a misuse, of authority, or an abuse of discretion, it would clearly not be within the province of a court of review to interfere.

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It follows from the conclusions stated that all assignments should be overruled and an affirmance of the judgment directed; that order has been entered.

Affirmed.

UTAH FUEL CO. v. INDUSTRIAL COMMISION. (No. 3534.)

(Supreme Court of Utah. Dec. 4, 1920.)

194 Pacific Reporter 122

1. MASTER AND SERVANT—FINDINGS ON SUBSTANTIAL EVIDENCE IN COMPENSATION CASE CONCLUSIVE.

Under Comp. Laws 1917, § 3148, as amended by laws 1919, c. 63, adding section 3148a, where there is some substantial evidence, as shown by the record, to support the findings of the Industrial Commission, the award will not be disturbed.*

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT HELD VALID.

Comp. Laws 1917, § 3148, as amended by Laws 1919, c. 63, adding section 3148a, affording through the Industrial Commission as an administrative body, speedy and adequate means of securing compensation to injured workmen or their dependents, is a valid exercise of the police power.

For other cases, see Master and Servant Dec. Dig. § 347).

4. MASTER AND SERVANT—INDUSTRIAL COMMISSION HELD TO HAVE JURISDICTION TO DETERMINE DISPUTE AS TO INJURY TO COMPENSATION CLAIMANT.

Where it was conceded that the relationship of employer and employee existed between the parties to a petition for compensation and that both were subject to the Industrial Commission Act (Comp. Laws 1917, § 3148, as amended by Laws 1919, c. 63, adding section 3148a), the employer's denial of employee's injury did not require a dismissal of the petition as involving a dispute within the jurisdiction of the district court instead of the Industrial Commission, but the commission had jurisdiction to determine whether the injury arose out of and in the course of employment, and, if so, to make an award.

(For other cases, see Master and Servant Dec. Dig. § 397.)

Proceeding before the Industrial Commission by Clyde L. Knighton, employee, opposed by the Utah Fuel Company, employer and its own insurer. An award was made, and the employer brought this orginial proceeding against the Industrial Commission to review the award. Award sustained.

Proceeding before the Industrial Commission by Clyde L. Knighton, City, for plaintiff.

Dan B. Shields, Atty. Gen., and Morgan & Huffaker, of Salt Lake City, for defendant.

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* Industrial Commission v. Evans, 174 Pac. 825; Reteuna v. Industrial Commission, 185 Pac. 525; Geo. A. Lowe Co. v. Industrial Commission, 190 Pac. 934; McVicar v. Industrial Commission, 191 Pac. 1089.

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CORFMAN, C. J. This is an original proceeding brought by the plaintiff, Utah Fuel Company, to review an award made by the Industrial Commission of Utah under the provisions of title 49, Comp. Laws, Utah, 1917, as amended by chapter 63, Laws Utah 1919.

On the 14th day of January, 1920, one Clyde L. Knighton, hereinafter referred to as the applicant, filed a claim for compensation with the Industrial commission wherein he alleged, among other things, that during the latter part of the month of January, 1919, he sustained an injury occasioned by an accident arising out of and in the course of his employment with the plaintiff.

The plaintiff, after notice pursuant to statute, appeared and answered the petition, denying that the applicant had been injured in an accident arising out of and in the course of his employment with the plaintiff, and to the contrary, alleging in substance that applicant was suffering with some injury received or illness had or condition existing long prior to his employment with the plaintiff.

A hearing was had before the Industrial Commission during the month of February, 1920, at which it was stipulated and agreed between the applicant and the plaintiff that the plaintiff was an employer and its own insurance carrier, "subject to the provisions of chapter 100, Laws Utah 1917" (the Industrial Commission Act).

The average weekly wage of the applicant was also stipulated and agreed to between the contending parties. At the said hearing the applicant testified in substance that during the latter part of January, 1919, while engaged in the regular course of his employment with the plaintiff, in driving a horse used to move mine cars in plaintiff's coal mine at Sunnyside Utah, the horse became excited and suddenly turned in such a manner as to cause the applicant to be tripped and to fall, whereby the ligaments and nerves of his left leg became slightly injured, and from which he afterward suffered as a result thereof a permanent partial paralysis of his said leg.

Opposing evidence on the part of the plaintiff was to the effect that the applicant's present condition was due to a hysterical nervous or psychic condition. The respective theories of the parties were supported by medical experts who widely differed as to the applicant's physical condition and present disability. The commission found for the applicant and awarded him compensation for disability and also for medical services rendered unto him.

After a rehearing had been applied for and denied, the plaintiff brought the mattter to this court for review in the manner provided by statute.

The plaintiff assigns, as its reasons why the award should be vacated and set aside, the following, to wit:

"First. The grounds enumerated in section 3148, Compiled Laws of Utah 1917, as amended i, e., (a) that the Industrial Commission acted without or in excess of its powers, and (b) that there was no evidence sustaining or tending to sustain the conclusion and decision of said commission that the paralyzed condition of applicant was proximately caused by an accident arising out of and in the course of his employment by defendant during the latter part of January, 1919, but on the contrary the evidence did establish that Knighton's diseased condition existed at the time he was employed by defendant fuel company, that the award of compensation based on its said decision was entirely without or in excess of the power of the Industrial Commission, and therefore null and void.

"Second. The defendant fuel company contends that the Industrial Commission of Utah is an administrative body, authorized and empowered to exercise such functions as may be specifically delegated to it by law, and

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no other functions. The defendant further contends that the so-called Compensation Act, to wit, title 49, Compiled Laws of Utah 1917, as amended by chapter 63, Laws of Utah 1919, does not specifically nor by implication, delegate nor attempt to delegate to said Commission the power to hear, consider and determine controversies between litigants as to ultimate liability, or their property rights, and that the Industrial Commission, in assuming the power to so hear, consider, and determine the ultimate liability between the applicant and defendant, unlawfully usurped judicial power, and that such usurpation of judicial power, by said commission violates those sections of the Constitution of the State of Utah specifically delegating such power to regularly constituted courts, to wit, article 5, § 1, and article 8, §§ 1, 5, and 7.

"Third. That even though it is held that title 49, Compiled Laws of Utah 1917, as amended by chapter 63, Laws of Utah 1919, actually does attempt, specifically or by implication to vest said Industrial Commission with power to hear, consider, and adjudge with whom is the right of the cause, such attempted delegation of power would be to constitute said commission in legal effect a court; and, further, that the statutes creating and defining the powers of the Industrial Commission do not protect the right of employer or employee to have questions of fact involved in a controversy between an employer and employee passed upon by any court, as provided by article 1, §§ 7 and 11, article 5, § 1, article 8, §§ 1, 5, and 7, Constitution of the State of Utah, and is therefore null and void.

[1] It will be seen that the first contention made by plaintiff is that the commission acted in excess of its powers in granting to the applicant compensation, for the reason "that there was no evidence sustaining or tending to sustain the conclusion and decision of the commission" that the paralyzed condition of the applicant was due to "an accident arising out of and in the course of his employment" with the plaintiff.

The province of the Supreme Court in matters of review of the awards of the Industrial Commision has so frequently been discussed and passed upon in the former opinions of this court that it would seem wholly unnecessary and needless repetition to again set forth the statutory provisions bearing on the question, or to cite the decided cases. However, as both counsel for the plaintiff and the Attorney General have in their presentation of the present case made very comprehensive and extended arguments in support of their respective positions, particularly with reference to the constitutional questions raised, we shall again set forth some of the provisions of our statutes which, in our opinion, govern, and shall also briefly and in a general way discuss what we believe to be the powers of the commission under them.

Section 3148, Comp. Laws Utah 1917, as amended by Section 3148a, c. 63, Laws of Utah 1919, provides among other things, that our review of an award made by the Industrial Commission shall not be extended further than to determine whether or not:

"(1) The commission acted without or in excess of its powers. (2) If findings of fact are made, whether or not such findings of fact support the award under review. (3) The findings and conclusions of the commission on questions of fact shall include ultimate facts and findings and mission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and findings and conclusions of the commission."

Bearing on the question of the sufficiency of the evidence to support the findings of the commission and its award in the present case, we have heretofore repeatedly held that where there is some substantial evidence, as shown by the record, to support the findings of the commission, the award

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made must not be disturbed. Ind. Com. v. Evans, 174 Pac. 825. Keteuna v. Ind. Com. 185 Pac. 535; Geo. A. Lowe Co. v. Ind. Com. 190 Pac. 934; McVicar v. Ind. Com, 191 Pac. 1089.

[2-4] But counsel contends that, because in the case at bar plaintiff denied the injury to the applicant and offered testimony in support of its denial, it therefore becomes the duty of this court, by reason of that fact, to vacate and set aside the award on the ground that the commission exceeded its powers and jurisdiction in proceeding to hear and determine such controversy. In short, that the commission had no jurisdiction to render any decision nor to do anything more than dismiss the applicant's petition. Further, the plaintiff contends that it is beyond the power of this court, as a reviewing court, to determine the question of plaintiff's liability, and that the only way it may be legally determined is by a district court regularly exercising its jurisdiction under the provisions of article 8, § 5, of the State Constitution, and in the usual way.

We do not share in the views of counsel nor in the contention made by them that the mere fact that when a dispute arises between an employer and employee (both concededly subject to the provisions of the Act) as to whether or not the employee suffered an accidental injury arising out of and in the course of the employment, the commission is thereby shorn of all of its powers and may not rightfully take testimony, under the evidence make findings an ultimately determine liability and make an award.

Every administrative body, if it is to function at all, must have some power and jurisdiction to determine for itself whether or not it may proceed in a given case, and this we think may be done without usurping the functions of the courts, so long as it does not act arbitrarily nor in excess of the express powers conferred by legislative enactment. Nor do we think, for the reasons assigned by the plaintiff, the act as amended is in violation of any of the provisions of either our state or the federal Constitution. The whole scheme of workmen's compensation laws in general is to place the risks of injury to workmen upon the industry in which they are engaged. Ultimately the loss, if any is sustained, will as a matter of course, fall upon the consuming public. With that end in view, the loss is made to follow the injury, so long as not self-inflicted, regardless of the fault of the employer or of the employee. That this may be accomplished by appropriate legislative enactments without usurping the functions of the courts or offending the constitutional rights of the citizen has been so often fully determined by the adjudications of courts, both state and federal, that generally speaking these legislative enactments do not any longer warrant an extended review.

If the position taken by counsel in the present case is tenable, then in every instance where the applicant is injured, and the employer denies the fact, the commission must dismiss his petition for compensation, and the matter in dispute, if to be settled and determined at all must be taken to the courts in the usual way for final disposition. Such is not in keeping with the purpose of the enactments, nor the basic principles upon which they are founded. They are intended to afford, through administrative bodies, injured industrial workmen or their dependents speedy and adequate means of securing compensation which the more humane and moral conception of our time requires. They are predicated on the police power inherent in every sovereignty—the power to legislate and govern for the best interests of the state. 1 Honnold, Workmen's Comp. § 12, p. 58.

In the present case as pointed out, it was conceded that the relationship of employer and employee existed between the plaintiff and the applicant. It was likewise conceded that both the plaintiff and the applicant were subject to the provisions of the Industrial Commission Act. These facts being conceded, we think the commission under the cir-

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cumstances of this case, had jurisdiction and the power to proceed to investigate and determine whether or not the applicant had received an injury arising out of and in the course of his employment with the plaintiff, and, if so, make an award under the statute. Having done so, and there being substantial evidence, as shown by the record, to support the finding and conclusions and the award made by the commission, this court may not disturb the award.

The award is therefore sustained, with costs.

Frick, Weber, Gideon, and Thurman, JJ., concur.

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NEW CORNELIA COPPER CO. v. ESPINOZA. (No. 3437.)

(United States Circuit Court of Appeals, Ninth Circuit. September 7, 1920. On Rehearing, October 18, 1920.)

268 Federal Reporter, 742.

2. MASTER AND SERVANT—INJURY BY EXPLOSION BEFORE BEGINNING WORK HELD NOT WITHIN STATE EMPLOYERS' LIABILITY ACT.

Employers' Liability Law Ariz. § 4, cl. 2, protecting employees in all work necessitating dangerous proximity to explosives, is not applicable to a miner, injured by an explosion which occurred on the surface of the soil in the morning, before beginning work, resulting from a fire built by the servant to warm himself.

(For other cases, see Master and Servant, Dec. Dig. § 372.)

3. MASTER AND SERVANT — EVIDENCE TO ESTABLISH CLAIM UNDER STATE EMPLOYERS' LIABILITY ACT FOR INJURY FROM EXPLOSION HELD INSUFFICIENT TO GO TO JURY.

In an action for a miner's death. under Employers' Liability Law Ariz. § 4, cl. 2, protecting employees required to be in dangerous proximity to explosives, evidence *held* insufficient to go to the jury.

(For other cases, see Master and Servant, Dec. Dig. § 409½, New, vol. 7A Key-No. Series.)

In Error to the District Court of the United States for the District of Arizona; William H. Sawtell, Judge.

Action by Ignacio S. Espinoza, as administrator of the estate of Jose Maria Ochoa, deceased, against the New Cornelia Copper Company. Judgment for plaintiff, and defendant brings error. Reversed.

Cleon T. Knapp, of Bisbee, Ariz., and Boyle & Pickett, of Douglas, Ariz., for plaintiff in error.

Kibbey, Bennett & Jenckes, of Phœnix, Ariz., for defendant in error.

Before Gilbert, Ross, and Morrow, Circuit Judges.

MORROW, C. J. The plaintiff, as administrator of the estate of Jose Maria Ochoa, deceased, brought this action in the lower court to recover damages from the defendant for the death of the deceased, under two causes of action specified in the complaint, to wit: Under the "Employers' Liability Law of Arizona," and also under the common-law liability, alleging certain negligent acts and omissions upon the part of the defendant. Upon motion, plaintiff was required to elect as between the two causes of action alleged by him in the complaint, whereupon the plaintiff elected to proceed under the Employers' Liability Law (Laws Ariz. 1912, c. 89), which is the first cause of action.

It is alleged in the complaint: That on or about the 27th day of November, 1918, the defendant, was, had been for a long time theretofore, ever since has been, and now is engaged in the business and occupation of mining and operating its mines at and near Ajo, in the county of Pima, in the state of Arizona, and in the extraction of ores therefrom by means, among other methods of tunnels, open pits, shafts, and other excavations into the earth. That in the prosecution of said work the defendant used in and about said mines large quantities of gunpowder,

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blasting powder, dynamite, compressed air, and other explosives. That on said November 27, 1918, said Jose Maria Ochoa was employed by the defendant to work in and about the working and operation of said mines then being operated by the defendant as aforesaid, and was actually engaged in work and labor under said employment, in and about said mines, and in dangerous proximity to said gunpowder, blasting powder, dynamite, and other explosives which were then upon and about said mines, and had been placed there by the defendant for use in the carrying on of its said work of mining. That said Ochoa had no notice or knowledge of the dangerous proximity to him, of said gunpowder, blasting powder, dynamite, and other explosives. That while said Ochoa was so upon said mines, and while there actually engaged in the work and labor for which he had as aforesaid been employed by the defendant, and while in said dangerous proximity to said gunpowder, blasting powder, dynamite, and other explosives, said gunpowder, blasting powder, dynamite, and other explosives were, without any fault of the said Ochoa exploded. That by the effect of said explosion said Ochoa was killed. That the said death of said Ochoa was not caused by the negligence of said deceased. That by reason of the premises and by virtue of the laws of the state of Arizona in such case made and provided, namely, by virtue of the provisions of chapter 6, title 14, Revised Statutes of the state of Arizona of 1913, relating to the "liability of employers for injuries to workmen in dangerous occupations," the defendant was liable in damages to the plaintiff, as administrator of said estate of said Jose Maria Ochoa, deceased, and for the benefit of his surviving widow and children; and plaintiff, as such administrator, alleged that by reason of the premises the said estate of said Jose Maria Ochoa, deceased, has sustained damages in the sum of $20,000, for which sum plaintiff prays for a judgment against defendant and for his costs of suit.

The defendant demurred to the complaint upon the ground that said Employers' Liability Law and section 7 of article 18 of the Constitution of the state of Arizona are both unconstitutional and void, in that said provisions are contrary to and contravene the Fourteenth Amendment to the Constitution of the United States, in that said provisions deprive the defendant of its property without due process of law and deny to it the equal protection of the law, by subjecting it to unlimited liability for damages for personal injuries by its employees, without any fault or negligence on the part of the defendant causing such injury, or contributing thereto, and therefore that plaintiff's complaint fails to state facts sufficient to constitute a cause of action. Defendant also denied each and every allegation contained in the complaint, and alleged that if the deceased was killed, either as alleged in the complaint or otherwise, his death wholly resulted from and was wholly caused by decedent's willful neglect and carelessness, and his failure to use and care or caution in his own behalf at the time and place of said alleged accident.

At the close of the testimony for plaintiff the defendant moved the court for an instructed verdict in favor of the defendant which motion was denied. At the close of the testimony for the defendant, the defendant again moved the court for an instructed verdict in its favor which motion was denied. The case was submitted to the jury, who returned a verdict in favor of the plaintiff and against the defendant in the sum of $10,000, whereupon a judgment was entered for said amount, with costs of suit. A motion for a new trial was denied. From the said judgment the defendant sued out a writ of error from this court. The parties will be designated as in the court below.

It has been determined by the Supreme Court of the United States, in Arizona Employers' Liability Cases, 250 U. S. 400, 39 Sup. Ct. 553,

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63 L. Ed. 1058, 6 A. L. R. 1537, that the constitutional provision of the state of Arizona and the Employers' Liability Act here involved are not repugnant to the provisions of the Fourteenth Amendment of the Constitution of the United States and that question is no longer in issue in this case.

The Constitution of the state of Arizona provides, in article 18, section 7, as follows:

"To protect the safety of employees in all hazardous occupations, in mining * * * the Legislature shall enact an Employers' Liability Law, by the terms of which any employer * * * shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured." Revised Statutes of Arizona 1913, p. 168.

This Constitution of the state came into effect upon the admission of the state into the Union February 14, 1912. Id. p. 195. The act of May 24, 1912, passed at the first regular session of the Legislature of the state of Arizona (chapter 89 of the Session Laws of Arizona of 1912, p. 491; Revised Statutes of Arizona, 1913, §§ 3153-3162), is declared in section 1 to be an Employers' Liability Law, as prescribed in the foregoing section of the Constitution. Section 2 of the act refers to the constitutional provision and follows strictly its language. Section 3 of the act provides by way of declaration and determination a legislative construction for the words "hazardous occupation" as used in the Constitution and in the act. It provides that—

"The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in" section 4 of this act, "are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of" section 2 of this act.

To this legislative construction of the words "hazardous occupation" there is added the specific declaration that such occupations are dangerous and hazardous to the workmen therein because of the risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein. The declaration is as follows:

"By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein."

Section 4 declares and determines certain occupations to be hazardous within the meaning of the act, among others in clause 2 of the section:

"All work when making, using, or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive."

In Endlich on the Interpretation of Statutes, § 527, the author, commenting on the weight to be given the legislative interpretation of constitutional provisions, says:

"The greatest deference is shown by the courts to the interpretation put upon the Constitution by the Legislature, in the enactment of laws and other practical application of constitutional provisions has had the silent acquiescence of the people, including the legal profession and the judiciary and especially when injurious results would follow the disturbing of it. The deference due to such legislative exposition is said to be all the more signal when the latter is made almost contemporaneously

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with the establishment of the Constitution and may be supposed to result from the same views of policy and modes of reason that prevailed among the framers of the instrument thus expounded."

In 8 Cyc. p. 37, it is said that the practical construction of constitutional provisions by the legislative department in the enactment of laws necessarily has great weight with the judiciary and is sometimes followed by the latter when clearly erroneous. To the same effect is the rule stated in 12 Corpus Juris, p. 714.

[1] The act of May 24, 1912, was passed almost contemporaneously with the going into effect of the Constitution, and for eight years it has been acquiesced in by the people of the state and by the judiciary as a correct interpretation of the Constitution.. We see no reason why it should not be accepted in all its terms as a correct exposition of the Employers' Liability Law.

For a month and a few days prior to November 27, 1918, Jose Maria Ochoa was employed by the defendant in its mine near Ajo, in Pima county, Ariz. On that date Ochoa left his residence about 6:30 in the morning for the mine, where he was due to go to work at 7 o'clock. He arrived at a point on the surface about 30 or 40 feet from the entrance to the mine at about 6:45 o'clock, or about 15 minutes before the time he was required to descend to his work in the mine. He stopped at this point and built a fire with wood about 10 or 15 feet to the side of the road. An explosion in the wood killed him.

Juan Delgado, a witness for the plaintiff, testified as to what occurred. This testimony is without contradiction:

"I knew Jose Maria Ochoa, the deceased. I was going to my work when he was killed. The deceased was near a fire which he (the deceased) had built. The fire was within the lines of the copper company. At that time 8 or 10 more men were with me and the deceased. They were all by the fire. The deceased alone built the fire. I arrived at the place as soon the deceasd built the fire. The others began to come afterwards. The fire was within the land of the company, about 35 or 40 feet to one side of the quarry hole in which the men were supposed to work. We were all going to work in the quarry hole that day. We were waiting for our time to go to work. I and the others went to work in the quarry hole after we picked up the deceased. Before the accident the deceased had been working in the quarry hole about a month, more or less. There was some powder under some wood, and the deceased didn't know that there was any powder there, and he lit some papers there. The powder was under the fire. It was concealed under the wood on the surface. It was not customary for the employees coming to work in the morning to build fires to warm themselves before actually going in to the work. In the mines they use gunpowder, dynamite, and other explosives. I used powder in working in the mine. I got the powder that I used in the mine from the powder house. All the workmen there who used powder get it in the same way. A man in charge, who works for the copper company, furnished the powder from the powder house. The powder used by the men belonged to the New Cornelia Copper Company. The workmen used only that part of the powder furnished each day that was necessary.. I do not know where the powder came from that exploded. The day of the accident was a cold day there."

On cross-examination the witness testified that—

"The accident occurred at 7 minutes to 7. The deceased, myself, and the other men were supposed to begin work at 7 o'clock. The deceased, before the explosion, called me and the other men.. I was standing, at the time of the explosion, on the ground 6 or 7 feet from the fire, with my back to it. Immediately after the explosion the deceased was lying

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down about 8 feet from me. I spoke to him, and notified the foreman, who came and asked the men to help. I took care of the deceased until an automobile came and took him to the hospital, where the doctors took charge of him. I went to the hospital with the deceased, where the deceased died at 10 o'clock in the morning. I left the hospital and went to my work. There was a path leading to the entrance of the mine, and the fire built by the deceased was about 10 or 15 feet to the side of the road."

This was all the evidence for the plaintiff relating to the accident and its cause, when the plaintiff rested his case. The defendant thereupon moved the court to instruct the jury to return a verdict for the defendant. The court was in doubt as to whether the mere fact that the dynamite was placed there by some unknown person was one of the conditions of the employment. Thereupon the plaintiff was permitted to recall the witness Juan Delgado as to the practice of the employees in the handling of the powder belonging to the company. The witness testified that:

"I have observed the handling of powder by the other employees of the mine. They get the powder by means of a report. In my experience I never had powder left at the close of the day; they just give what powder is necessary. If it happened that a little more was given than necessary, it would be returned to the powder house. I never knew of an instance where powder not used was not returned to the powder house. I came here as a witness for the company. * * * I worked for the company a year and a month. During that time there was never any other explosion of powder buried around the property. This was the only instance I ever heard of where a man was injured on top of the ground by powder, and the only instance I ever knew of where powder was placed around on top of the ground."

The court thereupon denied the motion of the defendant for an instructed verdict in its favor. The defedant then called Charles W. McHenry, the mine foreman, who testified that:

"The deceased was employed as a miner at the time of his death. The deceased's duties were running a jack-hammer and blasting. On the day the deceased was killed, he was supposed to work in the glory hole, which is an outcropping of ore that had been mined from 30 to 75 feet below the level of the surrounding country. The deceased's duty was to drill inside of the edge of said glory hole and let the rock cave to the bottom. It was not deceased's duty to light any fires either to warm himself or for any other purpose. The defendant company has no particular rule about lighting fires, but dries and stoves are furnished, and the men are asked not to build fires to warm themselves. I do not know whether there were any such dries or houses on the morning deceased was killed, but it is the practice to provide a place for the men. I was new on the ground at the time the deceased was killed. The place of the explosion where the deceasel was killed was 20 or 30 feet from the rim of the glory hole, which is from 30 to 75 or 80 feet deep and approximately 200 feet long. The place where the deceased would be working was 200 feet, more or less, from the place where the explosion occurred. Eight or 10 minutes before 7 o'clock in the morning, there was an explosion, which should not have occurred at that particular time, and was out of the ordinary. * * * The deceased was not working at the time of the accident. The defendant company kept a powder house with a man in charge on each level, where its men were working. If a few men are working, the shift boss is also in charge of the powder magazine. The houses are supplied with order books, which state the number of sticks of powder, the number of feet of fuse, and the number of caps to be used. At the bottom of the order is the number of

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the miner who gets the order. The order has to be signed by the shift boss for a man to get powder. The man asks the shift boss for the exact amount of powder that is needed, and the order is based upon the man's report. All the powder not used shall be returned immediately to the powder house. There are instances, rather rare, where a man orders enough powder for filling all holes, and something has happened a hole has caved, and he can't get the powder in, and there is a stick that is to be returned. The rule is that the powder is to be returned to the powder house. There are times when men have powder left over. Unless the men return the powder left over to the powder house, I do not know what they might do. It is possible that some powder left over might not be returned to the powder house. It is done. I do not know whether deceased was killed by dynamite or powder, or whether the powder or dynamite was owned or controlled in any way by the defendant company. In my experience with the company, there was never an explosion such as occurred when the deceased was killed. I do not recall a case where an explosion occurred of powder or dynamite left upon the surface or placed around for safe-keeping. There had been other unexpected powder explosions in the mine, but none that I recall from powder that had been left around or placed anywhere for safe-keeping. On my recommendation, made immediately after I started to work on September 1, 1918, the defendant company provided dries for the men, places for the men to warm by, and the company asked the men not to build fires outside; but I could not say positively that such places were working at the time deceased was killed. Before the time of the accident, the weather was too warm for the men to build fires around. When I first landed on the job, I asked for a dry on account of the men being wet below, and not because of weather conditions on top. The men on the surface had no use, particularly, for a fire until along about the first of the year. The entrance where the deceased would go into the glory hole was about 30 feet away from the fire, and after he got into the glory hole he would walk under the rim of it some way to his place of work, a gradual incline from the rim of the glory hole down to the bottom. Neither powder nor dynamite would be placed at the spot where the deceased was killed, to be used in the work in the mine. I presume it had been placed there, since there was an explosion; but whether it was powder or dynamite I could not say. The powder used by the company was Hercules 40 per cent, commonly called giant powder."

Peter R. Brady, the shift boss, testified that—

"The deceased's duties were drilling and blasting ground. At the time of the accident, there were orders that any powder left over after the holes were filled was to be returned to the powder house. The powder was kept in a little powder house built of corrugated iron about 300 feet from where the accident occurred. I had charge of the powder when I was on shift. The shift boss is supposed to measure the holes after they are drilled and more or less determine the amount of powder that is to be used. When the men get through drilling the powder is issued to them, and there is a note made of the powder issued, and if there is any powder left through some accident to the hole, being filled or caved in, the men are supposed to return it to the powder house. I do not remember that there were any instructions on the day of the explosion with reference to building fires around the property; but we would not allow the men to build any fires around the works on account of the lumber that was piled up there. My instructions were not to allow the fires anywhere around the works. When the men did not return powder left over, there had to be some kind of an accounting, because I was responsible for the powder that they used. By the rule regarding the return of leftover powder to the powder house, I mean the men were supposed to avoid danger in leaving powder scattered

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around the works. As far as I can recall, the men on my shift always obeyed these instructions. I cannot say about the other shifts. There possibly may have been instances where powder was not returned to the powder house according to instructions; but I do not recall any such, and I have been on the works two years."

Thereupon the defendant renewed its motion for an instructed verdict in its favor, which the court denied.

[2] The statute (clause 2 of section 4, Act of May 24, 1912) protects the employee at manual and mechanical labor in all work where it is necessary for him to be in dangerous proximity to gunpowder, blasting powder, dynamite, or any other explosive. It was necessary for the deceased to be in dangerous proximity to at least one of these explosives, when he was at work in the mine, where such explosives were being used by the defendant in prosecuting its mining operations; but the deceased was not at work in the mine at the time of the explosion causing his death, and he was not in dangerous proximity to the explosive being used in the mine. He was on the surface, where no mining operations were being carried on by the defendant, and where it was not using explosives. The deceased was employed by the defendant to work in the mine, and not on the surface. The hazardous occupation in which the deceased was engaged was in the mine, and not on the surface. The building of a fire on the surface was no part of defendant's mining operations. It was the deceased's voluntary act. at a point 10 or 15 feet to the side of the road,and before he had gone to work, and against the general instructions of the mine foreman. The powder or dynamite was not placed under the wood by the defendant, or by its direction or consent. It was concealed under the wood, and the inference is that, if it was obtained from the defendant, it was taken without authority and was a tortious act.

The risk or hazard which the deceased incurred in being near the fire on the surface was not a risk or hazard inherent in the work in the mine, and in the doing of that work the risk or hazard was avoidable by the deceased. It was an outside venture, unattached to the hazarous employment in which he was engaged when at work in the mine. He need not have gone there; he need not have started the fire. The work for which deceased was employed did not necessitate his presence near the fire on the surface, or near the explosive that was there, or at that place at all. It did not necessitate his dangerous proximity to gunpowder or dynamite at or near the place of the accident.

In Arizona Eastern Railway Co. v. Matthews, 20 Ariz. 282, 180 Pac. 159, the plaintiff was employed as a bill clerk at a railroad freight house. He was injured by falling into a scale pit being constructed by the railroad company along the usual route traveled by himself and others having business in and about defendant's freight depot. The plaintiff was employed during the night-time. The accident occurred between 4 and 5 o'clock in the morning, when he was returning from luncheon at a nearby restaurant. The plaintiff was injued, and claimed damages from the railroad company under the Employers' Liability Act. Upon a trial before a jury a verdict was returned in his favor for $3,000. The defendant appealed to the Supreme Court. In the opinion of that court there is an elaborate discussion of the constitutional and legislative provisions of the Employers' Liability Law, particularly the clause in the Constitution protecting the safety of employees in all hazardous occupations, by placing the liability for the death or injury to such employee "caused by any accident due to a condition or conditions of such occupation." The court says:

"The expression 'caused by an accident due to a condition or conditions of such occupation' is original in our Constitution and laws. We have not been able to find it in any of the Compensation or Liability

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Laws, or in any decision of a court, or in any text-book, and it therefore necessarily follows that it has not been defined or applied. It is evident that the accident must arise out of and also be inherent in the occupation itself; the condition or conditions that produce the accident must inhere in the occupation. If the occupation is nonhazardous, if the condition or conditions inherent therein are innocuous, the occupation and the employee therein are ouside of the purview of the Constitution and likewise of the Liability Law."

Referring to the facts in that case, the court said:

"The danger of falling into the scale pit was not peculiar to appellee in his occupation of bill clerk. It was a danger to which persons not employees of appellant were exposed as much as those engaged in the service of appellant. Appellee shows by his complaint and by the testimony of himself and others that the scale pit into which he fell was 'along the route usually traveled by himself and others having business in and about defendant's freight depot.' This being so, it was not a risk or hazard peculiar to his work, but one 'common to the neighborhood.' In re McNicol, 215 Mass. 497, L. R. A. 1916A, 306, 102 N. E. 697."

Before reaching the question of liability of the defendant for the damage to the plaintiff caused by his fall into the scale pit, the court had determined that the plaintiff as a bill clerk was not engaged "at manual and mechanical labor," as provided in section 3 of the act, and for that reason was not entitled to recover. But in our opinion this fact does not materially lessen the value of this part of the opinion as an authority of that court upon this question.

"Where at the time of the injury the employee is engaged in a voluntary act, not accepted by, or known to, his employer, and outside the duties for which he is employed, the injury cannot be said to be in the course of the employment." Workmen's Compensation Act. Corpus Juris, p. 82.

[3] We conclude that the evidence on the part of the plaintiff was not sufficient to establish a cause of action against the defendant under the statute, and for that reason the court should have granted defendant's motion for an instructed verdict for the defendant. We are also of the opinion that the defendant was entitled to the same instruction at the close of the case.

The judgment is accordingly reversed, with direction to enter judgment in favor of the defendant.

On Rehearing.

In a petition for rehearing the copy of a recent decision of the Supreme Court of Arizona in Consolidated Arizona Smelting Co. v. John Edich, 192 Pac. ——, not yet [officially] reported, is submitten, with the statement that the doctrine enunciated by that court in Arizona Eastern Railroad Co. v. Matthews, 20 Ariz. 282, 180 Pac. 159, referred to in our opinion as an authority, has been overruled by the later case. Upon an examination of the opinion in that case, it appears that the holding in the Matthews Case that there can be no recovery "under the Employers' Liability Act for an injury resulting from an accident not due to risk or hazard inherent in the occupation" has been modified; the court holding in the later case that—

"An employee engaged in work in one of the hazardous occupations enumerated in the statute may recover for any accident occurring in the ordinary course of events during his work, the only other essentials being that the accident must be due to a condition or conditions of his employment, and not brought about by his sole negligence or fault."

In our former opinion, we refered to the opinion in the Matthews Case mainly with reference to that feature of the case, wherein it ap-

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peared that plaintiff, a bill clerk employed in defendant's freight office had fallen into a scale pit that was being constructed by the defendant along the route usually traveled by himself and others having business in and about defendant's freight depot. The court held that, before an employee may recover for injury under the act, it must have occurred while he was at work in his occupation, and it must have been occasioned by a risk or danger "inherent in the occupation." In the later decision the court holds that the clause "inherent in the occupation" is misleading in the relation in which it was used in the prior case. The court says:

"The condition or conditions that caused the accident resulting in injury or death may be inherent in the occupation, or they may arise from the manner in which the business is carried on. The conditions of the occupation in which the employee does his work involve not only the place he works, but the tools with which he works, the one as much as the other."

The plaintiff in this last case had been injured while breaking rock with a hammer. While at work the head of the hammer flew off the handle and struck his right foot, breaking the toe. The approximate cause of the accident was the negligence of the defendant in furnishing plaintiff with a defective hammer to do his work. It will be observed that the plaintiff was at work in the mine at the time of the accident, and was using a tool furnished by the defendant. The distinction between that case and the present case is that the deceased in the present case was not at work, either in or about the mine, at the time of the accident, and was not using any tool or implement furnished by the defendant. The modification of the opinion of the Supreme Court of Arizona in the Matthews Case does not, therefore, affect the question involved in this case.

Rehearing denied.

PROUSE v. INDUSTRIAL COMMISSION OF COLORADO ET AL (No. 9680.)

(Supreme Court of Colorado. Dec. 6, 1920. Rehearing Denied Jan. 10, 1921.)

194 Pacific Reporter, 625.

1. MASTER AND SERVANT — DETAILED FINDINGS OF FACT REQUIRED IN COMPENSATION CASE.

Under Sess. Laws 1915, p. 558, § 81, and Sess. Laws 1919,, p. 743, § 103, the Industrial Commission is required to make sufficiently detailed findings of fact, so that the courts can determine whether the compensation award is supported by the facts.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT — FINDINGS IN COMPENSATION CASE HELD TO STATE MERELY A CONCLUSION OF LAW.

In Workmen's Compensation proceedings, findings of the Industrial Commission that claimants have not established their claim by a preponderance of the evidence, that they have not established that the death of employee was due to accident arising out of and in the course of employment, and that they have failed to show any connection between the death and the accident. and that the claim was therefore denied, *held* insufficient as merely stating a conclusion of law.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

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3. MASTER AND SERVANT — SUPREME COURT WILL CONSIDER UNCONTROVERTED EVIDENCE IN COMPENSATION CASE AS FINDINGS OF FACT.

Though under Sess. Laws 1915, p. 558, § 81, the Supreme Court, reviewing a judgment of the district court affirming the Industrial Commission's decision, has no right to review the case on the evidence. it will not remand the case for detailed findings of fact where the facts are undisputed, but will consider the evidence as if it were the findings of fact.

(For other cases, see Master and Servant, Dec. Dig. § 418[5].)

4. MASTER AND SERVANT—ACCIDENT WITHIN COMPENSATION ACTS MUST BE TRACEABLE TO DEFINE TIME, PLACE, AND CAUSE.

An occurrence to constitute an "accident" within Workmen's Compensation Acts must be traceable to a definite time, place, and cause, and must have been unexpected.

(For other cases, see Master and Servant, Dec. Dig. § 371.

(For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental.)

5. MASTER AND SERVANT — DEATH FROM DISEASE CONTRACTED IN WEAKENED CONDITION, CAUSED BY BAD AIR, NOT DUE TO "ACCIDENT" WITHIN COMPENSATION ACT.

A mine employee's death from septicæmia or pyæmia after having, with knowledge that air in mine was bad, continued for more than two weeks to work therein in weakened condition, *held* not due to injury proximately caused by "accident" within Workmen's Compensation Act, § 8, in absence of evidence as to the time, place, or manner of contracting the disease, there being no accident traceable to a definite place and cause, or which was unexpected, and the bad air not having proximately caused employee's death, having merely weakened his condition, making him more susceptible to the disease.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

Scott, J., and Garrigues, C. J., dissenting.

En Banc.

Error to District Court, Boulder County; Neili F. Graham, Judge.

Proceedings under Workmen's Compensation Act by Pearl Prouse in behalf of herself and minor child, for compensation for death of her husband, George Prouse, opposed by the Rocky Mountain Fuel Company, employer, and the Employers' Mutual Insurance Company, insurer. Judgment of the Industrial Commission denying applicant's claim for compensation was affirmed by the District Court, and the applicant brings error. Affirmed.

Rinn & Archibald, of Boulder, for plaintiff in error.

Victor E. Keyes, Atty. Gen., John S. Fine, Asst. Atty. Gen. (Walter E. Schwed, of Denver, of counsel), for Industrial Commission.

Hughes & Dorsey, W. M. Bond, Jr., and Robert L. Stearns, all of Denver, for defendants in error Rocky Mountain Fuel Co. and Employers' Mut. Ins. Co.

DENISON, J. The Industrial Commission denied the claim of the plaintiff in error, Pearl Prouse, for compensation for the death of her husband, and its judgment was affirmed by the district court.

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It is claimed: First, that the commission did not make sufficient findings of fact as required by law; and, second, that the commission erroneously held that the death of the husband of plaintiff in error, George Prouse, was not caused by accident.

As to the first point, the finding of the commission was:

"That the burden of proof is upon the claimants herein. That the claimants have not established their claim by a preponderance of the evidence. That they have not established that the death of the said George Prouse, deceased, was caused by any accident arising out of and in the course of his employment while employed by the said the Rocky Mountain Fuel Company, and that they have failed to show any connection between his death and any alleged accident sustained by him while in the employ of the said the Rocky Mountain Fuel Company, and that therefore the claim of the said claimants should be denied."

[1] It is the duty of the commission to make sufficiently detailed findings of fact so that the courts can determine whether the order or award is supported by the facts. S. L. 1919, p. 743, § 103, and S. L. 1915. p. 558, § 81. This seems to be the rule in other jurisdications. Gardner v. Horsehead's Construction Co., 171 App. Div. 66, 156 N. Y. Supp. 899, Inland Steel Co. v. Lambert (Ind. App.) 118 N. E. 163; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398; Dodge v. Barstow Stove Co., 40 R. I. 191, 100 Atl. 245.

[2] The findings of fact in this case are insufficient. They state merely a conclusion of law.

[3] We have no right to review the case upon the evidence. S. L. 1915, p. 558, § 81. The evidence, however, in this case, is not conflicting the facts are undisputed. and we think the commission's decision was right; therefore the case is not remanded for more detailed finding, but we consider the evidence as if it were the findings of fact.

George Prouse on the 15th day of December, 1917, was working with others in the Mitchell mine. They broke into an old, inclosed entry, whence came foul air and dioxide gas. Foul air and gas continued in the mine for some weeks, and until Prouse was compelled to stop work.

About January 1, 1918, his physician was called to see him, and told him that he was working too hard in bad air, and advised him to lay off. About the 12th or 15th of January the physician was called again, and found his suffering from headache, pain all over, sore throat, and high temperature. He later went back to work, however. Two or three days later the doctor found him much worse; he was taken to a hospital, and about the 17th of February died. The bacteriologist's test showed septicæmia. Dr. Braden, the physician who attended him, testified that, in his opinion, the immediate cause of death was septicæmia, that a contributing cause was his failure to show the average resistance, and that was "the result of working in a poorly ventilated atmosphere. That is my opinion; that was what I had in mind when I advised him to lay off." Dr. Reed, the bacteriologist who had charge of the patient at the hospital, gave his opinion that the direct cause was pyæmia (of a similar nature to septicæmia), and his opinion also was that the bad ventilation at the mine had rendered the patient susceptible to the infection, but there was no evidence as to when, where, or how the patient contracted it.

The statute (Session Laws 1915, p. 522, § 8) provides for compensation only "where the injury is proximately caused by accident. * * *" The question is whether the death of George Prouse was proximately caused by an accident. There is no evidence that such is the case. The evidence is undisputed that the man died of infection by the germ of septicæmia or pyæmia. There is no evidence as to where he got that germ. There is no evidence that the sudden inhalation of gas and foul air from the old workings caused the disease, but the evidence is that the continued inhalation of foul air in the mine rendered the patient more susceptible or less resistant to the infection, and so contributed to the death.

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[4, 5] There are several reasons why this is not within the terms of the statute above quoted: First. An accident, under the various Workmen's Compensation Acts, must be traceable to a definite time, place, and cause. Matthiessen, etc., Co. v. Industrial Board, 284 Ill. 378, 120 N. E. 249. The occurrence shown in the evidence is not traceable to a definite time. Second. The occurrence constituting an accident must be unexpected. 1 Corp. Jur. 39; Matthiessen v. Industrial Board, supra. In the present case it was not unexpected. Third. The occurence must be the proximate cause of the death or of the disease which produced the death. This occurrence was not.

As to the first point: In the present case the time is indefinite. A continued working in bad air for somewhere between two weeks and two months depleted the system, and rendered it susceptible to a disease or unable to resist a disease, the time, place, or manner of contracting which is not shown by the evidence, nor is anything shown from which it can be determined.

The case most nearly like the present is the Scotch Case (Kelly v. Coal Company, 48 Scottish Law Rep. 768), but there the "accident" was "one lethal dose" of carbon monoxide, generated by an explosion of gunpowder. The court lays stress upon the point that there was an unusual occurrence on a definite day, from which the symptoms were immediately felt, and they cite Steele v. Cammell et al., [1905] 2 K. B., holding that—

"Injury from long-continued breathing of lead fumes was not accidental because it could not be traced to any particular day, but was the result of an accumulation of poisoning extending over a period of time."

Broderick v. London County Council, 2 K. B. 807, is also cited upon the same point. The Scotch case, then, is an authority against and not for the claimant in this case. See, also, Alloa Coal Co. v. Drylie, 6 B. W. C. C. 398, Hurle v. Plymouth Cordage Co., 217 Mass. 223, 104 N. E. 336, L. R. A. 1916A, 279, Ann. Cas. 1915C, 919.

Upon the second point: An accident must be unexpected. Bad air, continued from day to day is expected. The doctor expected it to continue and advised a lay-off. Prouse knew it was bad, knew it was continuing, or he could not have told the doctor about it. Prouse continued to labor in the gas-contaminated air for some weeks, growing constantly worse, so his doctor testified, because of the bad air. This is no accident. Every definition or attempted definition of accident includes the element of unexpectedness. 1 Corp. Jur. 390; Matthiessen v. Indus. Bd., 284 Ill. 378, 120 N. E. 249, 251; Kelly v. Coal Co., 48 Scottish Law Rep. 768; Broderick v. London County Council, etc., 2 K. B. 807; Steele v. Cammell, etc., [1905] 2 K. B. 232. The deleterious result was also expected; the doctor warned against it; so the deleterious result was not an accident.

As to the third point: Prouse did not die of the poisonous gas; he died of septicæmia or pyæmia, a disease caused by a definite infection by a germ, which has been isolated by the bacteriologists and classified. The only connection which the gas and bad air had with this disease, according to the undisputed testimony of the physicians, was that it depleted the patient's system and rendered him more susceptible or less resistant to it. They do not say that he would not have contracted the disease if he had not worked in the gas, or would not have died of it,, nor do they express such opinions.

Bad air makes a man more susceptible to tuberculosis. Every clerk works part of the time in bad air. If he contracts tuberculosis no physician can deny that the bad air probably made him susceptible, and so was a contributing cause. If so, is he entitled to compensation? So of any other germ disease, e. g., typhoid fever, infant paralysis, meningitis. etc.

The decision in the case of the United Paperboard Co., 65 Ind. App. 356, 117 N. E. 276, seems to us extreme in itself, but the dicta of the court

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therein would seem to make the employer liable for every case of sickness of which the employment was the procuring cause, and we cannot follow it.

The Massachusetts cases have no bearing here, because the Massachusetts act does not use the word "accident," nor any derivative or equivalent. The word "accidentally" and the words "proximately caused by accident" in our act (Session Laws, p. 522, § 8) must be given some force.

The judgment of the district court is affirmed.

Garrigues, C. J., dissents.

Teller, J., not participating.

SCOTT, J. I must earnestly dissent from the opinion of the majority. To my mind there is no reasonable distinction to be made between this case and that of Carroll, considered at the same time, wherein a precisely contrary view of the law is taken. Hairsplitting distinctions used in the opinion do not cover the wrong and injustice to follow, not in this case alone, but in others of similiar character.

The difficulty seems to lie in the seeming inability of lawyers and judges to get away from the hoary defenses of contibutory negligence and assumed risk in negligence cases,, so clearly wiped out by the express language of the statute we are considering.

A "consideration of the majority opinion will disclose that the conclusion is based solely upon the doctrine of assumed risk. Prouse went back to work after the gas was discovered, which act was his own fault, and by which he assumed the risk, and should not recover. Such is the reasoning. and the opinion not only ignores the command of the statute in this respect, but fails to comprehend the principle and puprpose of the legislative acts of the character involved.

The statute is not penal in its nature. nor compensatory as against the employer, and therefore every element of negligence has been eliminated by it from consideration. For this there has been substituted the policy of humanity and state polity—immediate provisions for the injured and his dependents, and economy to the state and the public in avoiding to the extent possible the number of public charges.

The insurance is primarily by the state itself, and profit from premiums paid in such insurance by the state was never contemplated by the European founders of the plan, nor by the American states which have adopted it. The compensation allowed does not rest upon either duty or contract. Such statutes are sustained only upon the theory of the exercise of the police power. With this view of the purposes and character of the act, the authorities hereinafter cited fully sustain the view that compensation should have been awarded in this case.

George Prouse was a coal miner in the employ of the defendant the Rocky Mountain Coal Company, and at the Mitchell mine. While so employed, and on or about the 15th day of December, 1917, there was broken into an old and inclosed entry, from which there exuded foul air and gas, termed dioxide gas, which condition continued until he was compelled to and did cease to labor, dying shortly after from the disease called pyæm'a. being a poison; a germ disease. His death occurred on the 17th of February. He had theretofore been a strong healthy man, weighing about 180 pounds, working constantly, and had not theretofore suffered from any illness. His family physician, Dr. Braden, who had known him for some years, was called to see him the latter part of December or the first of January. He complained of a cough and weakness, and that he had difficulty in doing his work, and had lost much flesh. The doctor concluded that he was working too hard, and probably in bad air, and advised him to lay off. The physician was called to his home at a time from the 12th to the 15th day of January, and found him suffering from a headache, ach-

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ing all over, with a sore throat, and high temperature. The deceased went back to work later. But about the third day after the call above stated, the physician found him in the condition as follows:

"I saw him about the third day, when he began to have fever and pains in the right upper chest and shoulder. He had not been able to bathe himself, and still had the coal dust on him from the mines. He said he had a bad night, slept very little, vomited, had headache and ached all over; his temperature was about 104.

"Q. What did he do after that? A. His condition was similiar the next day. He vomited and took very little nourishment, breathed rapidly, abdomen extended, and had pains in the shoulder. I am not positive as to the time of those things. One ankle became swollen, his knee became swollen, and there was evidence of a fluid of some kind in his knee. Later one wrist began to swell, and after a few days the other wrist became involved. This covered a period of probably two weeks. Then one eye became inflamed and swollen until it could be brushed from the socket. he became blind in one eye. During the time these changes were taking place he developed symptoms of endocarditis, or inflammation of the linings of the heart. He had a septic type until we sent him to the hospital along about the 14th or 15th of February."

Dr. Braden's testimony as to the cause of death was as follows:

"I think the immediate cause of death was septicæmia; that was my diagnosis before sending him here, and my report from Dr. Reed was that the bacteriological test showed septicæmia from the blood and from the pus taken from the infection in the left shoulder. The contributing cause was his failure to show the average resistance, and in my opinion his failure to show the average resistance was the result of working in a poorly ventilated atmosphere; that is my opinion. That was what I had in mind when I advised him to take a lay-off."

The only other physician to testify was Dr. Reed, who had charge of the patient at the University Hospital. He treated him from the time of his entrance to the hospital until his death. He gave it as his opinion that the direct cause of the death was pyæmia. It seems that pyæmia, like septicæmia, is a germ poison, and of similar nature. Dr. Reed was asked the questions and gave answers as follows:

"Q. Assuming the above statement of facts as disclosed in question No. 1 to be true, could you not state with reasonable certainty, and from the examination you made of the deceased, that the pyæmia followed as a natural consequence from the injury to the system and to the throat and lungs of the said deceased, which was originally caused by the inhalation of poisonous gasses as aforesaid?

"A. My answer to that question is simply this, as Dr. Braden has stated two or three times, and I want to confirm because it is my own belief, that his working in bad air and lowering his general state of health put him in such a position that his resistance is bad; now an infection comes along at a time when his vitality is low, and he is susceptible to it, and succumbs to it and dies of the pyæmia.

"Q. This morning, Doctor, did you not answer this question, which I have just written and read to you in this way, 'There would seem to be a reasonable connection between his pyæmia and infection and the gas inhalation'? A. Yes, I will still say the same thing.

"Q. Is it not a fact that germs or microbes may affect the human system by being breathed into the throat and lungs? A. Yes.

"Q. Is it not a fact that a weakened condition of the body, caused by a continuous inhalation of mine gas, will render such body reasonably susceptible of becoming poisoned by the microbe which is the basis of pyæmia? A. Yes.

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Dr. Braden also testified that there was a reasonable connection between the inhalation of the gas which the patient inhaled and the disease from which he died.

There was no contradictory testimony given or offered. There is much other testimony by these physicians that makes the conclusion irresistible that the disease from which Prouse died was induced and caused from inhaling the gas from the mines in which he was working.

We now come to the question as to whether or not under the facts and circumstances of this case. appearing from the record. the petitioners are entitled to recover under the Workmen's Compensation Law. Was the death of Prouse the result of an accident within the meaning of the law?

It is generally held that the term "accident," within the meaning of the statute, cannot be confined to an injury by external, violent and accidental means, but includes injuries to workmen which are unexpected and unintentional. The authorities upon this question are quite fully reviewed in the case of Fidelity & Casualty Co. v. Commission, 177 Cal 614, 171 Pac. 429, L. R. A. 1918F, 856. That case involved the claim to compensation under the Compensation Act, of a sign writer who had for about 1½ years been in the habit of usuing dyes dissolved in wood alcohol and forced through a fine needle by air pressure. This was done in order to better shade of colors. Ordinarily this method was employed but a small portion of the time, but during the holidays, and shortly prior to the accident, it was frequently used. Without notice of anything unusual, he suddenly discovered his eyesight failing, and later was so badly affected that it prevented his following his employment. The court held that it was an accident which arose out of his employment. After a review of the authorities, the court said:

"Applying this current of authority to the facts of the case at bar, it must be evident that the injury suffered by the applicant as set forth in the findings of fact of the Industrial Accident Commission and for which he was awarded compensation was an 'accident' within the meaning of the act. Many cases might be cited from other states having similar statutes and from England, in which like unforeseen, unexpected, and unintended injuries to employees have been classed as 'accidents' and held sufficient to justify awards, such as injuries sustained by persons while lifting heavy objects, or through exposures to drafts or chilly air, or icy water in mines, or through the rupture of blood vessels brought on by an unusual heat or overexertion, or through the inhalation of poisonous gases, and the like; but we think the reasoning of the decisions of this court above cited sufficient to define the scope and meaning of the act so as to justify its application to the instant case."

A case very similiar to the case at bar was that of Matthiessen Co. v. Industrial Board, by the Supreme Court of Illinois, 284 Ill. 378, 120 N. E. 249. The opinion is instructive and exhaustive, and seems to be conclusive of this point.

There one Adrian, for many years engaged as a fireman in a smelter, where zinc ores were smelted, was required each day for a time to draw the scum and dross, or oxide from the surface of the moulten zinc. He had worked up to and including the day he was stricken without indication of illness. On the evening of that day, he was seized with cramps through his arms, legs, chest, stomach, and bowels His teeth became black and loose, his toe and finger nails became black and his eyes glassy, and his mind wandering. He died within a short time. Two physicians testified that in their opinion death was caused by arsenical poisoning; that his system had become surcharged with this, and which, finally becoming acute, caused his death. The award was sustained by the court. The opinion proceeds to consider the policy and principle of the Workmen's Compensation Act along the lines of Industrial Commission v. Ætna Life Insurance Co., 64 Colo. 480, 174 Pac. 589, 3 A. L. R. 1336, and declares:

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"While it is not intended, and perhaps not possible, to give a definition of the words used in the act as applied to all possible circumstances, it may safely be said that an injury is accidental, within the meaning of the act, which occurs in the course of the employment unexpectedly and without the affirmative act or design of the employee. In this case there was evidence from which the Industrial Board was warranted in finding that on October 6, 1914, in the course of the employment of Adrian he contracted arsenical poisoning which resulted in his death. It is true that Adrian had been exposed to practically the same conditions for many years without injury, but it would not be unreasonable to conclude that his immunity was the cause of the state of his health and his ability to resist the deleterious effect of the gases and fumes over which he worked, but this time his physical condition was such as to make him susceptible to arsenical poisoning in such a degree as to bring on his fatal illness and death. There was sufficient competent evidence before the board to sustain the finding, and it cannot be disturbed."

The doctrine announced in these cases is approved in an exhaustive review of the authorities, in Indian Creek Coal Mining Co. v. Calvert (Ind. App.) 119 N. E. 519.

In the Scotch case of Kelly v. Auchenlea Coal Company Ltd., Scottish Law Reporter, vol. 48, p. 758, will be found a very convincing review of the subject we are discussing. The facts of the case were:

"A miner employed in a mine in the course of his work fired a shot of gunpowder, and after three minutes after the explosion returned to the working place when it was still full of smoke. He subsequently died of pneumonia, caused by the inhalation of carbon monoxide gas generated by the explosion. It was found proved that this gas was generated by the combustion of gunpowder in varying proportions depending on the ventilation, that similar blasting operations were of daily occurrence. and that on previous occasions, the deceased had suffered by headache and nausea caused by the gas. In a claim at the instance of the deceased's dependents, held, that death resulted from an accident within the meaning of the act."

It is contended that the evidence does not show such causal connections between the conditions under which the work was required to be performed and the resulting injury and death.

The case of the United Paper Board Co. v. Lewis, 65 Ind. App. 356, 117 N. E. 276, is enlightening upon this subject. In that case the workman, by reason of a broken pipe, was compelled to flush out the hot steam pulp into a sewer. This caused him to become overheated, and while overheated he came into contact with the open air, which caused him to chill for several days. and, as a final result of such overheating. the disease of acute nephritis, or inflammation of the kidneys, developed, causing the disability claimed. The court said:

"It may be well to observe that the courts are practically unanimous in holding that the words 'by accident arising out of and in the course of the employment,' as used in Workmen's Compensation Acts, should be given a broad and liberal construction in order that the humane purposes of their enactment may be realized. Holland-St. Louis Sugar Co. v. Shraluka. 116 N. E. 330, and the authorities there cited. Their meaning, when so used, had been frequently considered in various jurisdictions having such acts, and it is generally accepted that an injury is received in the course of the employment when it comes while the workman is performing his duty for which he is employed, and that it arises out of the employment, when there is apparent to the rational mind, upon a consideration of all the circumstances, a causal connection between the conditions under which the work was required to be performed and the resulting injury. * * *

"We have held that the evidence was sufficient to warrant the board in finding that appellee was suffering from an injury by accident, and from

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a consideration of the rule above stated and the authorities cited, it is quite apparent that there was evidence to warrant the further finding that such injury arose out of and in the course of his employment. There was evidence which tended to show that the accident which caused the injury was the overheating described, and that it occurred while appellee was performing the duty required of him in the basement room, in flushing the hot, steaming pulp into the sewer. Under such circumstances, it is clear that the injury was received in the course of his employment. There was also evidence which tended to show that the enforced exposure in the basement room under the unusual conditions first caused appellee to become overheated, that while thus overheated he came into contact with the open air, which caused him to chill for several days, and that as a final result of such overheating the disease of acute nephritis developed, causing the disability for which he claims compensation . Such evidence furnished a sufficient basis for finding a causal connection between the conditions under which the work was required to be performed and the resulting injury. In such event the board was warranted in finding that appellee's injury arose out of his employment."

Clearly there was established a plainer case of causal connection between the working conditions and the final result in the case at bar than in that case.

In the case of In re Madden, 222 Mass. 487, 111 N. E. 379, L. R. A. 1916D, 1000, it was held that when the already impaired heart of a servant was injured by her work of pulling a carpet, which did not require such a muscular exertion as would have effected a healthy person, the injury nevertheless resulted from her work as a contributing, proximate cause. The court said:

"It has been argued with force on behalf of the insurer that since the harm to the employee was not wholly the effect of the work but came in large part from the previously weakened condition of the employee's heart, hence, either there can be no award of compensation, or it should be restricted to that part of the injury which resulted directly from the work, and the part of the injury which flowed from the previous condition should be exlcuded. Even though the premises may be sound, the conclusion does not follow. The act makes no provision for any such analysis or apportionment. It protects the 'employee.' That word is defined in part 5, § 2, as including 'every person in the service of another under any contract of hire' with exceptions not here pertinent. There is nothing said about the protection being confined to the healthy employee. The previous condition of health is of no consequence in determining the matter of relief to be afforded. It has no more to do with it than his lack of ordinary care or the employer's freedom from simple negligence. It is a most material circumstance to be considered and weighed in ascertaining whether the injury resulted from the work or from disease. It is the injury arising out of the employment and not out of disease of the employee for which compensation is to be made. Yet it is the hazard of the employment acting upon the particular employee in his condition of health and not what the hazard would be if acting upon a healthy employee or upon the average employee. The act makes no distinction between wise or foolish, skilled or inexperienced, healthy or diseased employees. All who are rightly describable as employees come within the act."

In the case of Retmier v. Cruse (Ind. App.) 119 N. E. 32, where an employee received a severe injury to his back on September 8, 1915, and died from tuberculois on July 8, 1917, and where medical testimony disclosed that his injury resulted in nephritis, which lowered his power to resist an attack of tuberculosis it was held that the finding of the Industrial Commission that the injury accelerated the disease and caused his death earlier than it would have otherwise occurred, was proper, and compensation was awarded.

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In City of Milwaukee v. Industrial Commission, 160 Wis. 238, 151 N. W. 247, a school principal, while supervising a basketball game, within the line of his duty, was struck on the head by a ball; he was suffering at the time from an advanced stage of arteriosclerosis. The court found that had he not been so suffering, the blow would in all probably have caused no injury.. It was held:

"Proximate cause as applied to negligence law has, by definition, included within it the element of reasonable anticipation. But the right to recover under the Workmen's Compensation Act is no dependen upon a question of negligence, and an injury is 'proximately caused by accident' within the meaning of section 2394—4, Stats. 1911, if it can be traced to physical causation not too remote in time or place to the accident, irrespective of any element of reasonable anticipation."

In Hurle's Case, 217 Mass. 223, 104 N. E. 336, L. R. A. 1916A, 279, Ann. Cas. 1915C, 919, a workman. employed in tending furnaces that produced gas from the burning of coal, was obliged to remove the covers from the holes in the tops of the furnaces about 70 times a day. At such times of removal of the covers poisonous coal tar gases arose from the furnaces, and the workman contracted neuritis as a result of such inhalation, which caused blindness. In his claim for compensation, it apeared that there was no explosion or distinguishing difference of time or place, but simply the continuous operation of the furnaces that brought about the result. It was held that he was entitled to recover under the Workmen's Compensation Act.

In the case of Vennen v. New Dells Lumber Co., 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A 273, Ann, Cas. 1918B, 293, where a laborer contracted typhoid fever by drinking infected water from a well on the premises of the employer, and died from such fever. it was held that his dependents may recover. The court said:

"The fact that the deceased became afflicted with typhoid fever while in defendant's service would not in the sense of statute constitute a charge that he sustained an accidental injury, but the allegations go further, and state that this typhoid affliction is attributable to the undesigned and unexpected occurrence of the presence of bacteria in the drinking water furnished him by the defendant, as an incident to his employment. These facts and circumstances clearly charge that Vennen's sickness was the result of an unintended and unexpected mishap incident to his employment. These allegations fulfill the requirements of the statute that the drinking of the polluted water by the deceased was an accidental occurrence, while he was 'performing services growing out of and incidental to his employment.' It is alleged that the consequence of this alleged incident resulted in afflicting Vennen with typhhoid disease, which caused his death. Diseases caused by accident to employee while 'performing services growing out of and incidental to his employment' are injuries within the contemplation of the Workmen's Compensation Act."

In the case of London Guarantee Co. v. McPhee, 222 Mass. 1, 109 N. E. 633, L. R. A. 1916D, 1000, the employee, while attempting to extinguish a fire on the employer's property, was drenched with water and saturated with smoke which began an invasion of his system, ultimately causing lobar pneumonia and death, in an unbroken chain of causation with the accident. Compensation was allowed.

In volume 89. p. 380, of the Central Law Journal, under date of November 21, 1919, will be found the case of Eldridge v. Endicott & Co. et al. (Sup.) 177 N. Y. Supp. 863, where a servant's neck was cut while being shaved in a barber shop, and where the next day symptoms of anthrax arose, from which disease the servant afterward died. This was held to be due to an accidental injury arising in the course of employment. Many decided cases are cited in the opinion and in the extended note thereto by the publication, which sustain the conclusion herein reached.

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It is suggested that there must be some definite and occurrence to which the resulting injury must be traced. There is no clearer case reported, where the facts fix the time and the occurrence of the accident with causal resulting injury or death than the case at bar.

In the working of the mine on a date fixed, an inclosure with foul air and gas was broken into. The condition of foul air and gas continued until the laborer was compelled to quit work. Within two weeks from the occurrence, according to the testimony, he had lost flesh, and become so debilitated as to cause him to consult a physician. He again attempted to continue work, but was unable to do so, and took to his bed, where his condition was found to grow worse continually until his death, all occurring within a period of two months.

Two physicians testified that in their opinion there was a reasonable causal connection between the gas and foul air and the disease from which he died. This makes a clear case for compensation within the rule of the many cases I have cited.

In this case I do not hold that where a disease exists, and there appears no reasonably specific cause, in the course of an employment, which hastens incapacity or produces a causal relation to death, or where no reasonably specific cause in the course of employment produces a condition in which itself is not found to have a causal relation to the injury or to the direct cause of death, recovery may be had under the Workmen's Compensation Act. The state of facts here does not present such a case, and therefore it is not necessary nor proper to consider or determine the question.

It is as certain as human testimony can make it, positive and medical expert, that Prouse died of a disease directly or indirectly due to the inhalation of gas and foul air while working in the mine of defendant company. It is held by the great wealth of judicial authority that this constitutes an accident within the meaning of workmen's compensation laws, and entitles the workman or his dependents to an award of compensation. Simple justice and sound reason suport this view.

MAZZI v. SMEDLEY CO.

(Supreme Court of Errors of Connecticut. Jan. 6, 1921.)

112 Atlantic Reporter, 168.

1. MASTER AND SERVANT—AVERAGE PREVAILING WAGE FOR LESS THAN "NET PERIOD OF TWO CALENDAR WEEKS" HELD BASIS FOR COMPENSATION.

Where a servant has worked eight days, having worked four days in the first week, commencing on Tuesday, one day in each two weeks separated by several weeks, and two days in the week of injury, the average weekly wages prevailing in the same employment, and not the actual weekly wage, furnishes the basis for compensation under Gen. St. 1918, § 5353, as amended by Pub. Acts 1919, c. 142, § 8, making 26 calendar weeks the basic period for determining the actual average weekly wage computed by excluding the first week if broken and the week of injury, and providing that, when the employment is computed to be less than a "net period of two calendar weeks," then the weekly wage shall be considered to be equivalent to the average weekly wage prevailing in similar employment, the phrase "net period of two calendar weeks" meaning two full weeks of six days each.

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

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2. MASTER AND SERVANT—AVERAGE PREVAILING WAGE BASIS FOR COMPENSATION TO DAY WORKER.

Where the servant worked sporadically, a new contract being made for each day's work, the period of employment, under the specific contract in force on the day of the injury, governs, so that under Gen. St. 1918, § 5353, as amended by Pub. Acts 1919, c. 142, § 8, compensation for the injury must be based on the average wage prevailing in the occupation.

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

Case reserved from Superior Court, New Haven County; James H. Webb, Judge.

Application by James Mazzi for compensation under the Workmen's Compensation Act against the Smedley Company, employer. The commissioner, having heard the case, entered a pro forma award, and the case was reserved by the superior court for the advise of the Supreme Court of Errors. Superior court advised to sustain appeal from commissioner and remand case with directions.

The claimant is a barber and conducts a barber shop. In order to earn extra money, he, on various occasions, worked for the employer respondent, going to the office of the employer respondent in the morning of each day, and asking for work and being given work for the particular day, and at the end of the working day received his pay, $3.50, for the day. Each day's employment constituted an independent contract. In this employment the cleaimant worked for the employer respondent, in 1920, on Tuesday, March 23d, Wednesday, March 24th, Thursday, March 25th, and Friday, March 26th, Thursday, April 8th, Wednesday, May 5th, Tuesday, May 18th, and Wednesday, May 19th. He received $3.50 for each day's work. In this employment the week began on Monday morning. The average weekly wage prevailing in the community in the employment in which the claimant was engaged at the time of his injury was $21 per week. On May 18th there was some talk between the claimant and the respondent as to an arangement for regular work on four days of each week but no contract was entered into, and the claimant continued to work without a contract other than the agreement made at the beginning of each day that the claimant should work for that day.

The commissioner held that this case involved doubtful questions of law, which he stated as follows:

First. If, after excluding the broken week at the beginning of the period of employment and the week of the injury, there remain only two days of work under an employment calling of work for four days a week, and said two days are separated by a period of several weeks, is the case governed by the statutory rule prescribing the method of computing the actual average wage or that prescribing the method of computing the average wage prevailing in the same employment, and how, in detail, is the wage to be figured under whichever rule may be applicable?

Second. Whether, when there are several contracts of employment between the employer and the employee within the time fixed by statute for the determination of the average weekly wage, the period of employment the wages of which are to be counted and the length of which is to be considered in determining whether actual or customary wages are to be taken, is the period of employment under the specific contract in force at the moment of the injury, or the whole time of employment under all of the contracts?

Anthony P. Adinolfi, of New Haven, for plaintiff.

De Lancey S. Pelgrift, of Hartford, for defendant.

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GAGER, J. (after stating the facts as above). This case comes up as a reservation upon a pro forma award pursuant to the provisions of section 5383 of the General Statutes as amended by section 16 of chapter 142 of the Public Acts of 1919. The decision of the questions raised depends upon the construction to be given to section 5353 of the General Statutes as amended by section 8 of chapter 142 of the Public Acts of 1919. As a verbal scrutiny of this fact is requisite, we quote in full so much of the act as applies, as follows;

"For the purposes of said chapter, the average weekly wage shall be ascertained by dividing the total wages received by the injured workman from the employer in whose service he is injured during the twenty-six calendar weeks immediately preceding that during which he was injured by the number of said calendar weeks during which. or any portion of which, said workman was actually employed by said employer, provided, in making that computation, absence for seven consecutive calendar days, although not in the same calendar week, shall be considered as absence for a calendar week. When the employment commenced other than at the beginning of a calendar week such calendar week and the wage earned during such week shall be excluded in making the above computation. When the employment, previous to injury as provided above, is computed to be less than a net period of two calendar weeks, then his weekly wage shall be considered to be equivalent to the average weekly wage prevailing in the same or similar employment in the same locality at the time of injury."

[1] The first question is whether this is a case for the application of the rule with reference to the actual average weekly wage of the claimant or of the average weekly wage prevailing in the employment, and is framed on the assumption that the statutory method of compution requires taking into account all the days of work performed by the claimant for the employer within the period of 26 weeks. This was the method actually adopted by the commissioner. We note here that in the statement of the question there is included this as one of the conditions: "Under an employment calling for work on four days a week." No such situation is stated in the finding, and we ignore it as manifestly a clerical error. Four days was talked about as a possible term of employment, but it is expressly found that nothing came of it.

To determine this question under the assumption stated above, it is first necessary to undertake the computation of the actual average weekly wage. Our statute assumes 26 calendar weeks prior to the week of the accident as the basic period for determining the actual average wages. The claimant worked for the employer respondent for eight days in all. each day's employment constituting an independent contract. The first calendar week of employment began on Monday. March 22d. The first day's work was Tuesday, March 23d, and the claimant worked four days in that week. These four days are to be excluded from the computation under the language of the statute, which reads:

"When the employment commenced other than at the beginning of a calendar week such calendar week and the wages earned during such week shall be excluded in making the above computation."

The last two days of work were May 18th and 19th. These were in the same week in which the accident happened, and are excluded from the computation because the 26 weeks are those "immediately preceding that during which he was injured." We have left two days' work, April 8th and May 5th, a day in each of two separate calendar weeks, as the only days that can be taken account of in ascertaining the claimant's average weekly wage. The claimant's daily wage was $3.50, or $7 earned in two separate calendar weeks. Dividing this total wage by two, the number of said calendar weeks during which, or any portion of which, the said claimant was actually employed by the employer," we get the

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actual average week wage as $3.50. This is the same as the computation made by the commissioner, and was strictly within the language of the statute, assuming as stated above, that all days of work are to be considered.

After the statute prescribes the method of ascertaining the actual average weekly wage, which happens in this case to be the same as the daily wage, the following provision occurs:

"When the employment, previous to injury as provided above, is computed to be less than a net period of two calendar weeks, then his weekly wage shall be considered to be equivalent to the average weekly wage prevailing in the same or similar employment in the same locality at the time of injury."

The finding shows the average weekly wage in the employment to have been $21. The question is therefore reduced to this: What is meant by the phrase "employment * * * less than a net period of two calendar weeks." Apparantly the commissioner solved the question by treating the period of 26 weeks as the gross time which might be taken account of in determining the weekly wage. and treating the weeks which should be actually used in determining the divisor—that is, all weeks in the 26 left after making the exclusions—as a net period. This would make all calendar weeks during which any work was done, that could be counted, net weeks. This results, as applied to this case, in holding that one day's work in each of two calendar weeks constitutes employment for a net period of two calendar weeks, from which it follows that the right to invoke a compensation based upon the average weekly wage prevailing in the same or similar employments is limited to claimants whose only work has been done in but one calendar week, which could have been counted in determining the actual weekly wage, or in the same calendar week in which the accident happened.

We do not think this is a reasonable construction of the statute. and that it involves a manifest injustice which it is not to be presumed that the statute intended. Work for one day or more in a single calendar week secures the result of a compensation based upon the average weekly wage in the employment, while work by a claimant one day a week for two weeks, as in this case, limits him to a weekly wage identical with, and no more than, a single day's wage. Of course, the method of fixing the dividing line when compensation ceases to be based on the actually weekly average of wages, and is to be based on the prevailing weekly average, if such a distinction is to be made,, must be more or less arbitrary. But the statute appears to be designed to require some substantial quantity of labor to be performed within the limited period to establish a basis for determining a claimant's average weekly wage, and therefore requires that the claimant shall have been employed for at least a "net period of two calendar weeks," by which we think is meant exactly what will first occur to the reader, two full weeks of work out of a total of twenty-six possible weeks. The use of calendar here refers to the quantity of time and not the almanac period. "Net" means "not subject to any discount or deduction." Standard Dictionary. And a net period of time, as of a week, is a whole week. The term "calendar week," as used in determining the divisor for obtaining the average weekly wage, is described by the statute as meaning any calendar week "during which, or any portion of which, said workman has been actually employed." Again, it is provided that "absence for seven consecutive calendar days, although not in the same calendar week." Just what a "calendar day," is, as differing from any other sort of a day, we are unable to comprehend, but it is clear that the term "calendar" is loosely used in the statute, sometimes in the technical sense, and sometimes as meaning a period of seven days. though not all in one strictly calendar week. The phrase under examination clearly relates to the duration of employment. Labor for a portion of a

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calendar week cannot be labor for a net calendar week. "Calendar," as used in the phrase in question, must be intended to indicate a full week; and "net" can have no meaning as here used, unless it means that the sum total of days' labor as ascertained in computing the average weekly wage shall be the equivalent of two full calendar weeks; that is, the computation of the labor must bring about the result of two full weeks, in the same way that absences to be counted must be consecutive and in number equal to the number of days in the calendar week. Employment for a "net period" means for the whole of the period taken as the unit—that is, that period without deduction or deminution—and here means for a number of days equivalent to two calendar weeks. Even this period of time, as we have noted, is arbitrary; but the construction we give is, we think, required by the language and purpose of the act, and does not lead to such serious injustice as that adopted by the commissioner. Further, as applied to labor, the number of days in a calendar week must necessarily mean six, the number of days during which labor is lawful under our Sunday laws, for there is nothing in the finding to show that this case comes within any of the exceptions. Neither is there anything in the case which involves considering any custom of the business making less than six days the standard week's work.

We have hitherto discussed this section of the statute upon the same assumption that was made by the commissioner, that he was to take account of all the day's work done by the claimant for the employer respondent. As will appear from the answer to the second question reserved, we think the commissioner was in error in making this assumption.

[2] The reservation next raises the question whether, where the claimant has worked under different contracts for the same employer during the period of 26 weeks, the period of employment the wages of which are to be counted, and the length of which is to be considered in determining whether actual or customary wages are to be taken, is the period of employment under the specific contract in force at the moment of the injury, or the whole time of employment under all of the contracts; this latter having, in fact, been the method used by the commissioner. This question is also to be decided from the provisions of amended section 5353 as set out above.

The ascertainment of actual average weekly wage of the claimant is based upon the hypothesis of wages from the "employer in whose service he is injured during the twenty-six calendar weeks," immediately preceding that during which he was injured. The service here is to the one making the contract for service, and necessarily implies continuity of contract. The wage to be taken must arise under the same contract in force at the time of the injury. The "actually employed" just below clearly means actually at work under the contract in force when the accident happens. The provision as to "absence for seven consecutive calendar days" also necessarily implies the idea of continuity of contract; for it clearly carries the idea of not being where he might be expected to be found, which could only be true if there were a contract in existence calling for, or at least permitting, the workman's presence for the doing of work. Again, the phrase, "when the employment commenced on some other day than Monday," and implies a continuance of work; that is, of the employment down to the day of the injury. So when the statute speaks of the mployment previous to the injury as computed at less than two weeks, this must mean quantity of time of work under the contract in force at the day of the injury. The finding is very explicit that the total of eight days' work was performed under eight different contracts of service for a day at a time. The legal relationship is no different, so far as the application of this statute is concerned, from what it would have been had these contracts been with eight different men. The only contract which can be recognized in applying this statute is that entered into for the 19th day of May, the day of

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the injury. The contracts for prior days had expired with the end of the day. It is exactly as though the claimant worked for the employer respondent for the first time on the 19th, and happened to be injured on the first day of his employment. The view of the claimant's position brings him in the class of those whose compensation is based upon the prevailing average weekly wage as described in the statute.

The idea in the mind of the framer of the statute seems to have been that the most frequent case was that of indefinitely continuous service, and that 26 weeks was a reasonable time for ascertaining the average weekly wage. The statute does not, like some, refer to the entire earnings during the given period, but only the earnings of the employer in whose service the workman is injured. And this method, as we have seen, required at least two full weeks' work for its application. All other cases comes within the prevailing average weekly wage. Whatever possible failure of exact justice may arise from the application of our definite inelastic rule, it certainly does not work to the disadvantage of the occasional or floating workman.

We therefore answer the first question reserved that, upon the assumption of one contract covering the whole period, the case calls for the average wage prevailing in the same employment as the basis for compensation.

We answer the second question that the period of employment under the specific contract in force at the time of the injury governs in determining whether actual or customary wages are to be taken, that in the case reserved this was the contract of May 19th, and that the basis of compensation is the average wage previously in the same employment.

The superior court is advised to sustain the appeal from the commissioner, and to remand the case to him, with direction to make an award in favor of the plaintiff in accordance with this opinion.

The other Judges concurred.

AMERICAN COAL MINING CO. v. DECOURCEY. (No. 10935.)

(Appellate Court of Indiana, Division No. 1. Feb. 2, 1921.)

129 Northeastern Reporter, 635.

MASTER AND SERVANT—LOSS OF COMPENSATION BY REFUSAL OF EMPLOYER'S PHYSICIAN WAIVED BY VOLUNTARY PAYMENTS.

A finding by the Industrial Accident Board that employer voluntarily paid the employee compensation for the full period of his refusal to accept the services of the employer's physician shows that the refusal lasted only until the payment ceased, so that the employer waived his right under Workmen's Compensation Act, § 25, to refuse compensation while such refusal continued by making the payments, and he cannot refuse thereafter to pay compensation for partial permanent disability because of the past refusal to accept the physician's services.

(For other cases, see Master and Servant, Dec. Dig. § 385[17].)

Appeal from Award of Industrial Board.

Proceedings under the Workmen's Compensation Act, by William Decourcey against the American Coal Mining Company, for compensation for permanent partial disability after voluntary payment of compensation for temporary total disability. From an award of compensation by the Industrial Board, employer appeals. Affirmed.

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Hays & Hays, Alonzo C. Owens, W. Paul Stratton, and George W. Buff, all of Sullivan, for appellant.

John A. Riddle, of Vincennes, for appellee.

ENLOE, J. On August 19. 1919, the appellee, while in the employment of appellant, received an injury by accident, arising out of and in the course of his employment which resulted in his temporary total disability. On October 30, 1919, the appellant entered into a compensation agreement with the appellee, wereby it undertook and agreed to pay to appellee compensation at the rate of $13.20 per week, during the period of his total disability, not exceeding the period fixed by law, which agreement was never approved by the Industrial Board of Indiana. Appellant paid to appellee compensation, under said agreement, during the said period of his total disability, amounting to the sum of $209.31 On December 6. 1919, appellee filed with the Industrial Board his application for an award of compensation, as for permanent partial disability. and a hearing was had first before one member of said board. and later. upon application for review, the matter was considered by the full Industrial Board, which made the following finding:

"And the full board made a personal inspection of the plaintiff's injury, heard the argument of counsel, reviewed the evidence, and, being duly advised in the premises, finds that on the 19th day of August, 1919, plaintiff was in the employment of the defendant at an average weekly wage in excess of $24; that on said date he received a personal injury by an accident arising out of and in the course of his employment, of which the defendant had actual knowledge at the time; that as a result of his injury the plaintiff was totally disabled continuously from the date thereof until and including the 15th day of December, 1919; that on the 30th day of October, 1919, the plaintiff and defendant entered into a compensation agreement whereby the defendant agreed to pay to the plaintiff compensation during the period of his total disability, not exceeding the period fixed by the law, which agreement was was never approved by the Industrial Board of Indiana; that the defendant paid to the plaintiff compensation for disability in excess of seven days until and including the 15th day of December. 1919, or the total of $209.31; that on the date of the plaintiff's injury the defendant provided him with an attending physician, but made no statement as to the period during which said physician would be furnished. that a few days afterward the plaintiff discontinued the services of said physician, and procured the services of an entirely different physician, and thereafter refused to accept the services of the physician provided by the defendant; that the defendant had voluntarily paid to the plaintiff compensation for the full period of his refusal to accept the services of the physician provided by it; that as a result of the plaintiff's injury he has permanently lost 33 1/3 per cent. of the use of his right foot."

Upon this finding the board made an award of compensation at the rate of $13.20 per week for the period of 50 weeks, to be paid in a lump sum, with a deduction of $209.31 theretofore paid by appellant. From this award this appeal is prosecuted under an assignment of error that the award of the full board is contrary to law.

The appellant in its brief says, "There is evidence in the record to support each and every finding made by the Industrial Board," but it insists that, as the findings show that at the time of the injury appellant furnished a physician to attend the appellee, and that a few days thereafter the appellee discontinued the services of such physician, and procured one of his own choosing. and thereafter refused to accept the services of the said physician so provided by appellant, and that as there is no finding that the circumstances in this case justified such refusal,

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and that as such refusal has been continuous, the said appellee is not entitled to an award of compensation, under the provisions of section 25 of the Workmen's Compensation Act (Laws 1915, c. 106). It will be noted that the board found that appellant had voluntarily paid appellee compensation for the full period of his refusal to accept the services of the physician provided by it. As the payments made by the appellant ended on December 15, 1919, it necessarily follows that the refusal relied upon also ended upon said date. Under the finding, the contention of the appellant cannot be sustained. It was. by said board, given full credit for the money it so paid, and is in no position to complain, since it further appears that on the 30th day of October, 1919, and long after appellee had refused to accept the services of the physician tendered by appellant, it entered into the aforementioned contract with appellee, and voluntarily paid him compensation, when it well knew that under the provisions of the statute upon which it is now insisting he was not legally entitled thereto. If such total disability had continued for the full maximum period fixed by the statute, the appellant, on the record before us, after December 15, 1919, certainly could not have successfully resisted the making of the payments as stipulated in its said contract. Frankfort General Ins. Co. v. Conduitt, 127 N. E. 212. It had voluntarily and intentionally foregone its right in that matter. In short it had waived it. It now seeks to take advantage of appellee's refusal to receive medical attention from its doctors, at a time when, according to the findings, such refusal does not exist. This it cannot do. The award upon the findings is right, and must be affirmed.

IN RE HOGAN. (No. 11029.)

(Appellate Court of Indiana, Division No. 1. Feb. 4, 1921.)

129 Northeastern Reporter, 633.

1. MASTER AND SERVANT—COMPENSATION CLAIM FOR PERMANENT, PARTIAL DISABILITY AFTER TERMINATION OF TOTAL DISABILITY HELD BARRED BY LIMITATION.

Where servant was totally disabled on the 19th day of December, 1918, and such disability continued until the 7th day of April, 1919, at and after which time he was continually disabled to the extent of a permanent partial impairment, he then had a right to apply at once to the Industrial Board for an award of compensation based upon such partial disability, under Workmen's Compensation Act, § 45, but total disability and payments under it having ceased April 7, 1919. an application for an allowance on account of a continuing period made December 10, 1920,. was not within the statutory period, and therefore too late; the latter part of such statute being a statute of limitations.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

3. MASTER AND SERVANT—STATUTORY LIMITATION OF APPLICATION FOR MODIFIED COMPENSATION APPLICABLE TO PRIOR INJURIES.

The amendment of Workmen's Compensation Act, § 45. requiring that applications for modifications of awards must be filed within one year from termination of compensation period fixed in original award, applied to an injury which occurred prior to its passage.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

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Proceeding by Charles L. Hogan under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by Nordyke & Marmon Company, the employer. Certified question of law from the Industriad Board. Answered in favor of the employer.

ENLOE, J. The Industrial Board has certified the following statement of facts to this court:

On the 19th day of December, 1918, one Charles L. Hogan was in the employment of the Nordyke & Marmon Company in the city of Indianapolis, Ind., at an average weekly wage of $27.50; that on said date the said Charles L. Hogan received a personal injury by an accident arising out of and in the course of his employment by the said Nordyke & Marmon Company; that the employer had actual knowledge of said accidental injury at the time that it occurred. that as a direct result of his injury the plaintiff was wholly disabled for work continuously from the date thereof until and including the 7th day of April, 1919; that afterwards the said Charles L. Hogan and Nordyke & Marmon Company entered into a compensation agreement, whereby the said Nordyke & Marmon Company agreed to pay to the said Charles L. Hogan compensation at the rate of $13 20 per week, beginning on the 27th day of December, 1918, and to continue as long as the said Charles L. Hogan would be totally disabled, not to exceed 500 weeks; that said agreement was aproved by the Industrial Board of Indiana on February 4, 1919; that under said agreement the said Nordyke & Marmon Company paid to the said Charles L. Hogan compensation at the rate of $13.20 per week, beginning on the 27th day of December, 1918, and continuing until and including the 7th day of April, 1919; that the total disability of the said Charles L. Hogan to work, resulting from his said injury, ceased on the 7th day of April, 1919; that his said injury resulted in a permanent, partial impairment, as a result of which he lost permanently 25 per cent. of the use of his left hand or of the left arm below the elbow; that the compensation agreement between the said Charles L. Hogan and the said Nordyke & Marmon Company made no provisions for compensation on account of any permanent partial impairment; that on the 10th day of December, 1920. the said Charles L. Hogan filed his claim with the Industrial Board of Indiana, asking for an award of compensation on account of said permanent, partial impairment of his left hand.

The employer admits that the injury resulted in the permanent loss of 25 per cent. of the use of the left hand of the said Charles L. Hogan, but it denies he is entitled to an award of compensation therefore on the ground that his claim is barred by the statute of limitations.

The position of the employer is as follows with respect to said question:

First. That the period of compensation, fixed by said agreement, was the period of his total disability, which terminated on the 7th day of April, 1919.

Second. That by virtue of amended section 45 of the Indiana Workmen's Compensation Act (Acts 1919, p. 167) the plaintiff's application for additional compensation on account of the permanent, partial impairment of his left hand should have been filed within one year from April 7, 1919, or at least within one year from May 15, 1919. the date upon which amended section 45 went into force.

The position of the plaintiff with reference to said question is as follows:

First. That the compensation period fixed by the compensation agreement hereinbefore referred to was 500 weeks.

Second. That the amendment of said section 45 has no application to injuries which occurred prior to May 15, 1919.

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Third. As the compensation agreement made no provisions for compensation on account of any permanent, partial impairment resulting from his injury, the agreement was incomplete, and the plaintiff may at any time within two years from the date of his injury file his claim for compensation on account of said permanent, partial impairment.

On the foregoing facts the Industrial Board of Indiana respectfully submits the following question of law for your determination::

Is the right of Charles L. Hogan to an award of compensation for the permanent, partial impairment of his left hand, upon his application filed with the Industrial Board on December 10, 1920, barred by the statute of limitations?

In re Stone, 117 N. E. 669, this court said, speaking of an agreement very similar to the one involved in the instant case:

"It is apparent from the agreement that it is incomplete, in that no compensation is agreed upon for and during partial disability. Under such circumstances the board, not having relinquished its jurisdication of the parties or the subject-matter, has the right, upon proper petition, to hear the parties and make such further provisions for compensation as the facts warrant, not exceeding the maximum provided in the act, the same as though no agreement had been reached."

The same principle was announced in Standard Cabinet Co. v. Iliff, 119 N. E. 479.

[1] From the statement of facts submitted, we learn that said Hogan was totally disabled on the 19th day of December, 1918, and that such disability continued until the 7th day of April, 1919, at and after which time he was continually disabled, to the extent of a permanent partial impairment (25 per cent.) in the use of his left arm below the elbow. Under the authorities, supra, he then had a right to apply at once to the Industrial Board for an award of compensation, based upon such partial disability.

Section 45 of the Workmen's Compensation Act, as amended in 1919 (Acts 1919, p. 158) among other things provides:

"The power and jurisdication of the Industrial Board over each case shall be continuing, and, from time to time, it may, upon its own motion or upon the application of either party, on account of a change in conditions, make such modification or change in the award, ending, lessening, continuing, or extending the payments, previously awarded, either by agreement or upon hearing, as it may deem just, subject to the maximum and minimum provided for in this act. * * *

"The board shall not make any such modification upon its own motion nor shall any application therefor be filed by either party after the expiration of one year from the termination of the compensation period fixed in the original award, made either by an agreement or upon hearing."

[2, 3] The latter part of the above section of our statutes fixes the time within which the party must act, if he would enforce a present right. It is a statute of limitations. Such statutes are considered necessary to the welfare of society. They are enacted on the presumption that one having a well-founded claim will not delay enforcing it. They neither create nor destroy rights, but pertain to the remedy solely. Lamberton v. Grant, 94 Me. 508, 48 Atl. 127, 80 Am. St. Rep. 415.

The total disability and payments under it having ceased April 7, 1919, the application for an allowance, on account of a continuing disability, made December 10, 1920, was not within the statutory period, and therefore too late. It was barred by said statute.

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INDIANAPOLIS BLEACHING CO. v. MORGAN. (No. 10936.)

(Appellate Court of Indiana. Division No. Feb. 3, 1921.)

129 Northeastern Reporter, 644.

1. MASTER AND SERVANT—EVIDENCE AT FIRST HEARING NECESSARY TO DETERMINATION OF INCREASED COMPENSATION.

Under Workmen's Compensation Act, § 45, as amended by Acts 1919, c. 57, continuing the jurisdiction of the Industrial Board over each case become conclusive on the parties is essential to the determination of the right to increased compensation because of changed conditions, where there was no previous finding by the commission stating the conditions established by that evidence, since there is no other basis, for determining whether the conditions had changed.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

2. MASTER AND SERVANT—APPLICANT FOR INCREASED COMPENSATION NEED NOT REINTRODUCE EVIDENCE.

Under Workmen's Compensation Act, § 45, as amended by Acts 1919, c. 57, continuing the jurisdication of the Industrial Board over each case to make such change in the award as it may deem best, a second hearing before the board on application for increase of compensation because of changed conditions is not a new case, and the employee need not reintroduce the evidence offered at the first hearing to authorize the board to consider it in determining whether conditions had changed.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

3. MASTER AND SERVANT—AWARD OF INCREASED COMPENSATION NOT REVIEWABLE ON MERITS IN ABSENCE OF PART OF EVIDENCE.

An award by the Industrial Board of increased compensation to an injured employee because of changed conditions since the first award cannot be reviewed on the merits, where the evidence in the hearing for the first award was not in the record, and there were no findings in the first award which would make such evidence unnecessary to a determination of whether conditions have changed.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Appeal from Award of Industrial Board.

Proceedings under the Workmen's Compensation Act by Inez Morgan against the Indianapolis Bleaching Company. From an award by the Industrial Board increasing the compensation previously awarded because of changed conditions, the employer appeals. Affirmed.

Joseph W. Hutchinson and F. K. Warne, both of Indianapolis, for appellant.

Turner, Merrèll & Locke and Paul E. Beam, all of Indianapolis, for appellee.

BATMAN, J. The record in this case discloses that appellee was an employee of appellant on October 20, 1919, and on said date received personal injuries by reason of an accident arising out of and in the course of her said employment: that on November 20, 1919, she filed with the Industrial Board an application for the adjustment of her claim against appellant for compensation; that a single member of said board heard

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the evidence thereon in due time, and made a finding and an award in her favor; that no application was made for a review of said award within seven days from the date thereeof. and the same thereby became final and conclusive on the parties thereto; that on June 3, 1920, appellee filed her application for the review of such award on account of a change in condition; that a single member of the board heard evidence on said application, and made a finding and an award in favor of appellee thereon; that appellant, within seven days from the date of said last award, filed an application for the review thereof by the full board, and after having heard the argument of counsel, and having reviewed the evidence, the board made a finding and an award in favor of appellee, from which this appeal is prosecuted.

[1] Appellee contends that no question is presented by this appeal, as the only error assigned requires a consideration of the evidence, and appellant has failed to have the evidence, which formed the basis of the award in her favor, first above mentioned, incorporated in the record. It is obvious that the only way the Industrial Board could determine whether there has been such a change in appellee's condition between the time of her first award and the hearing on her second application as would entitle her to further compensation under section 45 of the Workmen's Compensation Act (Acts 1915, c. 106, as amended by Acts 1919, p. 167, § 1) was to consider her condition at each of such times. It follows as a matter of course that on the hearing of her said second application evidence of her condition at such time was proper and necessary. But on such hearing new evidence of appellee's condition when the first award in her favor was made would not be proper, as each party must accept as her true condition at such time what is shown by the evidence introduced on the hearing resulting in said first award, in the absence of a specific finding in that regard made at such time. Pedlow v. Swartz Electric Co., 120 N. E. 603. Harper on Workmen's Compensation, p. 424; Bloomington, etc., Co. v. Industrial Board, 276 Ill. 120, 114 N. E. 511; City of Panay v. Industrial Board, 279 Ill. 279, 116 N. E. 647; Casparis Stone Co. v. Industrial Board, 278 Ill. 77, 115 N. E. 822; Squire-Dingee Co. v. Industrial Board, 281 Ill. 359, 117 N. E. 1031; Carson-Payson Co. v. Industrial Board, 285 Ill. 635, 121 N. E. 264.

[2] Appellant, however, as a counter contention, asserts that, if it was necessary for the Industrial Board to consider the evidence introduced at the hearing on her original application for compensation, it devolved upon appellee to introduce the same in some proper manner, and, since the record does not show that she did so, she failed to establish her right to further compensation, and cites the case of Bloomington, etc., Co. v. Industrial Board (Ill.) supra, in suport of its contention. We cannot adopt appellant's view, as to the required procedure. The statute of our state, unlike that of Illinois, contains no provision requiring an applicant seeking the review of an award to file with the board an agreed statement or stenographic report of the facts of the proceedings at such former hearing, and hence the case cited does not sustain appellants contention. We observe that said section 45 of the Workmen's Compensation Act (Laws 1915, c. 106), as amended in 1919, provides that—

"The power and jurisdiction of the Industrial Board over each case shall be continuing, and from time to time, it may * * * make such modification or change in the award * * * as it may deem just."

It thus apears that appellee, by filing her application for a further award of compensation, on account of a change of condition, did not thereby begin a new proceeding, but merely took another step in the proceeding before the Industrial Board which was instituted when she filed her original application for the adjustment of her claim. Therefore all the evidence introduced before such board, or any member thereof, at the first hearing in such proceeding, was before it on said last hearing without any further introduction by either party.

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[3] As the finding on which the first award in favor of appellee was based does not purport to state her condition at such time, we hold that it was the duty of the board to take cognizance of all such evidence. and consider it in connection with all proper evidence introduced on appellee's last application, in determining whether there had been a change in her condition which entitled her to further compensation as claimed. This being true, it will be presumed that the board discharged their duty in that regard. The board had authority to make ample provisions for preserving such evidence during the pendency of such proceeding, and to provide adequate means for reproducing the same, when necessary, in the discharge of its duties, and it will be presumed that it has not been remiss in this regard. We therefore hold that the evidence introduced on the hearing of appellee's original application must appear in the record before us before we can determine the questions raised by the assignment of errors in this appeal.

An examination of the record fails to disclose that the evidence introduced on the hearing of apellee's original application is a part of the bill of exceptions containing the evidence. This is a fatal defect in the record, which prevents a consideration of the appeal on its merits. The award is therefore affirmed.

MILLER v. GARDNER & LINDBERG ET AL. (No. 33659.)

(Supreme Court of Iowa. Jan. 11, 1921.)

180 Northwestern Reporter, 742.

1. MASTER AND SERVANT—EVIDENCE SUFFICIENT TO SUSTAIN FINDING ADVERSE TO COMPENSATION CLAIMANT ALLEGING INJURY IN COURSE OF EMPLOYMENT.

In a proceeding under the Workmen's Compensation Act by a workman struck in the groin when a crowbar in his hands slipped, the finding of the Industrial Commission that his disability did not result from any injury in the course of his employment *held* warranted by the evidence, and so, under Acts 37th Gen. Assem. c. 370, § 17, was conclusive; there being conflicting evidence as to the cause and conditions.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—COMPENSATION CLAIMANT HAS BURDEN OF PROOF.

One making claim under the Workmen's Compensation Act has the burden of showing that the disability resulted from an injury occurring in the course of employment.

(For other cases, see Insurance, Dec. Dig. § 403.)

3. MASTER AND SERVANT—EVIDENCE OF COMPENSATION CLAIMANT, THOUGH UNCONTRADICTED, NOT BINDING ON INDUSTRIAL COMMISSION.

Evidence of a claimant under the Workmen's Compensation Act is not binding on the Industrial Commission because uncontradicted.

(For other cases, see Insurance, Dec. Dig. § 405[1].)

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Appeal from District Court, Dubuque County; J. W. Kintzinger. Judge.

In the district court this was an appeal by the claimant under the Workmen's Compensation Act from a finding of the Industrial Commissioner adverse to the claimant. The trial court reversed the order of the Industrial Commissioner and fixed the compensation of the claimant. The defendants appealed. Reversed.

Chandler Woodbridge, of Des Moines, for appellants.

Fratzen, Bonson & Gilloon, of Dubuque, for appellee.

EVANS, C. J. The plaintiff was in the employ of the defendant, during which time he came under disability which resulted in loss of time of many weeks. His claim was that such disability resulted from an injury sustained by him in the course of his employment. That the claimant was an employee of this defendant and that he did become disabled during the period of his employment is without dispute. The crucial question is whether such disability resulted from an injury suffered by the plaintiff in the course of his employment. The finding of the arbitration committee and of the Industrial Commissioner was adverse to him. From such adverse finding he appealed, and his claim was sustained in the district court. The statute provides as follows:

"The findings of fact made by the Industrial Commissioner within his powers shall, in the absence of fraud, be conclusive, but upon such hearing the Court may confirm or set aside such order or decree of the Industrial Commissioner, if he finds:

"(1) That the Industrial Commissioner acted without or in excess of his powers; or

"(2) That the order or decree was procured by fraud; or

"(3) That the facts found by the Industrial Commissioner do not support the order or decree.

"(4) That there is not sufficient competent evidence in the record to warrant the Industrial Commissioner in making the order or decree complained of.

"No order or decree of the Industrial Commissioner shall be set aside by the court upon any other than the grounds just stated."

Section 17, c. 270, Acts 37th G. A.

The trial court held that the record would not permit a reversal of the order of the Industrial Commissioner upon any one of the first three grounds above quoted. It based its reversing order on the fourth ground above quoted. The discussion here therefore will be directed to such fourth ground.

[1] According to the claimant's evidence as a witness, his injury occurred on Saturday, December 21, 1918. He was one of a group of men engaged in unloading a car. The group contained from seven to ten men. A crowbar in his hand slipped in such a way that the end thereof struck him in the left groin. He continued his work throughout the day and throughout the Monday following and worked for a time on Tuesday, at which time he reported his injury and was sent to the doctor. The doctor, Bigelow, found a condition which seemed to baffle diagnosis. There was an extensive suppuration and breaking down of the tissues with no external evidence of injury. Dr. Slattery also aided in the care of the patient. Operations for hernia were performed both on the right side and on the left. The suppuration was so persistent that the doctors found it almost impossible to heal the surgical wounds. The theory upon which the case was reversed in the district court was that the testimony of the claimant himself and that of Dr. Bigelow was conclusive in that there was no evidence contradictory thereto. It is true that the claimant testified to his injury as already stated. It is also true that the

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accident or injury, if such, occurred in the presence of his fellow workmen, seven to ten in number, and that no one of them saw or heard anything to indicate that such an accident had happened. The explanation of this is, that the blow was so slight that the claimant thought nothing of it and did not mention it. While this is an appropriate explanation, it will not do to say that the facts that no one else observed the accident and that the claimant himself did not mention it was without probative effect as tending to negative the plaintiff's claim. It was evidence competent as a matter of law, and it did tend to reduce the weight and credibility of the claimant's testimony. One of the claimant's witnesses at the hearing was Linehan the timekeeper. The claimant made his first complaint to this witness on Tuesday. His statement to Linehan was not that he was struck in the groin, but "across the middle of the thigh." This evidence was also contradictory to the claimant's testimony and tended to negative it. The testimony of Dr. Bigelow, which is relied upon as being conclusive. was summed up in the following statement of his direct examination:

"I couldn't find anything that would indicate that he was suffering from something else besides what he related to me. The suppuration may have started from an external injury, but the report of the pathologist was simply a breaking down of the tissues, so it might have come from the bruise—rather unusual. The treatment which I gave him was the only treatment I know of. During all this treatment I had other physicians come in when I was dressing him."

On cross-examination he testified:

"I used the word 'unusual.' I mean that the suppuration was unusual. The pathologist said this was just an inflammatory breaking down of the tissues; she couldn't make anything out of it so far as any infection was concerned—simply an inflammatory breaking down of the tissues. I have been practising for some 30 years. I never had a case to run on like this did. I am not satisfied in my own mind what could cause this extensive and prolonged suppuration. I have tried to find out. * * * I haven't sworn that this man's trouble is the result of an injury. I cannot find any other cause. This experience that this man has had is an unusual one from the cause described, we would not ordinarily expect that extent of trouble from such an injury as he described—receiving an injury one day, working two or three days afterwards, and then be laid off and have this suppuration go on, and have a hernia form there. I think the operation in April was for hernia. It came from the breaking down of the tissues from this suppuration. Ordinarily if a man develops swelling and pus such as developed in this case, I would expect to find some external signs of an injury. Yes, sir; I was puzzled in the length of time the thing hung on, and I tried to find out what was the cause of this suppuration, and why it should have suppurated in the beginning, but I couldn't, and the only thing I get out of it was it was an injury and the patient's word was the only evidence of an injury which I had."

Dr. Slattery testified for the defendant. He testified as follows:

"This long period of suppuration and this experience which Miller had, in my opinion, indicates that the glands were infected from some old gonorrheal or tubercular condition; the fact that it continued so long and so persistently is a factor in my conclusions."

As against this it is to be said that a pathologic examination failed to disclose evidence of gonorrhea. We do not assume to pass upon the weight or credibility of this testimony. It was evidence and was properly before the Industrial Commissioner. It may be conceded that it is not contradictory to the testimony of Dr. Bigelow. But that is because

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Dr. Bigelow did not commit himself to any explanation of the cause of the trouble which he found. So far as the opinion of Dr. Bigelow was favorable to the claimant. it was predicated upon the acceptance by the physician of the patient's own story.

[2, 3] The burden was upon the claimant under the statute to show that this disability did result from an injury received in the course of his employment. It will not do to say that the evidence of the claimant is binding upon the Commissioner in the absence of direct contradiction. It will not do to say that the Commissioner may not consider the weight and credibility of his evidence in the light of all the circumstances. The remedy here provided by the statute is intended to be a summary one. The method of hearing is intended to be more informal than regular court procedure. It aims at quick results, and this largely in the interest of the employee. It therefore makes the finding of facts by the Commissioner conclusive where there is a conflict of evidence. Though an appeal to the courts is permitted, the scope of such appeal is very restricted. To enlarge such scope would be to disregard the very purpose of the statute. To broaden such scope is to subject the employee to the very burden of litigation from which the statute purports to save him. We have held heretofore that on appeal the district court cannot try the question of fact except so far as it goes to the jurisdiction of the commissioner.

Upon the record before us we are satisfied that the finding of the Commissioner on the facts was conclusive upon the court.

The judgment of the district court is therefore reversed.

Reversed.

Weaver, Preston, and De Graff, JJ., concur.

NORTON v. DAY COAL CO. (No. 33348.)

(Supreme Court of Iowa. Dec. 31, 1920.)

180 Northwestern Reporter, 905.

1. MASTER AND SERVANT—"CONTRACTOR" AND "INDEPENDENT CONTRACTOR" IN COMPENSATION ACT RETAIN COMMON-LAW MEANING.

Within Workmen's Compensation Act (Code Supp. 1913, § 2477m16), which declares a contractor is not an "employee" entitled to compensation, the terms "contractor" and "independent contractor." despite the liberal interpretation of the act, retain their common-law meaning. (Per Salinger and Arthur, JJ.)

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series. Contractor; Independent Contractor.)

2. MASTER AND SERVANT—FINDING BY COMMISSIONER IN COMPENSATION CASE CONCLUSIVE.

In proceedings under the Workmen's Compensation Act, findings of fact made by the Industrial Commission are conclusive and cannot be reviewed by the courts unless there was no conflict in the evidence and no room for the drawing of different inferences therefrom. (Per Salinger and Arthur, JJ.)

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

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3. MASTER AND SERVANT—RIGHT TO DISCHARGE IS ESSENTIAL TEST OF EMPLOYMENT WITHIN COMPENSATION ACT.

The right to discharge for misconduct or disobedience is an essential test of employment within the Workmen's Compensation Act. (Per Salinger and Arthur, JJ.)

(For other cases, see Master and Servant, Dec. Dig. § 367.)

4. MASTER AND SERVANT—TEAMSTER HAULING COAL WHEN HE CHOSE HELD NOT AN 'EMPLOYEE" ENTITLED TO COMPENSATION.

The owner of a team who engaged in hauling for others including a coal company, but who hauled coal for the company only when he chose to apply for such work and was paid by the load for such hauling, the route and manner of hauling and the employment of assistants being matters for his determination, was not an employee of the coal company within the Workmen's Compensation Act while hauling coal for it, since the company had no power to discharge him, though it could refuse to furnish him coal to haul. (Per Salinger and Arthur, JJ.)

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

5. MASTER AND SERVANT—CONTROL BY EMPLOYER ESSENTIAL TO EMPLOYMENT WITHIN COMPENSATION ACT; "EMPLOYEE."

The owner of a team who engages himself and his team to another does not become an employee within the Compensation Act unless the other is in control of both man and team. (Per Salinger and Arthur, JJ.)

(For other cases, see Master and Servant, Dec. Dig. § 367.)

6. MASTER AND SERVANT—CONTROL AS TO DETAILS ESSENTIAL TO RELATIONSHIP.

The right of control essential to the relationship of master and servant must go beyond the power merely to direct a teamster where to haul coal with his own team and must include the right to exercise control over method and detail. (Per Salinger and Arthur, JJ.)

(For other cases, see Master and Servant, Dec. Dig. § 318[1].)

7. MASTER AND SERVANT—THAT FURNISHER OF TEAM DROVE IT HIMSELF DOES NOT CHANGE STATUS FROM CONTRACTOR TO EMPLOYEE.

The fact that one contracted to furnish a team to another drove the team himself while in the service of the other does not change the status of the owner of the team from that of contractor to that of servant.

(For other cases, see Master and Servant, Dec. Dig. § 316[1].)

8. MASTER AND SERVANT—TEST OF RELATIONSHIP IS MASTER'S LIABILITY FOR SERVANT'S ACTS.

One test of whether the relation between the parties is that of master and servant is whether the alleged master would be liable to third persons for misconduct of the servant. (Per Salinger and Arthur, JJ.)

(For other cases, see Master and Servant, Dec. Dig. § 316[1])

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9. MASTER AND SERVANT—EVIDENCE HELD TO SUSTAIN COMMISSIONER'S FINDING TEAMSTER WAS NOT AN EMPLOYEE.

In proceedings to recover compensation for injuries to a teamster sustained while hauling coal for a coal company with his own team, evidence as to relations between the parties *held* sufficient to sustain the finding of the Industrial Commissioner that the teamster was a contractor, not an employee.

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

Weaver, C. J., dissenting.

Appeal from District Court, Woodbury County; George Jepson, Judge.

Overruling the finding of the Industrial Commission, the trial court held that appellee was entitled to compensation under the act, because an employee of defendant. Defendant appeals. Reversed.

Sears, Snyder & Gleysteen, of Sioux City, for appellant.

T. P. Cleary, of Sioux City, for appellee.

SALINGER, J. [1] I. The statute not only fails to create a liability in favor of contractors, but declares that no contractor engaged to give services is an "employee." And the terms "contractor" or "independent contractor" do, despite liberal interpretation of the act, retain their common-law meaning and are still to be given the meaning that courts have always given them. Storm v. Thompson, 185 Iowa, 309, 170 N. W. 403, 405; Pace v. County, 184 Iowa, 498, 168 N. W. 916; Code Supp. 1913, § 2477m16.

[2] II. The commissioner found against liability, on the ground that claimant was a contractor.

How far can court review in the district court, or here, of such findings, go?

Speaking through Mr. Justice Weaver, we said in Fischer v. Priebe, 178 Iowa, 512, 160 N. W. 48:

"It was not within the authority of the court to review or reverse or modify the award. Its function in the matter was simply to receive the award certified to it and 'render a decree in accordance therewith and notify the parties.' "

We need not go so far as this, and in Griffith v. Cole, 183 Iowa, at page 418, 165 N. W. 577, L. R. A. 1918F, 923, and in Pierce v. Bekins, 185 Iowa, 1346, 172 N. W. 191, we declined to do so. We held in Pace v. County, 184 Iowa, 498, 168 N. W. 916, that—

'Courts may not interfere with the findings of fact made by the Industrial Commissioner, when these are supported by evidence, even though it may be thought there be error."

We said in the same case that his finding of fact on whether there was an employment is conclusive if the evidence be in conflict or be open to the drawing of different inferences. In Pierce v. Bekins, 185 Iowa, 1346, 172 N. W. 191, we declared:

"The effect of the Griffith Case [183 Iowa, 415, 165 N. W. 577, L. R. A. 1918F, 923] is that we cannot review a finding of fact unless the transcript makes it appear as matter of law that such finding is not sustained by or is contrary to the evidence"

—and say in that connection that "the court may not go into a general fact controversy."

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On application of these and of statute provision that we shall not have fact questions submitted to us, the sole question now is whether we may say that there was no conflict, no room for the drawing of different inferences, and that therefore, as matter of law, the finding of the commissioner is not sustained by the competent evidence.

III. One line of evidence is this: The plaintiff's general business was teaming, which he pursued with his own team. For the most of the year he hauled for the city and for materialmen, thus obtaining steadier work and better pay than defendant could give him. He hauled coal for defendant only when the demand for coal was so acute that there was more hauling than the regular employees of the defendant could handle. He admits he earned his livelihood by using his own team and working for different people with it. While he generally obtained coal hauling when he asked defendant for it, and though during some five weeks prior to his injury he did haul for defendant, he was at no time sure of obtaining it, knew at no time how much hauling he could get to do, or how long it would last. All hauling was paid for by the load. and settlement made weekly. He could apply for this work when he pleased and abandon it at any moment. He did the hauling with his own team. He was at liberty to decline any job of hauling for defendant and hauled coal for its competitors without subjecting himself to a refusal by defendant on later application to haul coal for it. It follows defendant had no right to and did not exercise any control over when plaintiff should or should not work for it, and its only power was to refuse him work which, as it happens, was a power it never exercised. The engagement between the parties was that, if plaintiff applied for any hauling and defendant had some, plaintiff would be permitted to haul. If there was no hauling when he applied, he would be advised when a job did turn up, and be permitted to haul. When there was no more hauling available, defendant would advise plaintiff of that fact, whereupon he would depart. Defendant was not concerned in whether Norton loaded or unloaded the wagon himself or with help hired by him. If he encountered any difficulties, his was the task of overcoming them. If he needed help, it was for him to hire and pay for it; and he did hire help on more than one occasion. He was told where to get coal to load and to whom to deliver it. On delivery he was to obtain a receipt, and this would be the basis of settling how much was due him.

He was injured while engaged with his own team in delivering coal that he was hauling for defendant. While walking beside wagon, it passed over his foot. He was alone and was handling his own team.

In effect, his so-called employment did not differ from employment a drayman, as to whom the cases stress the fact that they are not employees because, owing to the indefinite character and amount of their work, the right to discharge is never created. Tuttle v. Co., 192 Mich. 385, 158 N. W. 879, Ann. Cas. 1918C, 664. In effect, his status does not differ from the one of a passenger in a taxi. The general concensus of authority is that the taxi driver is not the employee of the passengner though the latter can direct him when to start, what route to travel and as to where the passengner is to be discharged. See Ash v. Co., 153 Iowa, 523, 133 N. W. 888, 38 L. R. A. (N. S.) 973; Cram v. City, 185 Iowa, 1292. 172 N. W. 23, Stewart v. Co., 131 Cal. 125, 63 Pac. 177, 724, 52 L. R. A. 205; Frerker v. Nicholson, 41 Colo. 12, 92 Pac. 224, 13 L. R. A. (N. S.) 1122, 14 Ann. Cas. 730; and Pillsbury's Case, 172 Cal. 807, 159 Pac. 721. In Ash v. Co., 153 Iowa, 523, 133 N. W. 888, 38 L. R. A. (N. S.) 973, we held there was no "employment." There, the driver teamed on the whole more for others than for defendant. He was engaged in an occupation other than serving defendant except at times when his independent business of teaming was less profitable than teaming for defendant during the rush season. And this was held

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though the driver was paid even when the foreman of defendant on occasion directed this driver to haul for others. We held in Storm v. Thompson, 185 Iowa, 309, 170 N. W. 403, that the claimant was engaged in an independent business which he styles "tree work" and he had supplied himself with the needed tools. In denying him the relationship of an employee and holding that he was a contractor, we said: Where there is no right to regulate the time for performance except in so far as the law implies a duty to complete within a reasonable period, there is no employment because there is control over nothing except such as is addressed to the general result. And see Perham v. Co, 193 Mich. 221, 159 N. W. 140.

[3, 4] IV. Norton is not an employee within the act because there was no right to discharge him, and the right to discharge for misconduct or disobedience is an essential test. Pace v. County, 184 Iowa, 498, 168 N. W. 916; Ash v. Co., 153 Iowa, 523, 133 N. W. 888, 38 L. R. A. (N. S.) 973; Pillsbury's Case, 172 Cal. 807, 159 Pac. 721; Stewart v. Co., 131 Cal. 125, 63 Pac. 177, 724, 52 L. R. A. 205; Quarman v. Bennett, 6 M. & W. 497; Tuttle v. Co., 192 Mich. 385, 158 N. W. 875, Ann. Cas. 1918C, 664; Carleton v. Co., 199 Mich. 148, 165 N. W. 817; Pioneer Co. v. Hansen, 176 Ill. 100, 52 N. E. 17; Butler v. Townsend, 126 N. Y. 105, 26 N. E. 1017; Litts v. Co., 224 N. Y. 321, 120 N. E. 730. There was no right to discharge because, as said, claimant had virtually the status of a draymann. Plaintiff could not tell when he came whether he would get any work. He was not obliged to accept any that was offered. He was at all times at liberty to haul for others rather than defendant. The most that could be done was to refrain from giving him coal to deliver. The only power the defendant had was to elect whether he should be given work and how long it should continue. There was the right to interrupt or terminate the contract, but not to discharge. Pace v. County, 184 Iowa, 498, 168 N. W. 916 We said in Ash v. Co., 153 Iowa, 523, 133 N. W. 888, 38 L. R. A. (N. S.) 973:

"While the defendant at any time might have interrupted the employment of the man and team in hauling, it was without authority to discharge [him] as driver of [the owner's] team or to substitute another in his stead."

Certainly, Norton was the owner of the team with which he did the hauling, and as certainly defendant could not substitute another to drive this team without the consent of Norton.

[5] V. One can so engage himself and his team to another so that the latter shall be in control of both. But he does not become a servant merely because he engages himself and his own team to work for another. To make the relationship the master must be in control of both man and team. Ash v. Co., 153 Iowa, 523, 133 N. W. 888, 38 L. R. A. (N. S.) 973; Pace v. County, 184 Iowa, 498, 168 N. W. 916; Morris v. Trudo, 83 Vt. 44, 74 Atl. 387, 25 L. R. A. (N. S.) 33; Huff v. Ford, 126 Mass. 24, 30 Am. Rep. 645; Driscoll v. Towle, 181 Mass. 416, 63 N. E. 922.

Defendant was given no right whatever to control the management and care of the team. And it never attempted to exercise any control on that head. The care and management remained entirely with Norton.

[6] VI. The relationship of master and servant does not exist unless there be the right to exercise control over methods and detail—to direct how the result is to be obtained. The power to direct must go beyond telling what is to be done—to telling "how it is to be done." Zeitlow v. Smock, 65 Ind. App. 643, 117 N. E. 668; Prest-O-Lite Co. v. Skeel, 182 Ind. 593, 106 N. E. 365, Ann. Cas. 1917A, 474. The only right defendant had to exercise control over methods and detail, and the only right on that head that was exercised, was to direct plaintiff where to get his coal and the kind and the amount; that he should then drive on the scale and weigh and then scale or trim the load or add to it as

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defendant might direct; to direct to whom delivery should be made and that a receipt be obtained as the basis for givingn proper credit for the haul. There was no right to exercise control, and none was exercised, over the speed with which delivery should be made or the route that should be taken in making delivery. There was less control or right to control in the case before us than there was in the many cases wherein it was held that it was not sufficient control over method and detail to constitute an employment. Among them are Pace v. County, 184 Iowa, 498, 168 N. W. 916; Stewart v. Co., 131 Cal. 125. 63 Pac. 177, 724. 52 L. R. A. 205; Tuttle v. Co., 192 Mich. 385, 158 N. W. 877, Ann. Cas. 1918C, 664; Pillsbury's Case, 172 Cal. 807, 159 Pac. 721; See v. Leidecker, 152 Ky. 724, 154 S. W. 10; Zeitlow v. Smock, 65 Ind. App. 643, 117 N. E. 666; Ash v. Co., 153 Iowa, 523, 133 N. W. 888, 38 L. R. A. (N. S.) 973. In Smith v. Insurance Fund, 262 Pa. 286, 105 Atl. 90, there was the right to exercise much more control over details than exists in this case, and yet it was held that the relation of master and servant had not been created. There was the right to direct that the transferring of freight to be done by claimant should be done in a good and workmanlike manner; that leather cars should be by him loaded in accordance with instructions from named tanning company; and he was to load or unload each standard gauge car within the time limit that would avoid demurrage charges. In See v. Leidecker, 152 Ky. 724. 154 S. W. 10, adopted in Pace v. County, 184 Iowa, 498, 168 N. W. 916, it was held the relationship did not exist, though the right given and exercised to direct as to details was vastly more plenary than exists or was exercised in the case at bar. And the holding of the Leidecker Case is fairly supported in Zeitlow v. Smock, 65 Ind. App. 643, 117 N. E. 666. In Ash v. Co., 153 Iowa, 523, 133 N. W. 888, 38 L. R. A. (N. S.) 973, the foreman of defendant gave written orders to the driver for a load of lumber and directed him where to take it, and he directed, too. that on delivery the driver would obtain a ticket signed by the recipient and return it to the office. There, the foreman "used his judgment which team shall take this order or that order," and "the directions are put there on the paper where to take it." Sometimes the foreman would "direct them which road if he knew the best place to go." We held there was no such right to direct and control as to methods and details as would make the driver an employee of the defendant. And see Tuttle v. Lumber Co., 192 Mich. 385, 158 N. W. 877, Ann. Cas. 1918C, 664.

6a. It is elementary doctrine, and it would fill many pages to cite the support it has, that one is not an employee if he may choose his own method of working—the mode and manner of doing the work. We select Smith v. Ins. Fund, 262 Pa. 286, 105 Atl. 90; Pace v. County, 184 Iowa, 498, 168 N. W. 916; Ash v. Co., 153 Iowa, 525, 133 N. W. 888, 38 L. R. A. (N. S.) 973; Butler v. Townsend, 126 N. Y. 105, 26 N. E. 1017. It has been summed by the statement that it is immaterial that there be power to prescribe what is to be done unless it includes the power to say "how it is to be done." Zeitlow v. Smock, 65 Ind. App. 643, 117 N. E. 668; Prest-O-Lite Co. v. Skeel, 182 Ind. 593, 106 N. E. 365, Ann. Cas. 1917A, 474.

It is not enough that there be power to see to it that the work is done to the satisfaction of the one who gives it. This power is control over ultimate results and not over methods, means, and details. Humpton v. Unterkircker, 97 Iowa, 509, 66 N. W. 776; Prest-O-Lite Co. v. Skeel, 182 Ind. 593, 106 N. E. 365, Ann. Cas. 1917A, 474; Zeitlow v. Smock, 65 Ind. App. 643, 117 N. E. 668. It is not direction looking to the final result, but as to means, that is controlling. We select Ash v. Co., 153 Iowa. at page 532, 133 N. W. 888, 38 L. R. A. (N. S.) 973; Pace v. Co., 184 Iowa, 498, 168 N. W. 916; Casement v. Brown, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582. It was said in Storm v. Thompson, 185 Iowa, 309, 170 N. W. 404, to be the concensus of the authorities

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that there is no employee unless the master may select the means by which the result is to be accomplished. And see Overhouser v. Co., 118 Iowa, 417, 92 N. W. 74; Francis v. Johnson, 127 Iowa, 391, 101 N. W. 878. There is an independent contractorship where the manner of operating the engine is not specified and there is no control over the "details" of the work as distinguished from the result—the manner of doing the work. There must be the right to dictate the details of the methods to be employed. Shearman & R. Neg. (6th Ed.) § 166. And see Leidecker's Case, 152 Ky. 724, 154 S. W. 10, also approved in the Pace Case; and 26 Cyc. 970; Storm v. Thompson, 185 Iowa, 309, 170 N. W. 404; Pace v. County, 184 Iowa, 498, 168 N. W. 916; Litts v. Co., 224 N. Y. 321, 120 N. E. 730.

The mere making of suggestions as to the methods of work to be pursued will not establish the relationship of master and servant, even though the suggestion be as to details or as to the co-operation necessary to bring about the larger general result. Carleton v. Co., 199 Mich. 148, 165 N. W. 818; Casement v. Brown, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582.

6b. In Ash v. Lumber Co., 153 Iowa, 523, 133 N. W. 888, 38 L. R. A. (N. S.) 973, it is held to be significant on but not conclusive of whether there was the relationship of employer and employee that the latter is paid by the day. Norton was paid by the load. But even in cases where the payment was fixed sum per day, it was held that the status of independent contractor has not been changed for that of a servant. We select Chisholm v. Walker, 2 B. W. C. C. 261; Ryan v. County Council, 49 Q. L. R. T. 1; Litts v. County, 224 N. Y. 321, 120 N. E. 731. That was the holding in the Pace Case, 184 Iowa, 498. 168 N. W. 916, where claimant was to be paid $14 a day for work by himself or a man and a team, with use of claimant's engine, and a day was to be ten hours. And in Pillsbury's Case, 172 Cal. 807, 159 Pac. 721, where the wagon was to be used eight hours a day.

VII. Some of the cases have much similarity to this case as a whole, but exhibit less reason for finding against employment than appears in this case.

The Pace Case approves Busse v. Brugger, 3 Ann. Rep. (1914) Wis. Industrial Com. 74, 78. There the applicants owned an ensilage cutting outfit, an ensilage cutter machine, and a silo filling outfit. They engaged to farmers to cut and fill and gave their personal services as far as necessary to operate the machinery and did so at a stated sum per hour for the time actually consumed in filling the silo. The farmer furnished the gasoline only. It was held that these men were independent contractors. It was emphasized that they had the right to complete the job, that the farmer had reserved no control and could discharge neither of the applicants, and that nothing could be required of the applicants, except, in a general way, to run the machinery and so feed the corn and so work as that the general result desired would be obtained. In Chisholm v. Walker & Co., 2 B. W. C. C. 261, the applicant owned a horse and engaged to drag logs of timber for respondent at 8s. a day. He was not required to give his personal services. Lord Justice Clerk said:

"On the facts stated here I cannot find anything to indicate that this man was a servant employed by a master and remunerated by wages, that is, at so much per day or per hour or per piece. The present case is a case in which a man who has a horse of his own goes to a firm of timber merchants; they say that they want logs removed from one place to another; he says, 'I have a horse, I shall bring it and work any day you wish me to do so, and for that you will pay 8s. a day.' There is nothing there of the nature of wages. It would have been the same thing if he had brought twenty horses to do the work instead of one. The contract was that he should get the work done. It was not a

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contract that he should do it in the only way in which it could be done by having somebody to lead the horse. That is not a contract of service."

Ryan v. County Council, 49 Ir. L. T. I., approved in the Pace Case, has quite a similarity to the case at bar. Deceased owned a horse and car and did a carting business. For several years he had hauled stones for the county council, though he did not work continuously, but for a day or a part of a day as he wished, being under no obligation to do the work at any particular time, or in any particular manner or to do any particular amount on any one day. He was not controlled in the work by the council, except that their surveyor told him whether and where he desired the stones to be hauled. Ryan was kicked by his horse while harnessing it preparatory to going to work to haul the stones, and relying largely on Chisholm v. Walker 2 B. W. C. C. 261, the court held Ryan to be an independent contractor.

VIII. In some cases upon which we have drawn, the claimant was furnished to defendant by a third person, or the one injured was a third person, or claimant did not work in person—and in some of these cases two or all three of these conditions were present. We think that the presence of one or all of these conditions exhibit a distinction which works no difference.

[7] It can make no difference that additional to furnishing the team Norton worked with it himself. In Western Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721, Stevens was held to be an independent contractor where he, in addition to furnishing teams and drivers. drove himself. In the Pace Case, 184 Iowa, 498, 168 N. W. 916, Pace was held to be an independent contractor though he had the right to have some one other than himself operate his engine or drive his team or to do this operating and driving himself. And we said that under such circumstances the authorities are all but conclusive that Pace should be deemed an independent contractor rather than an employee of the county. The case of Chisholm v. Walker, 2 B. W. C. C. 261, declares that he is not a servant, though he do work, if he is to furnish a horse as one means of doing the work. In Ash v. Lumber Co., 153 Iowa, 523, 133 N. W. 888, 38 L. R. A. (N. S.) 973, this from Quarman v. Bennett, 6 M. & W. 497, is approved:

"And whether such servant has been appointed by the master directly or intermediately through the intervention of an agent authorized by him to appoint servants for him can make no difference."

8a. Had a third person furnished the team, and Norton as its driver, it would scarcely be questioned that under the record in this case defendant would not have been liable had the negligence of Norton injured some one other than Norton. See Ash v. Co., 153 Iowa, 523, 133 N. W. 888, 38 L. R. A. (N. S.) 973; Quarman v. Bennett, 7 M. & W. 497, as approvingly analyzed in the Ash Case; Delory v. Blodgett, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114, 102 Ann. St. Rep. 328, approved in the Ash Case; the dissent in Howard v. Ludwig, 171 N. Y. 507, 64 N. E. 172, to which the Ash Case inclines as against the majority opinion; Morris v. Trudo, 83 Vt. 44, 74 Atl. 387, 25 L. R. A. (N. S.) 33; Stewart v. Co.. 131 Cal. 125, 63 Pac. 177, 724, 52 L. R. A. 205.

[8] Now, the great weight of authority holds that one test of whether one is a master is whether he would be liable to third persons for misconduct of the alleged servant. See Holbrook v. Hotel Co.. 200 Mich. 597, 166 N. W. 878. Why is not that a test here? If some one other than Norton had furnished Norton and a team to defendant and in hauling coal had injured some stranger, it would be conceded defendant is not liable. If that immunity rests on the fact that Norton and his team were furnished by some one other than Norton rather than

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by Norton and on the fact that he did the injuring instead of being injured, then this rule is not a test in this case. But the basis of the immunity is, not that the driver did not furnish himself and the team, nor that the driver injured instead of being injured. Such furnishing by a third person is but a circumstance tending to prove the ultimate defense that defendant had no right to exercise control. But such facts are not the only evidence of that ultimate fact. Other facts may prove that defendant lacked control over one who owned the team and did the driving. The test is not, who did the actual hauling or who owned the team, but is whether defendant had or had not control of the methods and details of doing the work. It follows that, if there was no right to control methods and details, it is quite immaterial that Norton rather than a third person owned the team with which Norton worked, or that though he did the work himself he might have substituted another for it, or that he injured himself, rather than a third person. With the essential right to control details and methods lacking, with the power of managing his own team permitted to remain in him, then though he did the driving himself, and injured himself instead of a third person, that cannot make him an employee.

[9] It is our judgment that there is sufficient competent evidence to sustain the finding of the Industrial Commissioner.

It follows that district court erred in annulling his order, and that the judgment of that court must be reversed.

Ladd, J., concurs in result.

Arthur, J., concurs.

Stevens, Preston, and Evans, JJ., concur in result on ground stated in last paragraph.

WEAVER, C. J. (dissenting). I. While the statute referred to by Mr. Justice Salinger at the outset of his opinion is correctly quoted as far as it goes, it omits the context without which its force and application may be misapprehended. The subsection so cited (Code Supp. 1913, § 2477 m16) contains the legislative definition of the words "workman" and "employee" as being synonymous terms and meaning "any person who has entered into the employment of, or works under contract of service, express or implied, * * * for an employer, except a person whose employment is purely casual and not for the purpose of the employer's trade or business; * * * provided that one who sustains the relation of contractor with any person, firm, association, corporation or the state, county, school district, municipal corporation, cites under special charter or commission form of government, shall not be considered an employee thereof."

It will thus be seen that, subject to the express exceptions found in the statute itself, the Compensation Act embraces within its scope all employers and all employees, without reference to their classification at common law. It addresses its provision, not to master and servant in the strict technical sense, but to "employer" and "employee," and prescribes for itself the meaning which shall be given to these terms Observing this statute, the sole question in cases of this character is whether the claimant of compensation entered the employment of the defendant or worked for him under contract of service, express or implied, and whether the injury of which he complains "arose out of and in the course of his employment." If this inquiry be answered in the affirmative, it matters not what may be the nature of the service performed or what the terms of the contract may be; the parties are thus brought within the scope of the act, and to this alone we must look for the measure of their mutual rights and obligations. If there be a contract of service, either express or implied, and the employee does not occupy the relation of a mere contractor, it is wholly immaterial whether

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he works by the year, month, day, or hour; whether his employment be for a fixed period or is terminable at the will of either party; or whether he receives payment on the basis of the time employed or of the work accomplished. That plaintiff in fact did work under contract and received injury arising out of and in the course of his employment is shown without dispute, and the sole question for our consideration is whether he must be denied compensation on the theory that he was an independent contractor within the meaning of the exception already quoted from the statute. The majority opinion affirms this proposition, a conclusion which I think is demonstrably wrong.

It is true, as suggested by the opinion, that the commissioner found for the appellant that plaintiff was a contractor and therefore not entitled to compensation. It is also true, as further suggested, that, where the facts found by the commissioner have support in the evidence, such finding is not open to review on appeal, but it is equally well settled that when the "transcript makes it appear as a matter of law that such finding is not sustained by competent evidence or is contrary to the evidence," the court may on appeal reverse the erroneous judgment. See Griffith Case, 183 Iowa, 415, 165 N. W. 577, L. R. A. 1918F, 923; Pierce v. Bekins, 185 Iowa, 1346, 172 N. W. 191.

The case now before us is one calling loudly for an application of such rule.

II. The rule that the act should be liberally construed and its provisions so applied as to promote the intended relief to injured employees is quoted by the majority—though for what purpose is quite undiscoverable, for in its discussion of the facts and law of the case the opinion treats the rule of liberal construction less as a standard by which the court is to be guided than as a starting post from which to sail away and never return.

III. As illustrating the tendency, I call attention to pertinent facts concerning which the majority goes far astray. It is true the plaintiff owned a team of his own and during the summer season earned his living principally by work for the city. As winter approached and city work slackened, he gave his time and attention to hauling coal, and for several winters he had found employment in that line with the defendant, coal dealer. At the opening of the winter in question, he went to the defendant's office and sought again to take up the work of hauling coal in their service and was told to be on hand the next morning for that purpose. It was arranged that he should use his own team and wagon; the defendant furnishing a wagon box on which its name was painted. For the work of hauling and delivering coal to defendant's customers plaintiff was to receive from 75 cents to $1.25 per ton according to the distance over which the deliveries were made. In each instance the load was made up at defendant's place of business or at the railway track. When weighed, duplicate tickets were given the plaintiff with directions as to the place of delivery. It was his business then to haul the coal to the customer, unload, obtain the purchaser's receipt on one of the tickets, and return it to the defendant's office. This process was repeated as often as the business of the day required. He had been engaged in this work steadily for about five weeks. He did no hauling for any other employer. At times the work would be completed before nightfall, and in such case he went to his home, where he remained until the following morning. He says that, on quitting for the day, he was told by defendant to be on hand in the morning, and that he made the practice of reporting to his employer each morning about 7 o'clock.

In all this there is nothing whatever inconsistent with the plaintiff's relation as an employee of the defendant and nothing whatever to characterize him as an independent contractor. In face of this showing, it seems strange that the opinion should say the "claimant could

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go or come when he pleased and work or not work as he pleased. He had the right to say what time he would devote to coal hauling. He could decline from time to time to haul at all," etc. If this be literally true (though it is not true in the apparent sense intended), what of it? It is equally true of every person engaged in the service of another. The hired workman or servant is not a slave, nor is his employer clothed with absolute authority to control his servant's movement. The one may drop the service at any moment, and the other may sever the relation and peremptorily discharge the employee, and the possession or exercise of such power does not prove that the relation between them is that of contractor and contractee.

Again the opinion indulges in this remarkable statement:

"At no time was the claimant engaged in the business of hauling coal for defendant or any one. * * * When Norton came in the morning he certainly was not yet employed. * * * He could not be discharged because he never was employed."

This is a palpable, though of course unintended, distortion of the undisputed facts. The plaintiff "was" both employed and engaged in the business of hauling coal for defendant. He had been steadily so employed and engaged for at least five weeks, and but for his injury would doubtless have continued in that relation for the remainder of the winter, as he had on previous occasions.

There is still another proposition which seems to have evaded the attention of courts, and law-writers until brought forth to complete the wall of defense which the opinion laboriously erects around the employer in this case. It is repeatedly pointed out and insisted that plaintiff used his own team in defendant's service, and that this, if nothing else, emphasizes the conclusion that plaintiff was a contractor. By insistent repetition of this point the writer of the opinion so far convinces himself as to declare that, even if the owner of a team is engaged with it in the service of another, "he does not become a servant if he does not yield to that other the control or management of the team. To make that relationship, the master must be in control of both man and team." In support of this dictum we are cited to the case of Ash v. Lumber Co., 153 Iowa, 523, 133 N. W. 888, 38 L. R. A. (N. S.) 973, and authority not involving in any manner the Workmen's Compensation Act, and having only a remote bearing on any issue in this case. That the proposition of the opinion is incorrect has been settled in many cases I shall soon show.

A person who provides his own horse and undertakes with the proprietor of a dairy to cart milk to and from a creamery during a certain period, on such dates as the proprietor should fix, and to receive pay at a rate per gallon of the milk hauled, is a servant, not a contractor. Clark v. Co-Op. Society, Law Reports Curr. Dig. 1913, vol. 772.

A workman employed to cart stone using his own cart and horse and paid by the day and working for other people when not needed by such employer is a workman under the Compensation Act. McNally v. Fitzgerald, 7 B. W. W. C. 966.

The precedents to this general effect are numerous, but I will extend this dissent no farther than to cite two comparatively recent cases which are entirely parallel in fact and principle with the case at bar. In Tuttle v. Embury, 192 Mich. 385, 158 N. W. 875, Ann. Cas. 1918C, 664, decided by the Michigan court, the defendants were the owners of saw logs which they desired hauled from the skidway to a distant sawmill. For this purpose it employed, not only its own teams and drivers, but others as well. The plaintiff owning a team of his own applied for work and he was engaged to do hauling. He was to use his own team and outfit, except a sleigh furnished by defendant. He lived and boarded at home, kept, cared for, and drove his own team, and was to

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receive $2 per thousand feet for logs hauled by him. Ordinarily he made one trip a day, but no requirement to this effect was placed upon him. He controlled his own working hours and was under no compulsion to work every day. He was assisted in loading and sometimes in unloading by defendant's employees, but drove his own team, chose his own route, and controlled the size of the loads which he hauled. The logs were measured at the mill and the driver given a slip or ticket upon return of which to the office he was credited with the amount and paid accordingly. Plaintiff, being injured in this work, claimed compensation under the statute of that state which is quite like our own in its provision that it shall apply to every person, firm, and corporation "who has any person in service under any contract of hire, express or implied, oral or written." The defendant resisted the claim, as is done in this case, on the theory that plaintiff was not an employee or servant but a contractor, and supported its defense by the same arguments relied upon by the majority in this case.

The court, basing its conclusion upon the statute and upon the admitted facts and referring to authorities upon the distinction between employee and contractor, says:

"In some cases much stress is laid upon the fact that the work to be performed is of an indefinite amount subject to discharge and control in that regard. Others, whether the employment is of a general, independent character, like that of draymen and common carriers, becomes the controlling question. We are of the opinion that the test of the relationship is the right to control. It is not the fact of actual interference * * * that makes the difference between an independent contractor and a servant or agent. 26 Cyc. 1547.

"In our opinion there was such control over the work of Tuttle, by the company, as makes it inconsistent to say that Tuttle was an independent contractor. His work was limited by the right of the company to terminate it at any time, and it was for no definite period or amount. The loading and unloading were under control of the company, both as to time and place. True, he was in charge of his team while going from the skidway to the mill, but that was true of all the drivers, whether working by the month or the thousand."

Still more strikingly identical with the present case is Waters v. Fuel Co., 52 Minn. 474, 55 N. W. 52, 38 Am. St. Rep. 564. There, the plaintiff, as in this case, was hauling coal for the defendant. He owned and used his own team and the running gear of a wagon for which the defendant furnished a wagon box. He was not sure of business every day and could quit when he wanted to. He was paid every Saturday, a fact which the court says tends to show that the employment was continuous until suspended. He was paid by the ton for the coal hauled by him. The manner of doing the business was precisely like that pursued in the instant case. When the dealer received a customer's order for coal, it was delivered to the hauler to execute. He loaded the coal, took it to the specified place, got the money for it, or took a receipt acknowledging its delivery and returned it to his employer. Upon these facts the court, being called to determine whether the workman's relation to the defendant was that of employee or contractor, said:

"We think this evidence shows that the person who delivered the coal was in the service of the defendant. though the term of service was precarious; and we do not see that it is material that he was paid by the load, by the hour, or by the day for his work. He represented the master in all the details of the work enumerated, and while he remained in defendant's employment he was subject to its control. If he had been at work by the day or by the month, and had been furnished with a team and wagon by the defendant, would the circumstances of the delivery have been any different? Or would the control of the defend-

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ant over the acts of the employee had been otherwise or greater than it was? His orders were to collect the pay for the coal in advance. If it had not been so paid for, he would have been obliged to have brought the coal back to the yard. The testimony shows that he had worked for the company about three months, hauling coal daily. He had in the mean time rendered service for no one else, and appeared to be subject to its orders, and was treated as one of its teamsters or drivers.

"It is not easy to frame a definition of the terms 'independent contractor' that will satisfactorily meet the conditions of different cases as they arise, as each case must depend so largely upon its own facts. One text-writer declares such contractor to be one who undertakes to do specific pieces of work for other persons, without submitting himself to their control in the details of the work, or one who renders the service in the course of an independent employment, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. 1 Shear. & R. Neg. §§ 164, 165.

"So it is said that an independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of the work. Powell v. Virginia Const. Co., 88 Tenn. 692, 13 S. W. 691 [17 Am. St. Rep. 925].

"The plaintiff is not concluded by these definitions. But, without attempting to discuss abstract definitions, we feel satisfied that, upon the undisputed facts in the case, the court was right in holding that the relation existing between the defendant and the carrier of the coal was that of master and servant."

The distinction between employee or servant and independent contractor has often been considered by the courts, but no statement of the rule has yet been accomplished which perfectly fits every case. The rule quoted by the Minnesota court from Shearman and Redfield's Negligence is perhaps the one most generally approved. But while the reserved right of the employer to control the details of the work is the most obvious test of the relations of employer and employee, it is to be kept in mind that it is the power or authority to control and not the control actually exercised to which we must look in reaching our conclusion. As having bearing on the point here discussed, see, also, Madisonville R. Co. v. Owen, 147 Ky. 1, 143 S. W. 421; Hamilton v. Trading Co., 33 Okl. 81, 124 Pac. 38; Cockran v. Rice, 26 S. D. 393, 128 N. W. 583, Ann. Cas. 1913B, 570; Macdonald v. O'Reilly, 45 Or. 589, 78 Pac. 753; State Acc. Fund v. Jacobs, 134 Md. 133, 106 Atl. 255; State ex rel. v. Dist. Court, 128 Minn. 43, 150 N. W. 211; City v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408; Mullich v. Brocker, 119 Mo. App. 332, 97 S W. 549; O'Donnell v. Clare, 6 B. W. C. C. 457; Thompson v. Twiss, 90 Conn. 444, 97 Atl. 328, L. R. A. 1916E, 506; Baldwin v. Abraham, 67 N. Y. S. 1079; Komula v. Assurance Co., 165 Wis. 520, 162 N. W. 919, subd. 4; Madix v. Brewing Co., 154 Wis. 448, 143 N. W. 189. The plaintiff in this case did not undertake to haul or deliver any specific amount of coal. He did not undertake the performance of an entire contract for a gross price, and either party was free to terminate the relation at any time without any liability to the other for damages.

The defendant was a dealer receiving orders and calls for coal from individual consumers scattered over the city, necessitating the employment of haulers by whom such orders could be filled. The plaintiff was employed for that purpose. Such service implied authority on part of the defendant to direct when, where, and to whom deliveries were to be made, and duty on plaintiff's part to observe all reasonable and proper directions with reference to the work he undertook to perform. He was at all times at the beck and call of his employer in a manner and to an extent inherently inconsistent with the independence of a contractor.

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It is wholly immaterial whether he engaged in other work in the summer season, or served different employers on other occasions, or that this employment was for no definite period and might be terminated at any time. Subject to the statutory exceptions and no other, the law imposes on the employer the obligation to make compensation to his employees for injuries arising out of and in the course of their employment without regard to the nature or terms or tenure of the service performed by them. It also imposes upon the arbitrators, the commissioner, and the courts the duty of liberal construction of its terms, and, if in any given case the proved facts leave the question in doubt whether the relation between the parties is that of employer and employee or contractor and contractee, an observance of the rule last mentioned requires the doubt to be resolved in favor of the claimant. So far as this case is concerned, we need not go to this extent, for there is no room for reasonable doubt of the plaintiff's right to the compensation adjudged to him by the trial court.

Such award is not the imposition of a penalty. The statute provides no penalty nor punishment. It simply recognizes the essential justice of making an industry or business bear in some reasonable degree the burden of the human wreckage which its prosecution brings about. In this manner and by providing for insurance against such liability, the ultimate loss falls upon society at large for the benefit of which all work is done and all business is transacted.

The opinion prepared for the majority is destructive of the statute, both in letter and in spirit. It ought not to have our approval. The judgment appealed from should be affirmed.

YOUNG v. MISSISSIPPI RIVER POWER CO. (No. 32021.)

(Supreme Court of Iowa. Jan. 11, 1921.)

180 Northwestern Reporter, 986.

MASTER AND SERVANT — INJURY TO PUMP ENGINEER ATTEMPTING TO RESTORE BROKEN ELECTRIC WIRE CROSS-ARM HELD ONE "ARISING OUT OF AND IN COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Where engineer of pumping station, charged with the duty of attending to the operation of pumps by use of electric power transmitted over the wires of the employer, a power company, was doing work for its interest in unloading a transformer when the operation caused the cross-arm on a pole carrying the company's high-voltage wires to break, disturbing the wires and causing them to drop or sag, he was not a mere volunteer when he attempted to repair the broken cross-arm, and his death in so doing was an injury "arising out of or in the course of his employment" within Workmen's Compensation Act; the peril threatening employer's property being an emergency justifying his conduct.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from District Court, Lee County; Henry Bank, Jr., Judge.

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From a judgment of the district court connfirming an award in plaintiff's favor under the Workmen's Compensation Act (Laws 1913, c. 147), the defendant appeals. The material facts are stated in the opinion. Affirmed.

George B. Stewart, of Ft. Madison, and J. O. Boyd, of Keokuk, for appellant.

E. C. Weber and John L. Benbow, both of Ft. Madison, for appellee.

WEAVER, J. The defendant is a corporation owning and operating an extensive plant for the production and distribution of electric power at Keokuk, Iowa. From its dam it maintains various transmission lines, one or more of which extends from its central station to the town of Ft. Madison, a distance of 24 miles. At Ft. Madison pumps are installed operated by electric power to lift surface water collecting there over the levee into the river. The transmission line carries 11,000 volts of electricity, from which about 440 volts are diverted by the use of a transformer for the operation of the pump.

In December, 1914, John D. Young, a married man 34 years old, was, and for a year or more had been, in the employment of the defendant company as engineer of the pumping station. To use the language of the defendant's witnesses, Young had full control of the station and could cut off the power by turning the switch. At the date named defendant had for some time been engaged preparing for the installation of a new transformer at this station. On December 8th Young, by telephone, called up the Keokuk office and reported to the superintendent that the transformer had arrived at the railway station. In response he was directed to secure a drayman to do the hauling. The superintendent, as a witness, further states that in addition to instructions regarding the employment of a drayman he told Young that he (witness) would come to Ft. Madison in the afternoon and "oversee the handling" of the transformer. Young did engage a drayman, and, without waiting for the arrival of the superintendent, they went to the railway station where they loaded the transformer on the dray and drove to the place where it was to be lifted to a platform prepared for it. Having arrived there, they undertook to unload it. As near as we can gather from the record, they drove the dray to the foot of the derrick or framework on which it was intended to place the transformer. They there arranged a block and tackle suspended from the cross-arm of one of the poles on which the transmission wires were strung, and with it proceeded to lift the transformer from the dray, intending, when they had the load thus suspended, to drive the dray out from under it. Whether it was their purpose to hoist the transformer to its resting place or the framework or to deposit it on the ground does not appear. At some stage of the lifting, not definitely mentioned, the cross-arm bearing the load broke. It was not completely severed, but the broken end carrying the wires dropped or sagged below their proper position. The drayman, the only living witness, says that thereupon Young "went up to fix the cross-arm and straighten it up," and that "he got a little too close to the electric power and fell from the wires to the ground." He was instantly killed.

Proceedings for an award of compensation were instituted on behalf of the widow and family. The defendants resisted the demand on the ground that the deceased was intoxicated at the time of receiving the fatal shock, and thereby brought about his own death, and that the injury suffered by him did not arise out of or in the course of his employment.

The board of arbitrators found against the defendant on each of the issues tendered. That finding was confirmed by the State Industrial Commissioner, and on appeal to the district court it was again sustained. While there is testimony in the record tending to show that the deceased

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had drank intoxicants to some extent on the day of his death, it falls far short of that measure of proof which would justify a finding that he was drunk or incapable of attending to his usual duties in a reasonably careful and efficient manner. Indeed, the conclusiveness of the commissioner's finding upon this branch of the case does not seem to be seriously contested on this appeal. The proposition most strenuously contended for by counsel for appellant is that the injury resulting in the death of deceased did not arise out of nor in the course of his employment. It is said that the employment and duties of the deceased were strictly confined and limited to his work as engineer of the pumping station; that he was charged with no duty or authority to make repairs or remedy breaks or defects in the wires carrying the electric current; that in attempting to repair or restore the broken cross-arm he was acting as a mere volunteer wholly outside of the scope of his employment; and that his death in so doing imposes no liability on his employer.

If there are precedents going to the extent of the appellant's claim in this respect, we are quite sure that they have never been followed by this court, and we regard them unsound in principle and contrary to the spirit and intent of our statute. Generally speaking, the employer of labor rightfully expects from his employee something of a spirit of loyalty and a reasonable degree of care for the protection of the employer's property in or about which his services are engaged. The hired servant is something more than a mere machine or automaton, and he brings to the service of the hirer not merely a pair of hands, but hands plus brains and conscience which will forbid an honest employee to stand idly by refusing to interpose the slightest effort to save his employer from irreparable injury or loss for no better reason than that the strict letter of his contractor does not require such action on his part. Such terms are rarely, if ever, expressed in the words of the agreement between employer and employee; but it is at least what, for want of a better term, we may call a moral implication in every contract of hire, and the employee, no matter what may be his rank or station or what may be the prescribed limit or range of his ordinary duties, who discovers imminent peril or calamity threatening his employer in person or property, and without stopping to debate with himself whether he will respond to the emergent call upon his manhood, at once hastens to avert the damages as best he may, is not a mere intermeddler or volunteer, and the injury to which he thus exposes himself arises out of and in the course of his employment within the meaning of the statute, and that, too, even though in the stress of the emergency he disregards some of the general rules prescribed for the control of his conduct under normal conditions.

Without extending this opinion to quote largely from the authorities, we cite the following in which the conclusion we here announce is distinctly upheld: Harding v. Colliery Co., 2 K. B. (Eng.) 747; Matthews v. Tile & Timber Co., 1 W. C. C. 124; F. M. Car Co. v. Commission, 168 Wis. 436, 170 N. W. 285; Dragovich v. Iron Co., 269 Ill. 478, 109 N. E. 999; State v. Brewing Co., 129 Minn. 176, 151 N. W. 912; U. S. F. Co. v. Commission, 174 Cal. 616, 163 Pac. 1013; Northern G. & E. Co. v. Pietzvak (Ind. App.) 118 N. E. 132; G. A. F. & L. v. Evans (Tex. Civ. App.) 201 S. W. 705; So. S. Co. v. Stubbs (Tex. Civ. App.) 199 S. W. 343; Rzepczynski v. Brass Co. (Sup.) 165 N. Y. Supp. 1110.

The general doctrine is well summed up in the case of London & E. S. Co. v. Brown, 7 Sc. Sess. (5th Ser.) 488, where Lord Justice Clerk says:

"I cannot doubt that a sudden emergency where there is danger a workman does not go out of his employment if he endeavors to prevent the danger from taking effect."

The facts in the case now before us bring it clearly within the rule of the cited cases.

Young was charged with the duty to attend the operation of the pumps by use of the electric power transmitted over these wires. He was

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doing work for and in the interest of the defendant when the cross-arm broke disturbing the wires and causing them to drop or sag. They were charged with a deadly current. The break in the arm and the resulting disturbance of the wires must have at once impressed him with the possibility of grave danger from that source both to life and property. That he should act at once and investigate the broken appliance with a view to preventing such harm is not strange; and, even though what he did may not have been the wisest expedient which could have been adopted, it detracts nothing from the merit of the plaintiff's claim for compensation. His negligence, if any, is not available to the appellant as a defense or as affecting his measure of recovery.

The finding by the commissioner and its approval by the trial court have ample support in the evidence and must be accepted as final.

The judgment of the district court is affirmed, with interest from the date of its rendition.

Affirmed.

Evans, C. J., and Preston and De Graff, JJ., concur.

SOUTHERN v. WESTERN STATES PORTLAND CEMENT CO. (No. 22879.)

(Supreme Court of Kansas. Jan. 8. 1921.)

194 Pacific Reporter, 637.

(Syllabus by the Court.)

2. MASTER AND SERVANT — ARBITRATION HELD REFUSED, SO AS TO JUSTIFY ACTION UNDER WORKMEN'S COMPENSATION ACT.

The writing of a letter by a workman to his employer with regard to a claim under the Compensation Act, stating that he wishes to negotitate for a settlement, and that if an agreement cannot be reached he desires an arbitration, and requests that the matter be taken up with his attorney, amounts to a consent on his part to arbitration, and a failure of the employer for over two months to respond to it may be regarded as such a refusal to consent thereto as to authorize the bringing of an action by the workman without a request to the judge of the district court to appoint an arbitrator.

(For other cases, see Master and Servant, Dec. Dig. § 398½, New, vol. 8A Key-No. Series.)

3. MASTER AND SERVANT — OFFER TO ARBITRATE DOES NOT IMPAIR RIGHT TO SUE UNDER WORKMEN'S COMPENSATION ACT, AFTER PREVIOUS REFUSAL.

Where by reason of the employer's refusal to arbitrate a workman is authorized to bring an action for compensation and does so, a subsequent offer of the defendant to settle the matter by arbitration does not impair the right of the plaintiff to maintain the action.

(For other cases, see Master and Servant, Dec. Dig. § 398½, New, vol. 8A Key-No. Series.)

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4. MASTER AND SERVANT—COMPENSATION ACT DOES NOT CONTEMPLATE SUBSTITUTION OF ARBITRATOR FOR JURY.

A suit under the Compensation Act is tried according to the ordinary procedure and the statute does not contemplate the substitution of an arbitrator for the jury.

(For other cases, see Master and Servant, Dec. Dig. § 408.)

5. MASTER AND SERVANT — JUDGMENT FOR IMMEDIATE PAYMENT OF FULL AMOUNT OF COMPENSATION PROPER.

Where an injured workman is authorized to seek compensation by action. as distinguished from arbitration. and does so, the court has jurisdiction to render judgment for the immediate payment of the full amount to which he is found to be entitled.

(For other cases, see Master and Servant, Dec. Dig. § 411.)

Appeal from District Court, Montgomery County.

Action under the Workmen's Compensation Act by Henry Southern against the Western States Portland Cement Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Banks & O'Brien, of Independence, for appellant.

J. D. Brown, of Independence, and Chas. D. Welch, of Coffeyville, for appellee.

MASON. J. Henry Southern recovered a judgment against the Western States Portland Cement Company under the Workmen's Compensation Act, and the defendant appeals.

[1] 1. The action was brought in July, 1919. A demurrer was filed August 1. 1919, which was overruled January 17. 1920. An answer was filed January 26, and on February 4 the trial was begun, over an objection by the defendant on the ground that the issues had not been joined 10 days before that, as required by the statute. Gen. Stat. 1915, § 7215. This ruling is now complained of. It is clear that, if the case had been set for trial at a later date, the defendant would not have been able to make any better or different showing, and no contention is made that any actual prejudice resulted. To reverse the judgment under such circumstances by reason of the trial having been begun a day earlier than contemplated by the Code would be futile and against the express mandate of the statute. Gen. Stat. 1915, § 7485. Upon the commencement of the trial the plaintiff was allowed to file a reply, consisting of a general denial, and the argument of the defendant that the case was not ripe for hearing is also based upon this additional consideration. The reply was probably unnecessary; at all events it made no change in the substantial controversy. and did not materially affect the situation. Thompson v. Machine Co., 94 Kan. 453, 146 Pac. 1188.

[2] 2. The statute provides that if an employer refuses to consent to an arbitration of a workman's claim for compensation, an action may be brought upon it, but only where the workman has consented to an arbitration, or applied to the judge of the district court to appoint an arbitrator. Laws 1917, c. 226, § 20. The defendant contends that the present action was not maintainable because the conditions stated had not been met. More than two months before the filing of the petition a letter was sent to the defendant, containing a statement on behalf of the plaintiff that he wished to negotiate for a settlement of his claim, and that if an agreement could not be reached he desired an arbitration, and requested that the matter be taken up with his attorney, whom he

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named, and by whom his name was signed. To this no response was made. The letter was a sufficient consent to arbitrate on the part of the plaintiff. It amounted to a fair effort to bring about an arbitration, and the failure of the defendant to respond to it may be regarded as a refusal to consent thereto. Roper v. Hammer. 106 Kan. 374, 187 Pac. 858. The plaintiff having consented to arbitration and having been met with a refusal was not required to apply to the district judge to appoint an arbitrator. Goodwin v. Packing Co.. 104 Kan. 747, 750, 180 Pac. 809.

[3] 3. The defendant in its answer offered to arbitrate and renewed the offer at the trial. The plaintiff's right to sue, however, accrued with the refusal of arbitration by the defendant, and after having been acted upon could not be impaired by a subsequent change of policy on the part of the employer.

[4] 4. The defendant asserts that the court erred in submitting the case to a jury, the suggestion being that an arbitrator should have been appointed. The statute provides that the judge of the court in which an action might be maintained may under certain circumstances appoint an arbitrator (Laws 1917, c. 226, § 11), but the provision is merely a a means for aiding in the settlement of the controversy by arbitration. If the claim is to be settled by a lawsuit, the ordinary methods of such procedure are to be employed; an arbitrator is not to be substituted for a jury.

[5] 5. A final contention of the defendant is that the court had no jurisdiction to render a lump sum judgment. Where the matter is settled by arbitration, compensation for future loss can be awarded only in periodical payments, but a different rule is provided where the controversy is determined by a court. Boyd v. Mining Co.. 105 Kan. 551, 553, 185 Pac. 9.

The judgment is affirmed.

All the Justices concurring.

LAWSON v. NEW YORK & P. R. S. S. CO. (No. 23836.)

(Supreme Court of Louisiana. May 31, 1920. On Rehearing Jan. 3, 1921.)

86 Southern Reporter, 815.

(Syllabus by Editorial Staff.)

1. MASTER AND SERVANT—EVIDENCE HELD TO SHOW COMPENSATION CLAIMANT'S TEMPORARY TOTAL DISABILITY.

Evidence as to injury from strain *held* to show temporary total disability within Employers' Liability Act (Act No. 20 of 1914, § 8, subsec. "a," as amended by Act No. 38 of 1918).

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

O'Niell, J., dissenting in part.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Proceedings by Jack Lawson against the New York & Porto Rico Steamship Company, for compensation for injuries under the Employers' Liability Act. From a judgment rejecting his demand, plaintiff appeals. Suit dismissed on rehearing for want of jurisdiction.

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Wm. H. Byrnes, Jr., Jules A. Grasser, and Rene A. Viosca, all of New Orleans, for appellant.

John May, of New Orleans, for appellee.

O'NIELL, J. Plaintiff appeals from a judgment rejecting his demand for compensation under the Employers' Liability Act (Act No. 20 of 1914). He sprained his back, or suffered what is technically termed a sacroiliac separation, while working as a longshoreman, unloading a steamship of the defendant company.

[1] The district judge has not furnished us a written opinion, further than that he considered "the law and the evidence to be in favor of the defendant." On the contrary, the law and the evidence appear to us to be entirely in favor of the plaintiff. He testified that, at about 8:30 a. m., on the 30th of July. 1919, while employed with a gang of men, lifting a heavy steel beam, called the burden piece, supporting the covers of the ship's hatch, he sprained his back so that he was unable to continue working. He immediately reported to the foreman, who, being short-handed, appealed to him to go into the hatch and work until he, the foreman, could find a man to relieve him. Plaintiff went into the hatch and worked, lifting sacks of sugar, with great difficulty, until about 3:30 or 4 o'clock that afternoon, when his suffering compelled him to quit. He again reported to the foreman, who sent him to the Flint-Goodrich Hospital. then supposed to have charge of the patients of the indemnity company. The physician of the indemnity company was promptly notified by defendant of plaintiff's injury. He was examined by the physician or surgeon in charge of the hospital on July 31 or August 1, 1919; and the physician testified that he found plaintiff complaining of pains in his back and of being unable to move. The physician strapped plaintiff's back with adhesive plasters, and issued a certificate on August 28, 1919, saying that plaintiff was injured on July 30, 1919, and was yet under his treatment and not yet able to work. In his testimony in this case, the doctor confirmed his diagnosis of the case, saying that plaintiff was yet unable to work. The assistant surgeon in charge of the hospital ordered a sacroiliac belt, a contrivance made especially for sprained back or sacroiliac separation; and plaintiff was yet wearing the belt at the time of the trial of this case.

Plaintiff's testimony is corroborated by that of two longshoremen, who were working with him on the ship, by the testimony of the foreman of the gang, and by the testimony of the physicians who examined him at different times after the accident. He consulted, and was examined by, eight physicians, including two X-ray specialists, with regard to the injury to his back. It appears that the examination by each physician was at a different time. Five of the physicians testified in this case, two having been summoned by the plaintiff, and three by the defendant. It does not appear that any of them had any reason to suspect that plaintiff was malingering. On the contrary, their testimony leaves no doubt that plaintiff was seriously injured in the manner alleged in his petition, and proven by his testimony and by that of his foreman and fellow workmen. In fact, no attempt was made to discredit the veracity of the plaintiff, of the foreman, or of the two other longshoremen, who testified in his behalf. The foreman testified that plaintiff had worked for him, off and on, for seven years, and had been one of his regular men; that plaintiff was always a man of great physical strength before the accident; that he, the foreman, therefore, always put plaintiff at the hardest task, and that he, plaintiff, had never complained of any work being too hard for him before the accident.

The evidence shows that plaintiff's average weekly wages amounted to $30 or more before the accident. Under subsection (a) of section 8 of Act 20 of 1914, as amended by Act 38 of 1918, p. 53, he should be

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paid "for injury producing temporary total disability to do work of any reasonable character, fifty-five per centum of wages during the period of disability, not however, beyond three hundred weeks." The maximum limit however is fixed at $16 a week by section 3 of Act 38 of 1918. Plaintiff claimed $16 per week for 400 weeks alleging that his disability was not only total but permanent. The testimony of the physicians convinces us that though plaintiff's disability to do work of any reasonable character was a total disability, it is only temporary. He is therefore entitled to the weekly compensation claimed in his petition, during the period of disability, not, however, beyond 300 weeks.

The judgment appealed from is annulled, and it is now ordered, adjudged, and decreed that plaintiff recover of and from the defendant company compensation at the rate of $16 per week, during the period of his disability, commencing on the 30th of July, 1919, not, however, beyond 300 weeks from that date; the amount of compensation due for the time which will have expired when this judgment shall have become final shall then be collectible in full, and the balance of the compensation shall be payable weekly thereafter. The defendant is to pay all costs of this suit.

On Rehearing.

SOMMERVILLE, J. [2] This is a personal injury suit based upon a maritime contract, for compensation under the State Employer's Liability Act.

Formerly the admiralty courts could alone have had original jurisdiction, but by an act of Congress an amendment to the Judicial Code, approved October 6, 1917—chapter 97, 40 Stat. 395 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 991[3], 1233)—was passed; and it was:

"An act to amend sections 24 and 256 of the Judicial Code, relating to the jurisdiction of the district courts, so as to save to claimants the rights and remedies under the Workmen's Compensation Law of any state."

While the case was pending in this court, on appeal, the Supreme Court of the United States, in an opinion in Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed.—held the amending statute above referred to to be unconstitutional, null, and void. On the strength of that decision, defendant's counsel filed a motion for rehearing, accompanied by a plea to the jurisdiction of the state courts. As this suit is brought upon a maritime contract over which the District Courts of the United States have exclusive original jurisdiction, the suit will have to be dismissed.

It is therefore ordered, adjudged, and decreed that this suit be dismissed for want of jurisdiction.

O'NIELL, J., dissents on the ground that defendant did not plead the unconstitutionality of the amendment of the Judicial Code until the decree had been rendered by this court.

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MAXWELL'S CASE.

(Supreme Judicial Court of Maine. Jan. 13, 1921.)

111 Atlantic Reporter, 849.

1. MASTER AND SERVANT — PETITION UNDER COMPENSATION ACT SHOULD SHOW NATURE OF CLAIM.

Under Workmen's Compensation Act, § 30, requiring the petition for compensation to set forth the matter in dispute and petitioner's claim in reference thereto, petition for injury to tip of finger should show whether the claim is for partial or total incapacity, for specific compensation or permanent impairment of the member, especially as under the last paragraph of section 16, added by Pub. Laws 1919, c. 238, it is for the full commission, and not its chairman, to pass on the extent of a permanent impairment.

(For other cases, see Master and Servant, Dec. Dig. § 401.)

2. MASTER AND SERVANT — AWARD UNDER COMPENSATION ACT NOT BARRED BY AGREEMENT UNLESS APPROVED BY LABOR COMMISSIONER.

Under Workmen's Compensation Act, §§ 35, 36, agreement between injured employee and employer for compensation is not binding on the employee, so as to prevent award under the act unless modified on review by a member of the commission, where it has not been approved by the labor commissioner.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

3. MASTER AND SERVANT — LOSS OF PART OF PHALANGE OF FINGER HELD NOT "LOSS OF PHALANGE OF FINGER" WITHIN COMPENSATION ACT.

Within Workmen's Compensation Act, § 16, specifying the compensation for loss of the first phalange of a finger, there is not even a substantial loss thereof, where the injured employee is still able to bend the finger at the distal joint, and has left practically a third of the bone of the phalange and some part of the nail.

(For other cases, see Master and Servant, Dec. Dig. § 385[12].)

Appeal from Supreme Judicial Court, Kennebec County, in Equity.

Proceeding by Harland C. Maxwell for compensation under the Workmen's Compensation Act, opposed by the Winthrop Mills Company, employer, and the American Mutual Liability Insurance Company. From a decree confirming the finding of the chairman of the commission in favor of petitioner, the employer and insurance company appeal. Reversed and recommitted to Industrial Accident Commission.

Argued before Spear, Hanson, Philbrook, Morrill, and Wilson, JJ.

Andrews & Nelson, of Augusta, for appellants.

WILSON, J. An appeal from a decree of a sitting Justice under section 34 of the Workmen's Compensation Act, now found in chapter 238, P. L. 1919, confirming the finding of the chairman of the Industrial Accident Commission. The petitioner was injured in the mill of the Winthrop Mills Company on the 6th day of December, 1919. From the report of the evidence, it appears that the petitioner and his employer entered into an agreement as to the compensation he was entitled to re-

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ceive under the Compensation Act, which was paid to him under and in accordance with the agreement for seven and a fraction weeks or until February 7, 1920.

More than a month after the payments under this agreement ceased, on March 20, 1920, the petition on which these proceedings are based was filed with the commission as though no agreement had been entered into. The petition evidently was made on a printed form furnished by the commission, and in substance sets forth as the basis of his claim: First, that he was injured on the sixth day of December, 1919, by an accident arising out of and in course of his employment with the Winthrop Mills Company; second, that the accident occurred through his finger being caught in the gears of the machinery in the mill where he was employed; third, that it resulted in a "laceration of the end of the middle finger of left hand requiring amputation of the end."

The remainder of the petition follows, in full:

"Did emyloyer have notice in writing of the accident? Yes.

"Did employer have knowledge of the injury? Yes.

"Have you entered into an agreement on a form furnished by the commission?

"Has said agreement been approved by the commissioner of labor? No.

"Whereupon your petitioner prays that after due notice a hearing may be had thereon and that he may be awarded such compensation as he may be entitled to in the premises."

A hearing was held by the chairman of the commission. It appears from the printed case that the accident resulted in a "trifle" more than two-thirds of the distal phalange of the middle finger of the left hand being amputated. There was left, however, sufficient of the phalange so that the finger could be bent at the first joint, and the roots of the nail were still left.

According to the testimony of the petitioner, it was his intention under these proceedings to claim compensation for the permanent impairment of the usefulness of the finger, presumably under the last paragraph of section 16 of the act. The chairman of the commission, however, heard the case alone and awarded him compensation under section 16 as though for the loss of the entire phalange and upon the consideration, as he put it, that "for all practical and useful purposes the phalange is gone."

The respondents filed a formal answer and contend: First, that the petition is deficient in that it does not set forth the "matter in dispute, and the petitioner's claim in reference thereto." as required by section 30 of the act, and that the commissioner who heard the case should have ordered it amended to comply with the statute which, though requested, he refused to do, and held the petition sufficient and proceeded with the hearing. second, that having already entered into an agreement and received compensation under it, he cannot obtain additional compensation except by proceeding under section 36 of the act; third, that since the petitioner based his claim on the permanent impairment of the usefulness of the finger, the amount of the compensation to which he was entitled could not be determined until the full commission had determined the extent to which the usefulness was impaired; fourth, that the finding of the chairman that the petitioner suffered the loss of the entire distal phalange was not warranted from the evidence inasmuch as it appeared that nearly a third of the bone of the phalange remained, and as a matter of law it was error to hold that the loss "for all practical or useful purposes" should enter into the determination of whether the loss of even a major part of a phalange entitled the petitioner to compensation under the specific provisions of section 15 of the act as for the loss of the entire phalange.

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[1] We think the contentions of the respondents, in part at least, must be sustained. Even though the commission may under section 37 of the act provide blank forms for petitioners, it cannot dispense with the plain requirements of the statute. Section 30 of the act requires that the petition shall set forth "the matter in dispute and the claim of the petitioner in reference thereto." The respondent is entitled to have this provision complied with in order that he may be prepared to meet the claim. Especially is this so since the addition of the last paragraph to section 16, in order that it may appear at the outset whether the chairman or the full commission must hear. The petition printed as a part of this case contains nothing that would apprise any one of the matter in dispute or the petitioner's claim relating thereto. Technical or formal language should not be required, but in substance the nature of the petitioner's claim should be set out in his petition—whether for partial or total incapacity, for specific compensation or permanent impairment of the usefulness of the member. We think as a matter of procedure the chairman should have ordered the petition amended as requested by the respondents. but whether a failure to do as alone constitutes a ground of appeal, unless it clearly appears that the rights of the respondent were thereby prejudiced, it is not necessary to decide in this case.

[2] As to the respondent's contentions that. since an agreement was entered into between the petitioner and the respondent under which the petitioner has already received compensation and which under section 35 of the act has the binding force of a judgment, he is thereby precluded from receiving any additional compensation unless such agreement is first modified in accordance with the provisions of section 36: Such, we think, would be the result if the agreement has been approved by the labor commissioner and is broad enough to cover all the compensation to which he is entitled under the act. Such agreements, however, do not bind the employee, except as to the conditions covered by them as a basis for the compensation agreed upon. Hunnewell's Case, 220 Mass. 351, 107 N. E. 934; Lemieux's Case, 223 Mass. 346. 111 N. E. 782. It does not appear from the printed case whether the agreement referred to in the evidence was ever approved by the commissioner of labor, or what its terms were. Its approval is expressly denied in the petition. Upon the evidence before us we are therefore unable to pass upon the respondent's contention on this point.

In answer to a question by the chairman, the petitioner stated that he asked the compensation in these proceedings upon the ground that there had been a permanent impairment of his finger—meaning in usefulness— by reason of the injury he suffered. Whereupon the respondents objected to further hearing by the chairman alone, as such claims under the last paragraph of section 16 of the act must be determined by the full commission.

[3] The chairman, however, heard the case, but based his decision on an entirely different ground, viz. that the loss, as he puts it, of "nearly three-fourths of the distal phalange, constitutes the loss of the entire phalange for all practical or useful purposes," and held that the petitioner had lost the phalange of his finger within the meaning of section 16 of the act and was entitled to the specific compensation therein provided, less the sums he had already received.

The decision just handed down by this court in the case of McLean v. American Express Co., 119 Me. 322, 111 Atl. 383, is decisive on this point, especially in view of the addition to section 16 in the re-enactment of the law in 1919, whereby compensation may be granted in cases of impairments of the usefulness or physical function of a member even though it is not entirely lost. This court in the above case said, in speaking of the loss of two-thirds of the foot:

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"We think it is more consonant with judicial interpretation to hold, that according to the common meaning of the language, the statutory words, 'the loss of a foot,' means the loss of the entire foot, and not a fractional part thereof."

The New York courts have adopted the construction of a provision corresponding to the one under consideration that, where "substantially" all of the phalange is gone, the Accident Commission is justified in holding that there has been a loss of the phalange. In the case of Matter of Petrie, 215 N. Y. 335, 109 N. E. 549, though it is not entirely clear just how much of the phalange was gone, it upheld the finding of the commission that there was a loss of the phalange upon the application of this rule. In Tetro v. Superior Printing & Box Co., 185 App Div. 73, 172 N. Y. Supp. 722, however, where only one-fourth of the bone was lost, the court said:

"It is a 'loss of the first phalange,' not of a part thereof, which is made equivalent to the loss of one-half of the finger."

But it still adhered to its ruling in the Matter of Petrie, supra, that, where "substantially" all of the portion of the finger specified in the act is lost, it may be regarded as a loss of that portion. Under the Compensation Act of this state as now amended. we see no occasion for adopting this rule.

In the case at bar, however, since the injured employee still retains some of the functions of the designated member—i. e., enough of the phalange remaining so that it may be fairly said, we think, that he is still able to bend the injured finger at the distal joint, and has practically one-third of the bone of the phalange left, and some part at least of the nail—he cannot be said to have lost even substantially all of the phalange, and the ruling of the chairman of the commission that, since it was lost for all practical and useful purposes, it was lost within the meaning of the statute, was error.

A liberal construction of the act does not require the court to strain plain and unequivocal language to this point.

However, since it does not appear whether the agreement alleged to have been made was signed by the labor commissioner or what its terms were, the case should be recommitted to the Industrial Accident Commission, where, if not barred by the alleged agreement, the petitioner may amend his petition and obtain compensation, if the facts warrant, for permanent impairment of use of the injured member. McKenna's Case, 117 Me. 179, 103 Atl. 69.

Appeal sustained. Findings of sitting Justice reversed. Case recommitted to Industrial Accident Commission for further hearing.

PATRICK v. J. B. HAM CO. ET AL.

(Supreme Judicial Court of Maine. Jan. 18, 1921.)

111 Atlantic Reporter, 912.

1. MASTER AND SERVANT — COMPENSATION CLAIMANT'S TESTIMONY AS TO INJURIES HELD CONSISTENT.

Evidence before the Industrial Accident Commission to recover for the death of an employee caused by cerebral hemorrhage while he was at work *held* to show that the hemorrhage began while the employee was lifting grain sacks into place, not before he started to lift the sacks, as was indicated by some statements in an affidavit of another employee who testified to the contrary at the hearing.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

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2. MASTER AND SERVANT—DECISION ON COMPENSATION CLAIM HELD NOT TO PLACE BURDEN OF PROOF ON EMPLOYER.

A decision by the chairman of the Industrial Accident Commission that the only question was whether the final cause of cerebral hemorrhage which occasioned the employee's death was a natural one or an act in the course of his employment, and that in view of the entire lack of evidence of any other possible cause the chairman found it due to a personal injury by accident, did not place the burden of proof upon the employer and the insurance carrier instead of upon the claimant.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

3. MASTER AND SERVANT — FACTS HELD TO SUSTAIN AWARD FOR DEATH FROM CEREBRAL HEMORRHAGE.

Evidence that a deceased employee, who died from cerebral hemorrhage, suffered the first stroke while lifting grain sacks. with expert testimony that the increased blood pressure thereby occasioned might have ruptured the blood vessel weakened by disease, *held* sufficient to sustain the finding of the chairman of Industrial Accident Commission that the death was caused by an accident arising out of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

4. MASTER AND SERVANT—FINDING ON SUBSTANTIAL EVIDENCE IN COMPENSATION CASE CONCLUSIVE.

The decision of the chairman of the Industrial Accident Commission finding employee's death was caused by accidental injury cannot be reversed on appeal if there is substantial evidence warranting such inference, though the court might reach a different conclusion on weighing the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

5. MASTER AND SERVANT — BURSTING BLOOD VESSEL WHILE LIFTING GRAIN IS AN "ACCIDENT."

The bursting of a blood vessel by the increased blood pressure resulting from the exertion of an employee in lifting a sack of grain is an "accident" within the Workmen's Compensation Act, "accident" being defined as undesigned or unexpected event.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental.)

6. MASTER AND SERVANT — COMPENSATION MAY BE AWARDED FOR AGGRAVATION OF EXISTING DISEASED CONDITION.

The fact that an employee was suffering from a disease which predisposed him to cerebral hemorrhage, so that he might have died from that cause within a short time even while in bed, does not prevent the bursting of a blood vessel as the result of an exertion during employment from entitling the dependents of employee to compensation.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

Philbrook. J., and Cornish, C. J., and Spear, J., dissenting.

Appeal from Supreme Judicial Court, Androscoggin County, in Equity.

Claim under the Workmen's Compensation Act by Elizabeth Patrick against the J. B. Ham Company, employer, and the Royal Indemnity Company, insurance carrier, for compensation for the death of claim-

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ant's husband. From a decision of the chairman of the Industrial Accident Commission awarding compensation, the employer and insurance carrier appeal. Appeal dismissed and decree affirmed.

Argued before Cornish, C. J., and Spear, Hanson, Philbrook, Dunn, Morrill. and Deasy, JJ.

Leon V. Walker, of Portland, for appellants.
McGillicudy & Morey, of Lewiston, for appellee.

HANSON, J. This is an appeal by J. B. Ham Company, an employer, and Royal Indemnity Company, its insurance carrier, from a decision of the chairman of the Industrial Accident Commission ordering them to pay to Elizabeth Patrick, dependent widow of Joseph Patrick, a deceased employee of said J. B. Ham Company. weekly compensation of $11.80 to the maximum sum of $3,500 provided for by the Workmen's Compensation Act (Rev. St. c. 50).

The facts found by the Industrial Commission were as follows:

On October 13, 1919, Joseph Patrick was an employee of the J. B. Ham Company, grain dealers of Lewiston, Me. The J. B. Ham Company were assenting employers under the terms of the Workmen's Compensation Act.

On the date of the alleged injury Mr. Patrick was engaged in load ing a car of grain at the place of business of the J. B. Ham Company. The grain was in bags containing 100 pounds each and consisted of corn and mixed grain. The grain was being wheeled into a car on small trucks, two bags at a time. Mr. Patrick had charge of loading the car, and remained in the car. Other employees were trucking the bags into the cars. As the bags were trucked into the car they would be wheeled to the front of the pile in such a manner as to place the bags to be unloaded from the truck parallel with those already placed in the car; the man who had wheeled the bags in would set the truck down and take one end of the bag while Mr. Patrick, while standing at the front end of the truck, would take the other end of the bag, and the two would swing the bag onto the pile. As the bags were piled up the height would vary according to the number placed in the car.

Mr. Patrick was engaged in this kind of work all the morning of October 13th. He went home to his dinner, as usual, at noon and returned, as usual, at 1 o'clock ready to continue his work. As the work commenced in the afternoon, a Mr. Bailey. who was one of those wheeling the grain into the car, asked Mr. Patrick if he was ready for some corn and Mr. Patrick said, "Bring it in." Mr. Bailey brought in a load of two bags and together with the help of Mr. Patrick started to place the bags on the pile. one at a time, in the usual way. Mr. Bailey testified that the pile, at that time, was about three feet high where the bags were to be placed.

Mr. Patrick stooped to pick up his end of the bag and as he threw it onto the pile Mr. Bailey said he noticed Mr. Patrick lurched a little. However, they put the bag in place and both stooped and picked up the second bag and placed it on the pile. Again Mr. Bailey says he noticed that Mr. Patrick lurched a little as he swing the bag up.

Mr. Bailey then went after another load of grain and returned with it.. Again Mr. Patrick stooped to pick up his end of a bag, but this time he fell across the bag and could not lift it. Mr. Bailey then saw there was something wrong with Mr. Patrick and he called some other men, who together with Mr. Bailey, assisted Mr. Patrick to walk out of the car into the storeroom. Mr. Patrick soon became unconscious; he was sent at once to a hospital, where he died about 10 o'clock that night without regaining consciousness. The cause of the death, as testified by two physicians, was cerebral hemorrhage.

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No question is raised as to dependency and the chairman found that Elizabeth Patrick was dependent, as defined by subdivision (a). paragraph 8, section 1, of the Workmen's Compensation Act, upon Joseph Patrick at the date of his death. And basing his decision upon the foregoing facts, and upon the testimony of the two physicians testifying in the case. the chairman further found that—

"In view of these two opinions, expressed by the two physicians who saw and attended Mr. Patrick, and the further evidence that Mr. Patrick had resumed his work for the afternoon in apparently his usual health and was actually engaged in that work at the time the fatal hemorrhage first appeared, and in view of the entire lack of evidence of any other possible cause of the hemorrhage. the chairman finds that Mr. Patrick's death was due to a personal injury by accident arising out of and in the course of his employment."

The decree followed, and it is the opinion of the court that there was evidence upon which the decree of the commission can rest.

Counsel for appellant contends that the chairman not only misapprehended the evidence on various vital points, but that he, in effect, placed the burden of proof, not upon the claimant. but upon the respondents.

[1] As to the first contention, the appellant's counsel strenuously urges that the testimony of Mr. Bailey is inconsistent with an affidavit previously made, which affidavit was written by counsel himself, and, after cross-examining Mr. Bailey in detail as to his statements. introduced the affidavit.

The chief contention was over the circumstances attending the piling of the first and second bags. There is variation between the affidavit and the testimony before the commission, as there always is when months intervene, but the variation is not such as to discredit the testimony of Mr. Bailey, and it can be reconciled easily with the petitioner's theory when the whole record is taken into consideration. It may be said that appellant does not challenge the integrity of the witness nor do we find that his close cross-examination destroys the value of his testimony because of its inconsistency. Counsel's theory is that Patrick was stricken before he lifted at all on either of the bags, and he claims that Bailey's testimony supports his theory; but it is found that, after confronting him with his former statement as to Patrick's position on the arrival of the first two bags,, Bailey does not support his claim. The record has it:

"Q. Now, Mr. Bailey, don't you recall that at the time you stated that 'When he stooped for the first bag, I noticed him lurch forward against the bag before he lifted it?" A. I do; yes. sir.

"Q. And then that you said, 'That is strange; he was a strong man and usually threw a bag of grain easily enough.' A. I did.

"Q. You made that statement? A. I made that settlement. He lurched every time against the bag when he lifted, but he lifted the two bags."

It is evident that the predisposing cause of Patrick's death operated in a very few minutes, and possibly within less time than a minute. The mere act of piling two bags would not consume a minute. It is argued that at 1 o'clock Mr. Robitaille. who was employed in the car pulling nails from the inside of the car, tried to talk with Patrick, who was then "looking at his tally slip which was nailed to the side of the car," and receiving no response to his remarks ceased speaking, and continued his work. It is argued from this occurrence that Patrick was then affected by the attack of cerebral hemorrhage which caused his death. But it appears that George M. Bailey, another employee, and the witness whose testimony reveals all the important facts and circumstances in the case, entered the car at five minutes after 1 o'clock and asked Mr. Patrick if he could take some corn in the south end of the car, and

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Patrick said "Yes; bring it in." A man stricken with cerebral hemorrhage would not be likely to answer so promptly. Immediately after this, Mr. Bailey brought in the first truckload of two bags and proceeded to unload the same with Patrick's help. In the act of jointly lifting and piling the two bags the cause of Mr. Patrick's death occurred. whether from accident arising out of and in the course of his employment, or from natural causes. It necessarily happened then. This is made certain by the testimony that Bailey, returning for another load, said to another workman, "Joe has had a shock," and on returning Bailey found Patrick standing "where he had left him," and "Patrick reached down to take hold and lurched over again, smiled, and drool was running out of his mouth." He did not lift on the second truckload, but turned and tried to "hold himself to the side of the car." That Mr. Patrick was stricken while in the course of his employment is not disputed. That he was a man of middle age, of good habits and regular life, and in the same employment for many years, appears in the record.

[2] Upon the second contention counsel urges that—

"The decision of the commission throws the burden of proof upon the respondents instead of upon claimant."

In his decision the chairman says:

"The only question raised in this case, therefore, is whether the final cause of the cerebral hemorrhage was a natural one or an act of Mr. Patrick while in the course of his employment.

"No evidence was produced at the hearing of any cause to which the hemorrhage could possibly be attributed, except the employment in which Mr. Patrick was engaged."

And again he says:

"In view of the entire lack of evidence of any other possible cause of the hemorrhage, the chairman finds that Mr. Patrick's death was due to a personal injury by accident arising out of * * * the employment."

As to this contention, we do not perceive that the record supports the same, or that the language used by the chairman can be held to have any such import as claimed by appellant. When read in connection with the finding as a whole, the suggestion of any such position on the part of the chairman disappears. The statement of the negative position was surplusage, and no doubt could have been omitted, but its inclusion cannot invalidate the positive fact found, which is the important inquiry here.

[3] That the burden of proof was amply sustained within the rule laid down in Mailman's Case, 118 Me. 172, 106 Atl. 606, is clearly shown in the record. And Mailman's Case, supra, is decisive of this case, and is authority for such change of burden of proof or proceeding had the same been required. There, as here, there was dispute as to the circumstances. and much was left for the commission to settle from inferences to be drawn from the facts proved or admitted. There the court held that—

"The decree of the commission is analogous to a finding of a judge who by consent determines facts or * * * an award by a referee agreed upon by the parties. That such a finding or award cannot be impeached by showing errors of judgment, however gross, as to the weight and credibility of testimony, is settled by so many authorities that citation is unnecessary."

And:

"In a case proved wholly, or in part, circumstantially, when there is a dispute as to what the circumstances are, the determination of such dispute by the commissioner is final. It is for the trier of facts, who sees and hears witnesses, to weigh their testimony and without appeal to determine their trustworthiness."

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And finally:

"When the evidence is circumstantial and a state of facts is shown more consistent with the commissioner's finding than with any other theory and the finding is supported by rational and natural inferences from facts proved or admitted, an appeal cannot be sustained."

[4] The chairman found from facts proved, and inferences from facts proved, that the decedent's death was due to personal injury by accident arising out of and in the course of his employment.

In Saunders v. New England Collapsible Tube Co. et al. (Supreme Court of Erors of Connecticut, June 10, 1920) 95 Conn. 40, 110 Atl. 538, a similar question was presented, and the court say:

"It is the duty of the trier to infer what one has done or left undone, although there be no positive testimony of this. And when the appellate court passes upon whether this duty has been judicially performed by legal standard it cannot inquire whether it would have reached the same result; it must limit its inquiry to the ascertainment of whether the inference is so unreasonable as to be unjustifiable. It is the right of every trier to infer what one's conduct has been in the circumstances, even though the inference reaches beyond the positive testimony in the case. Bunnell v. Berlin Iron Bridge Co., 66 Conn. 24, 36, 33 Atl. 533; Union Bank v. Middlebrook, 33 Conn. 95, 100; Dubuque v. Coman, 64 Conn. 475, 479, 30 Atl. 777."

And the opinion adds:

"It was the province of the commissioner to determine which theory was supported by the evidence. And if the evidence reasonably supported either theory he might adopt that theory, and the superior court on appeal could not disturb his decision upon that ground. The superior court does not weigh evidence in this class of cases; it may determine whether the finding of the commissioner should be corrected or not, or whether there was any evidence to support the conclusions reached. And when it has done this its control over the evidence ceases."

We are asked to reverse the decision of the commission because, as defendant's counsel says, "there is not even a scintilla of evidence to support its finding." We think there was sufficient evidence, though slight, from the very nature of the case, to support the finding, and that the inference of death from accidental cause was reasonable and justifiable.

The petitioner claimed that Patrick's death was due to injury resulting from accident occurring while decedent was engaged in lifting bags of grain. Appellant contended that there was no accident, but that decedent died from natural causes.

In reaching his conclusion the chairman had to determine: (1) Do the facts and circumstances of the case warrant a finding that an accident occurred injuring the decedent, within the meaning of the act? and if so (2) Did the decedent die from the results of such injury by accident?

The answer to the first question, under the testimony, solves the second, and sets at rest the contentions of counsel upon the main issue in the case.

[5] What is an accident, and what is the meaning of the word, the generally accepted meaning, and the generally adopted application in acts similar to that under consideration here? As defined by lexicographers, an accident is:

"A befalling; an event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event." Its synonyms include "mishap, mischance, misfortune, disaster, calamity, catastrophe." Webster's New International Dictionary.

"1. In general, anything that happens or begins to be without design, or as an unforeseen effect; that which falls out by chance; a for-

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tuitous event or circumstance. * * * 2. Specifically, an undesirable or unfortunate happening. an undesigned harm or injury. a casualty or mishap. * * * 3. The operation of chance, an undesigned contingency; a happening without intentional causation; chance; fortune." Century Dictionary.

"1. Anything that happens; an occurrence; event. Especially: (1) anything occurring unexpectedly, or without known or assignable cause; a contingency. * * * (2) Any unpleasant or unfortunate occurrence, that causes injury, loss, suffering, or death. (3) Med. An unfavorable or unanticipated symptom." New Standard Dictionary.

Bouvier, Rawle's Revision, defines it:

"An event which, under the circumstance, is unusual and unexpected by the person to whom it happens."

These sources of information, defining the word, are in complete harmony with the popular and generally accepted use of the word, and especially as construed by courts in states having Workmen's Compensation Laws with provisions similar to the provisions of the Maine Act. Some of the authorities are: Bystrom Bros. v. Jacobson, 162 Wis. 180, 155 N. W. 919, L. R. A. 1916D, 966; Zappala v. Ind. Ins. Commission, 82 Wash. 314, 144 Pac. 54, L. R. A. 1916A. 295; E. Baggot Co. v. Ind. Commission, 290 Ill. 530, 125 N. E. 254, 7 A. L. R. 1611; Clarke v. Lehigh Valley Coal Co., 264 Pa. .529. 107 Atl. 858; Miller v. Bell (Ind. App.) 127 N. E. 567; Bd. of Com'rs v. Shertzer (Ind. App.) 127 N. E. 843; State Road Comm. v. Ind. Commission of Utah (Utah) 190 Pac. 544; Steel Sales Corp. v. Ind. Commission (Ill.) 127 N. E. 698; Grannison's Adm'r v. B. & R. Const. Co., 187 Ky. 538, 219 S. W. 806; Manning v. Pomerene, 101 Neb. 127, 162 N. W. 492; State ex rel. Rau. v. District Court, 138 Minn. 250, 164 N. W. 916, L. R. A. 1918F. 918; City of Joliet v. Ind. Commission, 291 Ill. 555, 126 N. E. 618; Peoria Co. v. Ind. Board, 279 Ill. 352. 116 N. E. 651; M. & H. Zinc Co. v. Ind. Board, 284 Ill. 378. 120 N. E. 249.

In Peoria Co. v. Ind. Board. supra, may be found many cases cited both in this country and in England sustaining the petitioner's contention here. and the case holds that—

"Even where a workman dies from a pre-existing disease, if the disease is aggravated or accelerated under certain circumstances which can be said to be accidental, his death results from injury by accident. Acceleration or aggravation of a pre-existing disease is an injury caused by accident. 1 Bradbury on Workmen's Comp. 385; Elliott's Workmen's Comp. Act (7th Ed.) 9, and cited cases."

Another case directly to the point is also cited therein:

"A workman, whilst tightening a nut with a spanner, fell back on his head and died. A post-mortem examination showed that there was a large aneurism in the aorta, and that death was caused by a rupture of the aorta. The aneurism was in such an advanced condition that it might have been burst while the man was asleep, and a very slight exertion or strain would have been sufficient to bring about a rupture. The trial judge found that the death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal, and held that it was an accident within the meaning of the law. This decision was upheld both by the court of appeal and the House of Lords. Hughes v. Clover, Clayton & Co., [1909] 2 K. B. 798."

[6] That Patrick was suffering from diseased arteries predisposing him to cerebral hemorrhage is of no consequence in the case. That he might have died or would have died in his bed of cerebral hemorrhage in a year or a week is immaterial.

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The question before the commission was whether the work that he was doing on the afternoon of October 13, 1919, caused the cerebral hemorrhage to then occur. If so, we think it was an accident arising out of and in the course of his employment.

This was a question of fact. The Industrial Accident Commission, through its chairman, has decided this question of fact in favor of the claimant. The finding is, we believe, supported by rational and natural inferences from proved facts.

Accidental injury causing death is at least as believable and reasonable as the theory that a man continued to talk rationally and perform manual labor for a time, however short, after an attack of cerebral hemorrhage, which causes death in a few hours. Of the two theories, the former was adopted by the commission as the more reasonable, and we do not feel justified in disturbing its finding.

Appeal dismissed.

Decree affirmed.

PHILBROOK, J. (dissenting). I am unable to concur in the foregoing opinion, and because I feel that this case is one of more than ordinary importance, and that the effect of the opinion will be so far reaching, I am constrained to express the reasons which control my dissent.

The statute under consideration awards compensation for personal injuries, but only when those injuries arise (a) in a course of the employment, (b) out of the employment and (c) by accident.

By practically unanimous decisions of the courts of England and of this country it is held that an injury to an employee arises in the course of his employment when it occurs within the period of his employment, at a place where he may reasonably be, and while he is reasonably fulfilling the duties of his employment, or engaged in doing something incidental to it. In the case at bar it is conceded that the pathological conditions which resulted in the death of Patrick became manifest in the course of his employment, so that discussion of this point becomes unnecessary.

Judicial authorities and text-writers have not found it so easy to give a comprehensive definition of the expression "arising out of the employment," which shall precisely include all cases within and exclude all those without this statute. But there seems to be a practical unanimity in declaring that an injury may be said to arise out of the employment when there is a "causal connection between the conditions under which the employee worked and the injury he received." Westman's Case, 118 Me. at page 143, 106 Atl. at page 537.

In discussing the application of this rule of law to the facts arising in the case at bar, it is difficult to avoid reference to matters which may be also properly treated under the "accident" clause of the statute, and in advance I crave indulgence if I repeat somewhat when that branch of the case is reached. At the outset of our persent consideration we must discriminate between the so-called cause of death, as given in a medical death certificate, and the conditions which gave rise to that cause. That Patrick's death was due to cerebral hemorrhage, and that the hemorrhage was due to a bursting blood vessel no one will deny. It may also be frankly admitted that blood vessels in the human system more often burst because of increased blood pressure. But according to the testimony of the physicians in the case, as well as from common experience, we learn that in many cases blood vessels, weakened from disease, burst when no unusual exercise precedes the event, occurring sometimes, as these physicians say, when the victim is in repose, sleeping in his bed. In such cases, and they are not infrequent, say the doctors, the time appointed once for man to die has come on silent footsteps; the finger of death touches its victim and he sleeps forever. This being

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true, the petitioner must prove something more than cerebral hemorrhage, something more than a bursting blood vessel, something more, even, than increased blood pressure. She must prove that there existed a causal relation between these things and the "conditions under which the employee worked." In short, she must prove that the personal injuries which resulted in death arose out of the employment in which the deceased was engaged. This requires a careful, critical, impartial examination of the evidence. I yield to none in my sympathy for those who are in need, but the admonition which we impress upon jurors lest they be unduly influenced by this commendable trait of the human mind must as well restrain us in our judicial findings.

The evidence relied upon by the chairman of the commission, and by those who join in the opinion to which I am now dissenting, may be divided into two groups: First, the testimony of Bailey, the only person present when Patrick was stricken; second, that of the physician. Here it is proper to remark that I do not disregard that portion of the statute regarding finality of findings of fact made by the chairman of the commission, my dissent being based upon what I regard as lack of evidence to support that finding, thus raising a question of law.

The finding of the chairman is embodied, verbatim, in the opinion, and as it is before us in the opinion there is no necessity of repeating it. As to the testimony of Bailey; the crucial part is brief and I desire to point out what seems to me to be a contradiction, upon a vital point, between the testimony as given by the witness and the testimony as stated in the finding and opinion. The latter says:

"Mr. Patrick stooped to pick up his end of the bag and as he threw it onto the pile Mr. Bailey said he noticed Mr. Patrick lurched a little. However,. they put the bag in place and both stooped and picked up the second bag and placed it on the pile. Again Mr. Bailey says he noticed that Mr. Patrick lurched a little as he swung the bag up."

Apparently, from this statement of what the evidence was, the chairman drew the conclusion that the exertion of stooping and lifting caused the additional blood pressure and the train of fatal incidents followed. If such had been the testimony,, I might be able to concede that the petitioner had produced some evidence to prove this branch of the case. But if I am capable of understanding Mr. Bailey's testimony, ,as it appears in the record, it does not measure up to the interpretation put upon it by the chairman but falls considerably short of it. Mr. Bailey distinctly says that he "trucked the first two bags of grain in after dinner," and that alhough this, was the first work done, no previous lifting or straining being testified to, it was "when he (Patrick) went to unload those two bags, he lurched." This plainly shows that before he stooped, before he lifted, and before he had done anything pertaining to the work in which he was employed, the pathological conditions which resulted in his death had arisen. How can this testimony be said to show that there was causal relation "between the condition under which the employee worked and the injury he received"? It seems to me to negative rather than to sustain the claim of the petitioner that there was any such causal relation.

Turning to the testimony of the physicians. it will be observed that counsel for the petitioner, learned in law and familiar with the requirements of the statute, adroitly frames a hypothetical question which includes the condition of stooping and lifting before the lurching and asks if, "in view of those facts, the work in the forenoon and in the afternoon, lifting the bags that he was lifting, would increase the blood pressure." To this inquiry Dr. O'Connell answers in the affirmative. Again he was asked, "And did the cerebral hemorrhage follow, directly, in your judgment, as a result of the lifting, which produced the increased blood pressure." To this inquiry also an affirmative answer was returned.

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But, as we have already seen, the testimony of Mr. Bailey would not warrant the hypothetical question to be framed as it was. A similar hypothetical line of questions addressed to Dr. Scannell elicited similar affirmative answers. But we must not overlook other significant and important testimony of Dr. Scannell, where he tells us that when he was seeking for the history of the case he learned that Patrick had hardening of the arteries; that he had been feeling poorly for a month or six weeks; in the morning was sick to the stomach. and complained of headaches and dizziness. He also testified that—

"Some of the common causes leading up to apoplexy are diseased conditions which have tendency to cause hardening of the arteries, such as heart and kidney complications, worry, anxiety, overwork, and all those things that have a tendency to put wear and tear upon a man's vessels."

May we not truthfully say that in the case at bar there is quite as great a possibility that Patrick's attack of apoplexy was the result of his diseased condition, which undoubtedly existed before the shock, rather than the lifting of the bags that afternoon which, according to Mr. Bailey's testimony, was not done before the shock? The burden is upon the petitioner to satisfy the tribunal that her claim is well founded.

"The claimant must go further than simply to show a state of facts which is as equally consistent with no right to compensation as it is with such right. Surmise, conjecture, guess or speculation are not sufficient to sustain the burden and justify a finding in behalf of the claimant." Westman's Case, supra, 118 Me. at page 138, 106 Atl. at page 535, and cases there cited.

The time once appointed for Patrick to die had arrived. Has the petitioner shown that there was a causal relation between that death and the conditions under which he worked? From the testimony in the case, and that is all we have a right to depend upon, I am unable to answer this question in favor of the petitioner.

Passing now to the third essential for recovery under the statute, the question arises whether the petitioner has shown that Patrick died from personal injuries arising from accident. From a fairly extensive examination of the authorities it appears that there is not complete harmony of views among the courts as to what constitutes an accident, or an accidenal injury, arising out of and in the course of employment, which would authorize the injured party, or his dependent in case of death, to receive compensation. One writer upon the subject of Workmen's Compensation Acts declares that the term "accident" has probably been more discussed in adjudication than any other word in the whole English language. This may, in part, account for the varying views. On the one hand we should not be overtechnical and on the other we should not be too indulgent, when we attempt to construe the word and apply that construction to the case at bar. Damburn on Employer's Liability (4th Ed.) p. 100, says:

"Roughly speaking, accidents are divided into two great classes: (a) Accidents peculiarly known as such, such as railway accidents, breaking down of machinery, explosion, collisions, etc., where persons injured by them are spoken of as injured by accident; and (b) accident where there is no such external mishap, but where a man injures himself, as we would say, by accident, where he either strains a muscle, or ricks his back, or ruptures himself, or otherwise hurts himself in unexpected manner."

Boyd on Compensation Laws, § 458, says:

"Strains sustained by employees of normal health in the course of their employment are generally regarded as accidental injuries. Ruptures, resulting from lifting heavy objects, are generally held fortuitous and unexpected events, in other words, accidents."

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These words are oft quoted from Fentor v. Thorley, 89 L. T. 314:

"If a man in lifting a weight or trying to move something not easily moved, were to strain a muscle, or rick his back, or rupture himself, the mishap, in ordinary parlance, would be described as accidental."

In an extended compilation of cases by Kiser, under the title Workmen's Compensation Acts, accompanying the Cyc. Corpus Juris system, fortified by many citations, it is said that—

"The term 'accident,' as employed in the Compensation Acts, is broad enough to include an injury from muscular strain or physical overexertion, such as hernia, or rupture, or bursting of blood vessels. This is true, although the physical condition of the employee is such as to predispose him to the injury. But it has been held there must be a definite particular occurrence to which the injury can be attributed."

Obviously, in the case at bar, the petitioner depends on proving an accident in that class of cases latterly spoken of, and which does not call for any external violence, but which has been alluded to as having been occasioned by some act of the deceased whereby a strain produced the injury. But even in this class of cases we must not overlook the conceded rule that there must still be an accident. Hence definitions of lexicographers and courts are of importance in determining what an accident consists of and what are the fundamental principles to which we must look in deciding this or any other case. Our own court, speaking through the late Chief Justice Peters in McGlinchey v. Fidelity & Casualty Co., 80 Me. at page 253, 14 Atl. at page 14, 6 Am. St. Rep. 190. says:

"The definition of accident, generally assented to, is an event happening without any human agency, or if happening through human agency, an event which, under the circumstances, is unusual and not expected to the person to whom it happens."

If it should be urged that this definition was given in an accident insurance case, then we are only obliged to turn to the very first case relied upon in the opinion from which I am now dissenting, namely, Bystrom Bros. v. Jacobson et al., 162 Wis. 180, 155 N. W. 919, L. R. A. 1916D, 966, where the court holds that—

"The term 'accidental,' as used in compensation laws, denotes something unusual, unexpected and undesigned."

Here, then, is the angle of difference between myself and those who hold to the opinion, namely, on the day when Patrick suffered the shock did there occur anything as the cause of that shock that was unusual, unexpected, and undesigned? Of course, the shock and the subsequent death were unusual, unexpected. and undesigned, but that is not the point involved, but, rather, were the shock and subsequent death caused by anything arising from the conditions under which Patrick worked, which was unusual, unexpected, or undesigned? Cause must not be confounded with effect, and this the majority opinion seems to do. The causal relations of conditions to the shock once more come to the surface. Again we note the difference between the evidence of Mr. Bailey and the statement of facts made by the chairman of the commission as to wehther the shock preceded or followed the lifting of the bags of grain. But at this stage of the discussion the relative order of lifting, ,and shock become less important because, whichever preceded the other, the vital question is whether anything unusual, unexpected, or undesigned occurred as the cause of the shock. Plainly there can be but one answer, and that is in the negative. It is undisputed that Patrick was only called upon to lift, with the aid of another man, the comparatively light load consisting of a bag of grain weighing 100 pounds and place it on a pile. He was doing the same work, in the same way, with the same surrounding conditions, with the same load, as he had been doing for weeks, months, and per-

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haps years. How can it possibly be said that an accident occurred under the cases cited by the opinion where it is held that an accident involves the happening of something unusual, unexpected, or undesigned as a cause of the personal injury.

Lest this dissent may be unduly prolonged, I wish to cite only two cases from many which illustrate my position and then close. The first is a Michigan Case (Stombaugh v. Peerless Wire Fence Co., 198 Mich. 445, 164 N. W. 537), where a dependent widow sought compensation for the death of her husband, who, having had heart trouble of long standing, died as a result of heavy physical labor, the claim being made under the Workmen's Compensation Act of that state (Pub. Acts No. 10 of the Extra Session of 1912), on the theory that death was accidental. The compensation was denied. The court held that the deceased was doing the work he agreed to do, in the way he intended to do it; that there was no evidence of mischance or miscalculation in what was being done; none of anything fortuitous or unexpected in the manner of doing it. The work in which the deceased was employed was lifting and lowering rolls of wire weighing from 150 to 160 pounds, from their place in a car and then rolling them to the car door. A case strikingly like the one at bar.

The second case is from the Illinois court (Jakub v. Industrial Commission, 288 Ill. 87, 123 N. E. 263), where an employee engaged in baling copper was found dead near the bailing press,, with a completed bale of copper beside him, and there was no evidence proving accident or accidental injury; the claim being made that the heavy work which deceased was doing hastened his death by heart and kidney disease. The court said that, this being the only claim made, namely, that heavy work, done in the ordinary course of his employment, caused or hastened his death. there could be no compensation, because it was not shown that anything unexpected or unforeseen occurred.

I said at the outset that this case appeared to me to be of more than ordinary importance and the decision to be far reaching. I still think so. I cannot bring myself to believe that where a man is doing his ordinary work, under ordinary circumstances, in the ordinary way, and is suddenly stricken with a fatal malady, nothing unusual, unexpected or unforeseen occurring as a cause of the malady, it was intended by the Legislature to be regarded as a case of accidental death. If such was and is the intention of the lawmaking power, let it be declared in no uncertain way.

The duty of the court is to interpret and expound the law as it exists. Under this statute the employee has rights. but the employer also has his. The scale beam should rest exactly horizontal The balance weights should be of no baser metal than the pure gold of absolute justice.

Cornish, C. J., and Spear, J., concur.

ALTINOVITCH'S CASE.

(Supreme Judicial Court of Massachusetts. Berkshire. Jan. 7. 1921.)

129 Northeastern Reporter, 372.

1. MASTER AND SERVANT—CANCELLATION OF COMPENSATION POLICY QUESTION OF LAW AND REVIEWABLE.

Where the essential facts as to cancellation of policy issued by a workmen's compensation insurer are not in dispute, the question presented by the record thereon is one of law.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

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2. MASTER AND SERVANT — COMPENSATION POLICY CANCELABLE ONLY AS PRESCRIBED.

The right of cancellation of a workmen's compensation policy could be exercised by the insurer only as prescribed therein.

(For other cases, see Master and Servant, Dec. Dig. § 383.)

3. MASTER AND SERVANT — COMPENSATION POLICY CANCELED UNDER CLAUSE GIVING RIGHT.

Workmen's compensation policy canceled by the insurer, in view of comparison of the notice of cancellation with the wording of the clause giving the insurer the absolute right to terminate, *held* canceled under the clause giving the parties mutual right of cancellation, and not under an indorsement giving the insurer alone such right on 10 days' notice for reasons stated.

(For other cases, see Master and Servant, Dec. Dig. § 383.)

4. MASTER AND SERVANT—NOTICE OF CANCELLATION OF COMPENSATION POLICY UNDER ONE PROVISION EFFECTUAL.

It is enough that notice of cancellation of a workmen's compensation policy is valid under one of the provisions for cancellation not repugnant to the other terms of the policy.

(For other cases, see Master and Servant, Dec. Dig. § 383.)

5. MASTER AND SERVANT—EMPLOYEE'S ASSENT TO CANCELLATION OF COMPENSATION POLICY UNNECESSARY.

The employee not being a party to a workmen's compensation policy, his assent to its cancellation by the insurer, was not necessary, though if informed before the accident of what had taken place, he could have refused to remain in the employer's hire unless he reinsured and continued to be a subscriber.

(For other cases, see Master and Servant, Dec. Dig. § 383.)

Appeal from Superior Court, Berkshire County.

Proceedings for compensation under the Workmen's Compensation Act by Martin Altinovitch, the employee, against Warren H. Davis, the employer, and the Ætna Life Insurance Company, the insurer. Compensation was awarded, the award affirmed, by the superior court, and from its decree the insurer appeals. Decree ordered reversed, and claim dismissed.

Green & Bennett, of Holyoke, for appellant.

Frank H. Cande and Frederick M. Myers, both of Pittsfield, for appellee.

BRALEY, J. The word "subscriber" as used in St. 1911, c. 751, and acts in amendment thereof is practically the equivalent to "employer who has accepted the provisions of the act by insuring the compensation of his employees." We assume on the record that Warren H. Davis, the employer, was a subscriber at the date of the employment of Altinovitch. But even if at that time there was a valid outstanding policy, the insurer contends that it had been canceled before the injury was received. The accident occurred at 3 o'clock in the afternoon of August 30, 1919, and the notice of cancellation dated August 25 was received by the subscriber August 26, 1919. The portions of the policy material to the issue reads as follows:

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"This policy shall be canceled at any time by either of the parties hereto upon written notice to the other party stating when thereafter cancellation shall be effective. Notice of cancellation sent by registered mail to the address of the assured stated in the warranties hereof shall be a sufficient notice and the check of the company similarly mailed, a sufficient tender of any unearned premium. If canceled by the assured on any date other than an anniversary of the date of issue of the policy, unless the assured has retired from business, the company shall receive or retain the short rate premium in accordance with the table printed hereon which shall not be less than the minimum premiun stated in the warranties hereof. If canceled by the company at any time, or by the assured on any anniversary of the date of issue of the policy, the company shall be entitled to the earned premium pro rate when determined. In either case the earned premium shall be computed on the basis of the entire wages of compensation for a twelve months' period as indicated by the actual wages or compensation earned during the period the policy shall have been in force, such period to begin at the date of issue of the policy, or, in event of the policy having been in force for a longer period than twelve months, at the last anniversary thereof. In any event where cancellation is at the request of the assured. the company shall retain not less than the minimum premium stated in the warranties hereof.

"Endorsement.

"Quarterly Adjustment of Premium. $150.00. Deposit.

"1. The advance premium stated in this policy is not based upon the estimated wages for the full policy period, but is the sum hereby agreed to be paid in cash upon delivery of the policy.

"2. On or before the twentieth day of each month succeeding each three month period under this policy the assured shall state to the company in writing the full amount of compensation earned by his employees during the preceding three calendar months, or such part thereof as is within the policy period, and pay to the company in money the entire premium earned upon such compensation at the rates named in the policy; this advance premium to be applied to the last quarterly settlement in the policy period.

"3. If the assured shall fail to make such statement or pay such earned premium as provided in the foregoing paragraph, such neglect or failure shall entitle the company—at its option—to cancel the policy upon ten days notice to the assured, and calculate the earned premium to date of cancellation at customary short rates."

The notice of cancellation reads:

"We have been advised by our home office that they are no longer willing to carry your insurance and have requested that we effect cancellation of your policy * * * dated May 1, 1919.

"We, therefore, notify you that your policy * * * is canceled effective at 12 o'clock noon, Standard time, August 28, 1919, and the Ætna will not be liable for any accidents occurring subsequent to that time."

[1-5] It is contended by the employee that because the policy could be terminated in either way the burden of proof was on the insurer to show that the notice was sent under the cancellation clause and not under the "endorsement," and being equivocal the insurer's intention was a question of fact, and the notice being insufficient under the endorsement the finding and ruling of the board member affirmed by the Industrial Accident Board on review, that the policy remained in full force was warranted, and therefore cannot be reversed. The board on review also held that "the attempted cancellation of insurance * * * not having been valid, and the policy being in effect at the time of the employee's injury," compensation should be awarded. The essential facts not being in dispute, the question presented by the record is one of law. The right of cancellation could be exercised only as prescribed in the policy. Lipman

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v. Niagara Fire Ins. Co., 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719. A comparison of the notice with the wording of the absolute right to terminate, "This policy shall be canceled at any time by either of the parties hereto upon written notice to the other party stating when thereafter cancellation shall be effective," with the language of the endorsement that if the assured fails to pay earned premiums as stipulated the company upon such neglect of default shall be entitled at its option to cancel the policy upon ten days' notice, shows plainly that the insurer did not act under the endorsement. The mutual right of cancellation even if the right is arbitrarily exercised is conferred while under the endorsement, the insurer alone can discontinue the policy on ten days' notice for either of the reasons stated. Ferguson v. Union Mutual Life Ins. Co., 187 Mass. 8, 10, 72 N. E. 358. It is enough that the notice is valid under one of the provisions of cancellation which is not repugnant to the other terms of the policy. International Fire Ins. Co. v. Franklin Fire Ins. Co., 66 N. Y. 119. The employee not being a party to the policy, his assent was not necessary, although if informed before the accident of what had taken place he could have refused to remain in Davis' employment unless he reinsured and continued to be a subscriber. Keohane's Case, 232 Mass. 487, 122 N. E. 573. The question whether the employee has any remedy under part 4, § 21, of the act as amended for failure of the employer to give him notice in writing or print "that he has provided for payment to injured employees of the association" is not before us. See Young v. Duncan, 218 Mass. 346, 106 N. E. 1. It follows that the decree must be reversed and the claim dismissed.

Ordered accordingly.

DEVINE'S CASE.

(Supreme Judicial Court of Massachusetts. Bristol. Jan. 5, 1921.)

129 Northeastern Reporter, 414.

1. MASTER AND SERVANT — COMPENSATION CLAIM PROPERLY HEARD BY SINGLE MEMBER OF INDUSTRIAL BOARD ACCORDING TO STATUTE IN FORCE AT TIME OF HEARING.

Hearing and decision of widow's claim for compensation for her deceased husband's death was properly by a single member of the Industrial Accident Board under St. 1917, c. 297, in force when the hearing occurred, and not by a committee on arbitration in accordance with the statute in force at the time of the alleged injury, chapter 297, relating wholly to procedure, and affecting no substantial rights, no constitutional right of the employee or of his dependent being impaired by its enactment and enforcement.

(For other cases, see Master and Servant, Dec. Dig. § 414.)

2. MASTER AND SERVANT—WORKMEN'S "COMPENSATION" DEFINED.

The word "compensation," as used in the Workmen's Compensation Act, means the money relief afforded an injured employee or his dependents according to the scale established and for the persons designated in the act, and not the compensatory damages recoverable in an action at law for a wrong done for a contract broken.

(For other cases, see Master and Servant, Dec. Dig. § 346.)

(For other definitions, see Words and Phrases, First and Second Series, Compensation.)

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3. MASTER AND SERVANT—DENIAL OF FURTHER HEARING ON COMPENSATION CLAIM NOT ERROR.

Under the Workmen's Compensation Act, pt. 3, § 10, as amended by St. 1917, c. 297, § 6, providing no party shall as a matter of right be entitled to a second hearing on any question of fact,. denial of motion by the dependent ,supported by affidavits as to additional evidence, for further hearing on the merits before the Industrial Accident Board on review of the finding of the single member that there was no causal connection between the death and the injury, was not reversible error.

(For other cases, see Master and Servant. Dec. Dig. § 416.)

4. MASTER AND SERVANT — SUPREME JUDICIAL COURT CAN SEND COMPENSATION CASE BACK FOR FURTHER HEARING.

The Supreme Judicial Court has power to send a workmen's compensation case back for further hearing when justice seems to require it.

(For other cases, see Master and Servant, Dec. Dig. § 418[7].)

5. MASTER AND SERVANT — FINDING OF INDUSTRIAL BOARD SUPPORTED BY EVIDENCE IN COMPENSATION CASE CONCLUSIVE.

A finding of the Industrial Accident Board manifestly supported by evidence must stand.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Superior Court, Bristol County.

Proceedings for compensation under the Workmen's Compensation Act by Margaret Devine, widow of John Devine, the deceased employee, opposed by the Granite Mills, the employer, and the Employers' Liability Assurance Corporation, Limited, the insurer. Compensation was denied by the Industrial Accident Board, the denial affirmed by the superior court and from its decree the claimant appeals. Decree affirmed.

John W. & Charles R. Cummings, of Fall River, for appellant.

Swift, Grime & Buffinton and Harold S. R. Buffinton, all of Fall River, for insurer.

RUGG, C. J. This is an appeal from a decree of the superior court confirming a finding of the Industrial Accident Board to the effect that the death of John Devine, an employee under the Workmen's Compensation Act (St. 1911, c. 751, as amended by St. 1912, c. 571), was not due or related to a personal injury which arose out of or in the course of his employment, and dismissing the claim of his widow for compensation. The deceased employee is alleged to have received on May 14, 1917, the injury from which his death resulted. At that time it was provided by the act that in case of disagreement between the parties concerning compensation, a committee on arbitration should be formed to decide the matters in dispute. That committee was to be composed of a representative appointed by each of the respective parties and its chairman was to be a member of the board designated for that purpose. St. 1911, c. 751. pt. 3, §§ 6 and 7, as amended by St. 1912, c. 571, §§ 11 and 12. These provisions were changed by St. 1917, c. 297, which was approved on May 24, 1917, and took effect on June 23, 1917, whereby the committee on arbitration was eliminated and its functions were transferred to a single member of the board. By the same statute the membership of the board was increased from five to seven, although now reduced to six. See St. 1919, c. 299, § 3. Gen. Laws. c. 24, § 2. The hearing and decision of the dependent's claim in the case at bar was had before a single member in accordance with St. 1917, c. 297.

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1. The dependent now contends that this hearing and decision should have been by a committee on arbitration in accordance with the statute in force at the time of the alleged injury, and that the single member had no jurisdiction, although St. 1917, c. 297, was in force at the time the hearing occurred.

This point was raised for the first time by motion to recommit made in the superior court after adverse decisions by the single member and by the full board on appeal. It is assumed, but without so deciding, that the point thus raised, if sound, would affect the jurisdiction of the court and hence may be taken advantage of in this proceeding at any time before final decree. Corcoran v. Higgins, 194 Mass. 291, 80 N. E. 231. Boston Bar Association v. Casey, 227 Mass. 46, 50, 116 N. E. 541.

[1] This contention of the dependent cannot be supported. St. 1917, c. 297, relates wholly to procedure and affects no substantial rights of the employer, employee or insurer. The general purpose of the Workmen's Compensation Act was to substitute in cases to which it is applicable, for common law or statutory rights of action and grounds of liability, a system of money payments based upon the loss of wages by way of relief for workers or dependents of workers who receive injury in the course of and arising out of their employment. As stated in the "Report of the Commission on Compensation for Industrial Accidents' submitted in 1912, which framed the act adopted by the Legislature (without change except in part 5, § 3, whereby all liability insurance companies were granted the same privileges as the Massachusetts Employers' Association in the matter of insuring), at page 46:

"The Massachusetts law may be briefly characterized as an elective compensation insurance law giving compensation for all injuries arising out of employment irrespective of negligence except those due to the serious and willful misconduct of the injured employee. The basic principle of the act is that the cost of the injuries incidental to modern industry should be treated as a part of the cost of production. The act was framed with that end in view."

[2] The payments provided by the act are founded simply upon such injury and have no relation to any theory of fault on the part of the employer or right on the part of the employee either in tort or contract established by law prior to the passage of the act. All payments are by way of financial relief for inability to earn wages, or for deprivation of support flowing from wages theretofore received. The word "compensation," in the connection in which it is used in the act, means the money relief afforded according to the scale established and for the persons designed by the act, and not the compensatory damages recoverable in an action at law for a wrong done or contract broken. Derinza's Case, 229 Mass. 435, 441, 118 N. E. 942. The employee takes no part in the contract for insurance which is made solely by the employer and the insurer in accordance with the terms of the act. He has no active relation to it unless and until he receives a personal injury, arising out of and in the course of his employment. The rights of the employee under the act rest neither in negligence nor contract. They arise wholly out of the Workmen's Compensation Act. That act establishes a status for those subject to its provisions from which flow certain obligations and rights for employer, employee and insurer. Those obligations and rights so far as the employee is concerned, are susceptible of enforcement exclusively through the procedure set forth in the act. That procedure is direct and flexible but peculiar to the act. It is neither an action at law nor a suit in equity. Certain features of practice concerning cases arising under the Workmen's Compensation Act resemble in the main equitable procedure (Gould's Case, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372), but they are not suits in equity. The forms of that procedure, like other statutes of that character, may be changed from time to time by the Legislature without affecting the constitutional rights

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of the employee. Whether the claim for compensation be heard and decided in the first instance by a committee on arbitration, the chairman of which is a member of the board, or by a single impartial individual who is a member of the board, is a pure matter of procedure affecting no substantial rights either of the deceased employee or his dependents. The amount to be paid under the act is in no way influenced by the change wrought by St. 1917, c. 297. The right to have an arbitration committee in case occasion arose for the ascertainment of compensation under the act formed no part of the contract of employment. It was wholly a legislative regulation of the means furnished by the law as a step in the ascertainment of the material facts in case a claim for compensation was made under the act. Although our act is voluntary and not compulsory, the procedural portions of the act do not become a part of the contract of employment so as to become constitutionally unchangeable by the general court. See Young's Case, 218 Mass. 346, 350, 106 N. E. 1. The committee on arbitration and the industrial accident board are purely administrative tribunals created solely to administer the Workmen's Compensation Act in aid to the courts. Levangie's Case, 228 Mass. 213, 117 N. E. 200. They constitute no part of the substantive rights conferred by the act upon any of its beneficiaries, but like other such tribunals may be changed at will by the Legislature.

That the amendment of the act made by St. 1917, c. 297, is procedural, not affecting rights of substance, is plain not only from examination of its terms in connection with their context in the act, but from the fact that the sections to which it relates are under part 3 of the act, which is entitled "Procedure." It is clear from this circumstance that it was the legislative intention thereby to deal with procedure alone. Bartoni's Case, 225 Mass. 349, 354, 114 N. E. 663, L. R. A. 1917E, 765.

The case at bar in this particular is within the authority of many decisions. Rogers v. Nichols, 186 Mass. 440, 71 N. E. 950. Selectmen of Amesbury v. Citizens' Electric St. Ry., 199 Mass. 394, 85 N. E. 419; Howard v. Fall River Iron Works Co., 203 Mass. 273, 89 N. E. 615; Hanscom v. Malden & Melrose Gas Light Co., 220 Mass. 1, 3, 107 N. E. 426, Ann. Cas. 1917A, 145; Simmons v. Hanover, 23 Pick. 188; Hallowell v. Commons, 239 U. S. 509, 36 Sup. Ct. 202, 60 L. Ed. 409; Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401, 24 Sup. Ct. 676, 48 L. Ed. 1039; Campbell v. Iron-Silver Mining Co., 27 C. C. A. 646, 83 Fed. 643. See in this connection Wilson v. Head, 184 Mass. 515, 69 N. E. 317; Yeomans v. Heath, 185 Mass. 189, 70 N. E. 1114.

It was held in Commonwealth v. Phelps, 210 Mass. 78, 96 N. E. 349, after reviewing many decisions, that a statute enacted after the commission of a capital offense was not void as an ex post facto law because its effect was to provide that one in place of two or more judges should preside at the trial of the defendant before a jury. In principle that case is decisive of the case at bar upon this point.

It seems plain to us that no constitutional right of the employee or of his dependent was in the slightest impaired by the enactment and enforcement of St. 1917, c. 297.

2. No discussion is required to demonstrate that the agreement of the insurer, to the effect that the employee received an injury on May 14, 1917, for which compensation was paid, had no reference whatever to the contention of the insurer that the cause of the employee's death was something wholly unconnected with that injury. The decision of the board was not contrary to any agreed fact.

[3, 4] 3. The case was fully heard by the single member and his decision was that there was no causal connection between the death of the employee and the injury which arose out of and in the course of his employment. When the cause came on to be heard before the board on review, the dependent moved for further hearing on the merits supporting that motion with affidavits as to additional evidence. This motion was

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denied and the decision of the single member was affirmed. Motion was made by the dependent in the superior court that the cause be recommitted to the board for a new hearing with additional evidence on the merits. That motion for a general rehearing was denied. On this there was no reversible error. It is provided by the act, part 3, § 10, as amended, that—

"No party shall as matter of right be entitled to a second hearing upon any question of fact." St. 1917, c. 297, § 6.

The implication of this sentence is that commonly there shall be no rehearing. There is no doubt of the power of the court to send a case back for further hearing when justice seems to require it. Nelson's Case, 217 Mass. 467, 105 N. E. 357; Doherty's Case, 222 Mass. 98, 109 N. E. 887. Both the Industrial Accident Board and a judge of the superior court have decided that in the present case there ought to be no rehearing. There is nothing on this record to show that there has been any abuse of discretion, and we are not able to say that it was not wisely exercised. Fierro's Case, 223 Mass. 378, 111 N. E. 957; Bean's Case. 227 Mass. 558, 116 N. E. 826; Gorski's Case. 227 Mass. 456, 116 N. E. 811.

[5] 4. The finding of the Industrial Accident Board manifestly was supported by evidence and must stand. Pass' Case, 232 Mass. 515, 122 N. E. 642. No error of law is disclosed on the record.

Decree affirmed.

BRALEY'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1921.)

129 Northeastern Reporter, 420.

MASTER AND SERVANT — TURNING ANKLE ON WAY TO WORK NOT INJURY IN COURSE OF EMPLOYMENT WITHIN COMPENSATION ACT.

A collector of industrial insurance premiums for a life insurer, permitted to sell ordinary insurance, who, in leaving a street car when going to his office to report before going out on his collection route, turned his ankle and was injured, was not injured in the course of his employment; there having been no causal connection between his work and his injury.

(For other cases. see Master and Servant, Dec. Dig. § 373.)

Appeal from Superior Court, Suffolk County.

Proceedings for compensation under the Workmen's Compensation Act (St. 1911, c. 751. amended by St. 1912, c. 571), by Henry Braley, the employee, against the John Hancock Mutual Life Insurance Company, the employer, and the Employers' Liability Assurance Corporation, Limited, the insurer. Compensation was awarded, the award affirmed by the superior court, and from its decree the insurer appeals.. Decree reversed, and judgment entered for the insurer.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason. of Boston, of counsel), for appellant.

PIERCE, J. The evidence warranted a finding that the claimant on April 12, 1919, was in the employ of the John Hancock Mutual Life Insuance Company as a collector of industrial insurance premiums, for which he received a salary of $16.70 a week and a bonus; the "salary and

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bonus amounted to $1,201 last year." He was allowed to sell ordinary insurance, which "is insurance in which the policy holder pays his pre-premium either quarterly, semiannually, annually or in advance." For such work he was paid a commission. "Industrial insurance is insurance where a person pays so many cents a week." As a collector of industrial insurance he had a route, called a debit. in which there are certain policy holders who pay their premiums weekly. He lived at Lakeville, about a mile and three quarters from the office of the insurance company in Middleboro. It was his custom to ride back and forth to work on the trolley cars. "The company would have had no objection to him driving a horse and wagon to work and around his route, nor would it have objection to him using an automobile to cover his route." On the morning of his injury, at his home he collected from two persons an industrial insurance premium. He kept an appointment having to do with ordinary insurance at a near-by store. He then took a car going in the direction of Middleboro. During the ride to Middleboro he talked with a man he met on the car and a prospective customer about buying a $1,000 policy. When the car arrived at Middleboro it stopped in front of the waiting station on Main street. The office of the insurance company is on the same street, "possibly six rods from the waiting room," over a music store. He could have remained on the car until it came to the store. For some reason which does not clearly appear he got off the car at the station as soon as it stopped. He was the last one off and stepped from the platform of the car down on to the step. He carried his grip in his left hand and stepped to the ground on his right foot. When he stepped to the ground his ankle turned over. It does not appear what caused the ankle to turn. "He was going to his office to report before going out on his debit." On Saturday morning he generally went to the office unless he had some special business that called him in another direction.

Assuming the accident happened in the course of the employment it is difficult to see any causal connection between the work and his injury. The turning of an ankle is an extremely common event and may be caused by conditions of individual weakness or of the physical surface of the way. In the case at bar there is no evidence upon which it can be said to have been proved that the accident was attributable to the risk or hazard of the work of the claimant, and not to his individual peculiarities or weakness. The causative relation between employment and injury is remote and speculative. The case falls within Hewitt's Case, 225 Mass. 1, 113 N. E. 572, L. R. A. 1917B. 249, and Donahue's Case, 226 Mass. 595, 116 N. E. 226. L. R. A. 1918A, 215, and is distinct from Moran's Case, 235 Mass. —, 125 N. E. 591.

It follows that the decree must be reversed and judgment entered for the insurer.

So ordered.

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DORMAN'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 5, 1921.)

129 Northeastern Reporter, 352.

2. MASTER AND SERVANT — JURISDICTION UNDER COMPENSATION ACT OF CLAIM OF ADMIRALTY COGNIZANCE NOT ESTABLISHED BY CONDUCT OF PARTIES.

The jurisdiction of the Industrial Accident Board under the Workmen's Compensation Act, as opposed to the jurisdiction of the federal courts of admiralty, cannot be established by consideration arising from the conduct of the parties.

(For other cases, see Master and Servant, Dec. Dig. § 397.)

Appeal from Superior Court, Suffolk County.

Proceeding for compensation under the Workmen's Compensation Act by Sarah M. Dorman, widow of Charles Dorman, the deceased employee, opposed by the Boston Sand & Gravel Company, the employer, and the Contractors' Mutual Liability Insurance Company, the insurer, Compensation was awarded by the Industrial Accident Board, the award affirmed by the superior court. and from its decree the insurer appeals. Decree reversed, and decree directed in favor of the insurer.

J Frank Scannell, of Boston, for appellant.

Gilbert E. Kemp, of Boston, for appellee.

RUGG, C. J. Charles Dorman was employed as mate upon a vessel described as a steam lighter named the Herbert, used by its owner in coastwise traffic for the transportation of sand and gravel between Scituate and Boston. At the time in question the Herbert was on a voyage over tidewater between these two places, and was in or just outside of Boston Harbor and within three miles of shore. Dorman was employed by the Boston Sand & Gravel Company. which was insured under the Workmen's Compensation Act (St. 1911, c. 751, amended by St. 1912 c. 571), and which owned the vessel.

[1] It is assumed in favor of the dependent for the purposes of this decision that Dorman lost his life from causes arising out of and in the course of his employment. These causes manifestly were operative under such circumstances as to bring any legal liability arising therefrom within admirality cognizance. The locality of the incident is decisive upon that point.

"Every species of tort, however, occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." The Plymouth, 3 Wall. 20, 36, 18 L. Ed. 125; Proctor v. Dillon, 235 Mass. 538, 541, 129 N. E. 265.

The circumstance that the Herbert was engaged exclusively in commerce within the territorial limits of this commonwealth and did not go outside the three-mile limit does not divest the occurrence of its admiralty character, which depends wholly upon the question whether it is upon navigable waters. The Robert W. Parsons, 191 U. S. 17, 24 Sup. Ct. 8. 48 L. Ed. 73. See North Pacific S. S. Co. v. Hall Bros.. Marine Ry. & Shipbuilding Co., 249 U. S. 119, 39 Sup. Ct. 221, 63 L. Ed. 510; Altantic Transport Co. v. Imbrovek; 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157.

The Workmen's Compensation Act is broad enough in its terms to include cases like the one at bar. But it is plain from the facts here disclosed that that act (apart from a federal statute to be mentioned in a

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moment) could not be operative in favor of the dependent under the Constitution of the United States. That was settled beyond question by Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, decided in May 1917. We were constrained to follow that decision in Duart v. Simmons, 231 Mass. 313, 121 N. E. 10; Id. 236 Mass. 225, 128 N. E. 32, and in Sterling's Case, 233 Mass. 485, 124 N. E. 286. After the decision in the Jensen Case Congress attempted to confer jurisdiction upon the several states to deal with cases like the present by workmen's compensation laws by the enactment of 40 U. S. Sts. at Large, c. 97, § 2. approved Oct. 6, 1917 (U. S. Comp. St. 1918 U. S. Comp. St. Ann. Supp. 1919. § 1233). Seemingly the exclusive nature of federal jurisdiction under admiralty law was released to the states by that act taken at its face value. Duart v. Simmons, 231 Mass. 313, 320, 121 N. E. 10. The constitutionality of that act was assailed, however, and by the decision in Knickerbocker Ice Co. v. Stewart, 253, U. S. 149, 40 Sup. Ct. 438, rendered since this case was heard and decided by the Industrial Accident Board, it was held to be invalid because beyond the powers of Congress under the Constitution. We are bound by that decision. It is decisive against the right of the dependent to compensation in the case at bar. See also Sudden & Christensen v. Industrial Accident Commission, 181 Cal. —, 188 Pac. 803.

[2] There are no circumstances disclosed on this record which estop the insurer from availing itself of this point, or which show a waiver of its right to this defense. That is settled by Sterling's Case, supra. The point goes to the jurisdiction of the court, which cannot be established by considerations arising from conduct of parties. The case is quite distinguishable from cases like Pitkin v. Springfield, 112 Mass. 509, and Hellen v. Medford, 188 Mass. 42, 73 N. E. 1070, 69 L. R. A. 314, 108 Am. St. Rep. 459. By force of the controlling authority of Knickerbocker Ice Co. v. Stewart. 253 U. S. 149, 40 Sup. Ct. 438, the entry must be:

Decree reversed. Decree to be entered in favor of the insurer.

O'DONNELL'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1921.)

129 Northeastern Reporter, 353.

1. MASTER AND SERVANT — FINDING OF COMPENSATION BOARD CONCUSLIVE, IF SUBSTANTIALLY SUPPORTED.

A finding of the single member of the Industrial Accident Board, affirmed and adopted by the board, as to the cause of death, is conclusive, if it has a substantial support in the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—EVIDENCE HELD TO ESTABLISH DEATH BY LEAD POISONING IN EMPLOYMENT, WITHIN COMPENSATION ACT.

Evidence *held* sufficient to warrant the finding of the Industrial Accident Board that the employee's death was caused by lead poisoning suffered in his employment.

(For other cases. see Master and Servant, Dec. Dig. § 405[3].)

Appeal from Superior Court, Suffolk County.

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Proceeding for compensation under the Workmen's Compensation Act (St. 1911, c. 751, as amended by St. 1912, c. 571), by the dependents of John J. O'Donnell, employee, against an employer and insurer. Compensation was awarded by the Industrial Accident Board, the award affirmed by the superior court, and from its decree the insurer appeals. Decree affirmed.

Paul L. Keenan, of Boston, for claimant.
Roger Clapp and James T. Connolly, both of Boston, for insurer.

De Courcy, J. The issue as framed before the single member of the Industrial Accident Board, and before the board on review, is:

"Whether the employee's death was caused by lead poisoning suffered in his employment by the subscriber."

The decision of the single member, affirmed and adopted by the board, is as follows:

"Upon the evidence in this case I find that the cause of employee's death on June 26, 1918, was sclerosis of the coronary arteries and this sclerosis was caused by the accumulative effects of the lead which was being constantly assimilated into his system up to the time that the final assimilation of lead occurred during his employment as a painter [plumber], resulting from the use of lead in his employment, and that the final assimilation which caused his death occurred during his employment with the subscriber in this case."

[1, 2] As in the analogous case of the verdict of a jury or the finding of a judge in an action at law, this finding is conclusive if it has a substantial support in the evidence. Uzzio's Case, 228 Mass. 331, 117 N. E. 349. We are of opinion that there was evidence to warrant it. The family physician testified that for the last few years he had treated Mr. O'Donnell "for what he supposed was lead poisonng." The expert, after reviewing the history and symptoms, gave as his opinion that "the cause of death was sclerosis of the coronary arteries, and it was undoubtedly caused by lead poisoning." There was evidence that during the five months of his employment with C. H. Cronin, the assured, he was handling lead pipe, and his handkerchiefs and napkins would be colored red from red lead. On the testimony of the specialist it could be found that the lead poisoning, which was a contributing cause of the employee's death, was progressive, and probably due to the constant assimilation of the lead during the years he had been exposed to it. Without further reference to the evidence in detail, it is apparent that we cannot say the finding of the board was unwarranted. Johnson's Case, 217 Mass. 388, 104 N. E. 735; Doherty's Case, 222 Mass. 98, 100, 109 N. E. 887; Walker v. Gage, 223 Mass. 179, 182, 111 N. E. 766.

Decree affirmed.

WALKDEN'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1921.)

129 Northeastern Reporter, 396.

1. MASTER AND SERVANT—"KNOWLEDGE" WITHIN WORKMEN'S COMPENSATION ACT DEFINED.

Since knowledge of an accident on the part of the employer is a substitute for written notice to him, he must have knowledge within the time

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when the written notice should have been given under the Workmen's Compensation Act; "knowledge" being used in the statute in its ordinary sense as meaning actual knowledge, but not absolute certainty.

(For other cases, see Master and Servant. Dec. Dig. § 398.)

(For other definitions, see Words and Phrases, First and Second Series, Knowledge.)

2. MASTER AND SERVANT — INFORMATION ACQUIRED BY AGENT KNOWLEDGE WITHIN WORKMEN'S COMPENSATION ACT.

Where an employer or authorized agent or his representative received intelligible information of an accident either verbally or in writing from a source which he should have given heed to, he cannot say that he was without knowledge of the accident because it did not happen in his presence.

(For other cases, see Master and Servant. Dec. Dig. § 398.)

3. MASTER AND SERVANT — OVERSEER'S KNOWLEDGE OF ACCIDENT SUFFICIENT UNDER WORKMEN'S COMPENSATION ACT.

If the injured employee informed the overseer of his particular room, representing the employer, who exercised superintendence of the employees in such room, a finding of knowledge by him of what had occurred sufficient under the Workmen's Compensation Act to charge the employer is warranted.

(For other cases, see Master and Servant. Dec. Dig. § 398.)

4. MASTER AND SERVANT—"SECOND HAND" SUBORDINATE OF OVERSEER NOT AGENT TO RECEIVE NOTICE OF INJURY WITHIN WORKMEN'S COMPENSATION ACT.

A "second hand" in a textile mill, who was a subordinate of the overseer of the weave room, was not the employer's agent for purposes of receiving notice of injury to an employee to subject the employer to liability under the Workmen's Compensation Act, and finding to such effect was unwarranted.

(For other cases, see Master and Servant. Dec. Dig. § 398.)

5. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT PROVISION FOR NOTICE NOT RETROACTIVE.

St. 1920, c. 223. amending the Workmen's Compensation Act (St. 1911, c. 751, pt. 2, § 18), to provide that failure to give notice of injury shall not bar claim if the insurer was not prejudiced, cannot be applied where it became operative subsequent to the particular injury and date of award.

(For other cases, see Master and Servant. Dec. Dig. § 398.)

Appeal from Superior Court, Suffolk County.

Proceedings for compensation under Workmen's Compensation Act by James Walkden, the employee, opposed by the Passaic Cotton Mills, the employer, and the American Mutual Liability Insurance Company, the insurer. Compensation was awarded by the Industrial Accident Board, the award confirmed by the superior court, and from its decree the insurer appeals. Decree ordered reversed. and claim dismissed.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason, of Boston, of counsel), for appellant.

BRALEY, J. The employee not having given notice in writing as provided in St. 1911, c. 751, pt. 2, § 15. and section 16, as amended by St. 1912, c. 172, § 1. and chapter 571, § 3, must rely on section 18, that—

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"Want of notice shall not be a bar to proceedings under this act, if it be shown that the association, subscriber, or agent had knowledge of the injury."

The board member found that on July 1, 1919, the employee, a weaver, while at work was struck and injured by a flying shuttle, and on July 3, 1919, before leaving work spoke "of the accident and the pain to the weaver from whose loom the shuttle was thrown and to the second hand." It is unnecessary to review the medical history of the case or to comment on the physical results for which he asks and has been awarded compensation. The insurer having filed a claim for review, one of the questions was "whether the insurer or subscriber had notice or knowledge of the injury." After affirming and adopting the findings and rulings of the single member, a majority of the Industrial Accident Board, no new evidence having been presented, "find and rule * * * that the employee informed * * * the second hand, his direct foreman, and the agent for the subscribers on * * * July 3, 1919, the first day upon which he had absented himself from work because of the injury of July 1st, that he could not go to work," and that the subscriber "had knowledge of the injury as soon as practicable after the happening thereof." It appears that the overseer first knew of the accident about September 25th or 26th, but no report of the injury was filed by the employer as required under St. 1911, c. 751, pt. 3, § 18, until October 1, 1919.

[1] It is settled by Brown's Case, 228 Mass. 31, 37, 116 N. E. 897, and Murphy's Case, 226 Mass. 60, 115 N. E. 40, that because knowledge on the part of the employer is a substitute for the written notice the employer must have knowledge within the time when the written notice should have been given. The word "knowledge" is used in the statute in its ordinary sense as meaning actual knowledge, but no absolute certainty. While notice of what has happened is not actual knowledge that the employee has been injured, it is such information as men usually act upon in ordinary human affairs. "Intelligible information of a fact, either verbally or in writing, and coming from a source which a party ought to give heed to, is generally considered as notice of it, except in cases where particular forms are necessary." George v. Kent, 7 Allen, 16, 18.

[2] The employer, or his authorized agent, or his representative upon receiving such information cannot say he is without means of knowledge of the accident because it did not happen in his presence. It is plain that the notice being oral the employee cannot prevail unless the information communicated to the second hand is under the statute to be treated as means of knowledge by the corporation that an alleged injury arising out of and in the course of his employment had been received. The overseer of the weave room represented the employer, and because of his position it could be found that he exercised superintendence over the employees in the performance of their work. Ruddy v. George F. Blake Mfg. Co., 205 Mass. 172, 181, 91 N. E. 310; Bloom's Case, 222 Mass. 434, 111 N. E. 45.

[3] If notice had been given to the overseer there would be evidence warranting a finding of knowledge by him of what had occurred which would have been sufficient under the statute. Bloom's Case, 222 Mass. 434, 111 N. E. 45; McLean's Case, 223, Mass. 342, 111 N. E. 783; Murphy's Case, 226 Mass. 60, 115 N. E. 40; Brown's Case, 228 Mass. 31, 116 N. E. 897; Frier's Case, 232 Mass. 181, 122 N. E. 195.

[4] But the employee's uncontradicted and uncontrolled evidence is, that the second hand "is the boss foreman and takes his directions from the overseer and gave him directions from the overseer during the day," and when informed of the accident the second hand "told him to report it to the overseer." The position held by the second hand was that of a subordinate. He could neither hire nor discharge weavers, nor had he

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any authority of supervision except as directed by the overseer. We are according of opinion that the finding that the second hand was the employer's agent was unwarranted.

[5] St. 1920, c. 223, amending St. 1911, c. 751, pt. 2. § 18, that failure to give notice shall not be a bar "if it is found that the insurer was not prejudiced by want of notice," cannot be applied. It became operative subsequent to the injury and the date of the award. Swan v. Sayles, 165 Mass. 177, 42 N. E. 570.

The decree must be reversed and the claim dismissed.

So ordered.

KRAKER v. NETT. (No. 22148.)

(Supreme Court of Minnesota. Jan. 21, 1921.)

180 Northwestern Reporter, 1014.

(Syllabus by the Court.)

MASTER AND SERVANT — EVIDENCE HELD TO SHOW INJURY TO COMPENSATION CLAIMANT'S EYE, KNOWN TO EMPLOYER.

The finding that the loss of plaintiff's eye resulted from an injury which arose out of and in the course of his employment, and that relator had actual knowledge of the occurrence of the injury within 90 days after it happened, is sustained by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[1, 4].)

Certiorari from District Court, Stearns County; John A. Roeser, Judge.

Proceeding under the Workmen's Compensation Law by Mathias Kraker, against John Nett. Judgment for plaintiff, and defendant brings certiorari. Affirmed.

Donohue & Quigley, of St. Cloud, and M. C. Tifft, of Minneapolis, for appellant.

R. B. Brower and J. B. Himsl, both of St. Cloud, for respondent.

TAYLOR, C. This is a proceeding under the Workmen's Compensation Law (Gen. St. 1913, §§ 8195–8230). The court awarded the claimant the compensation prescribed by statute for the loss of an eye. That he lost the sight of his right eye is conceded.

The relator contends: (1) That the finding that claimant's loss of sight resulted from an injury which arose out of and in the course of his employment is not sustained by the evidence; (2) that the finding that relator had actual knowledge of the injury within 90 days after the happening thereof is not sustained by the evidence.

1. Relator operates a lumber yard and deals in building material, including cement, at the village of Albany in Stearns county. Claimant was employed to work in the yard, and his duties included handling cement and delivering it to customers. Claimant testified that while putting loose cement in a sack on a windy day some of it got in his eye; that it caused pain and made the eye red; that the eye continually grew worse and more painful thereafter, although he applied various home remedies and remedies which he obtained at a drug store; that these affording no relief he consulted Dr. Watson and applied the medicine prescribed by him, and that, his eye continuing to grow worse, he finally

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consulted Dr. Whiting. an eye specialist. He first consulted Dr. Whiting about three months after the cement got in his eye. Dr. Whiting testified as to the condition of the eye when he first examined it; that he had seen the action of cement on the exposed portion of the eye in many cases; that such action is caustic and corrosive and destructive of the tissues; and that the condition in which he found claimant's eye might have resulted from getting cement into it.

The finding that the loss of the eye resulted from getting cement into it in the manner and at the time claimed by claimant is sustained by the evidence within the rule stated in State ex rel. v. District Court, 142 Minn. 335, 172 N. W. 133, State ex rel. v. District Court, 145 Minn. 127, 176 N. W. 165, and State ex rel. v. District Court, 177 N. W. 934, and cannot be disturbed by this court.

2. Section 8213, G. S. 1913, reals:

"Unless the employer shall have actual knowledge of the occurrence of the injury, or unless the injured workman, or a dependent, or some one in behalf of either, shall give notice thereof to the employer in writing, within fourteen (14) days after the occurrence of the injury, then no compensation shall be due until such notice is given or knowledge obtained. If the notice is given, or the knowledge obtained within thirty (30) days from the occurrence of the injury, no want, failure, or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced by such want, defect, or inaccuracy, and then only to the extent of such prejudice. If the notice is given, or the knowledge obtained within ninety (90) days, and if the employee, or other beneficiary, shall show that his failure to give prior notice was due to his mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation or deceit of the employer or his agent, then compensation may be allowed, unless the employer shall show that he was prejudiced by failure to receive such notice, in which case the amount of compensation shall be reduced by such sum as shall fairly represent the prejudice shown. Unless knowledge be obtained or notice given, within ninety (90) days after the occurrence of the injury, no compensation shall be allowed."

Unless the employer receives notice or obtains knowledge of the occurrence of the injury within 14 days after its occurrence, no compensation is due until he receives such notice or obtains such knowledge. If he receives notice or obtains knowledge within 30 days from the occurrence of the injury, no want, failure or inaccuracy of the notice will be a bar to compensation unless he shows that he was prejudiced thereby and then only to the extent of such prejudice. Unless he obtains knowledge or receives notice within 90 days after the occurrence of the injury, no compensation can be allowed.

While claimant gave written notice of the injury, this notice was not given until nearly four months after the injury happened and was too late. Claimant does not rely on this notice, but claims that relator had actual knowledge of the occurrence of the injury within thirty days after it happened. The accident happened on or about July 26, 1919. Claimant ceased work on August 3, 1919. He went to relator for his pay on August 5th. There was a controversy as to the amount due. He had kept his time in a memorandum book and claimed that this showed $222.80 due him. He presented this book to relator and asked relator to examine it, saying that he, himself, was unable to see. He was given a check for $196, which was the amount due as claimed by relator. He apparently did not know the amount for which the check was drawn at the time it was given to him, but learned the amount when he presented it at the bank. Two or three days later, he returned and demanded $26.80 more, which was refused. In the altercation which followed he stated to relator:

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"I lose my eye through the work and you don't want to pay me for what I have earned."

He also testified that the fact that his eye was affected was plainly observable during both these interviews. He made no claim for compensation for the injury in these interviews, but it appears that he had no knowledge of the Compensation Law or of his rights thereunder at that time. The statute is highly remedial in its nature and must be liberally construed to accomplish the purpose for which it was enacted. State ex rel. v. District Court, 133 Minn. 439, 158 N. W. 700. It provides for a quick, summary and informal disposition of such claims, and manifests an intention throughout to do away with technicalities. If the employer actually receives information of the occurrence of the injury, it is sufficient; and the form or manner in which he receives such information is not material. It was pointed out in State ex rel. Niessen v. District Court of Ramsey Co., 142 Minn. 335. 172 N. W. 133, that the review, in this court, of proceedings under the compensation law is limited by the act to a review of questions of law, and that where reasonable minds might draw different conclusions from the evidence, the question to be determined is a question of fact and not of law. The evidence brings the question whether relator had actual knowledge of the occurrence of the injury within this rule and the finding of the trial court cannot be disturbed.

Judgment affirmed.

SEGALE v. ST. PAUL CITY RY. CO. (No. 22090.)

(Supreme Court of Minnesota. Jan. 7, 1921.)

180 Northwestern Reporter, 777.

(Syllabus by the Court.)

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT APPLIED TO POLICEMEN AND FIREMEN.

The Workmen's Compensation Act (Gen. St. 1913, §§ 8195–8230) in the form in which it was enacted applied to policemen and firemen in the service of the city of St. Paul, and so remained until the passage of chapter 176, Laws 1919.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

2. MASTER AND SERVANT — MUNICIPAL EMPLOYEES NOT EXCLUDED FROM COMPENSATION ACT BY CHARTER.

The presence at the time of the enactment of that law of provisions in the charter of the city of St. Paul for the relief of injured policemen and firemen furnishes no sufficient basis for an inference that the Legislature intended to exclude the employees of St. Paul from the Compensation Act (Gen. St. 1913, §§ 8195–8230). Markley v. City of St. Paul, 142 Minn. 356, 172 N. W. 215, followed and applied.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

Appeal from District Court, Ramsey County; Hugo O. Hanft, Judge.

Action by Anthony Segale against the St. Paul City Railway Company. Judgment for plaintiff, and defendant appeals.. Reversed, with directions.

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W. D. Dwyer, of Minneapolis, and C. J. Menz, of St. Paul, for appellant.

Tom J. McGrath, of St. Paul, for respondent.

BROWN, C. J. Plaintiff was in the employ of the city of St. Paul in the capacity of a fireman and a member of its duly organized fire department. He was insured on October 2, 1918, while engaged in his employment, suffering therefrom a temporary disability. The injury received resulted from a collision between a fire truck on which plaintiff was riding to a fire and a street car operated by defendant. Defendant as to its employees is within and subject to the Workmen's Compensation Act (Gen. St. 1913, §§ 8195–8230), and if plaintiff as an employee of the city was within the act at the time of the injury, defendant is entitled to the benefits of the third party provisions of section 8229. On the theory and claim that plaintiff was not then subject to the act, and therefore in no way bound by its provisions, he brought this action at law to recover from the defendant, alleging that the injuries complained of were caused by its negligence in the operation of the street car so colliding with the truck. Defendant pleaded in defense, among other things, that both parties were subject to and within the Compensation Act, that plaintiff's remedy and relief is limited to the relief there provided, and that this action cannot be maintained. Plaintiff put in issue claim that his rights are controlled by the Compensation Act. At the trial the parties stipulated that if plaintiff was within the act he was entitled to judgment for the sum of $120; but, if not subject to the act, the sum of $500 was agreed upon as damages for his injuries. The trial court held the Compensation Act inapplicable, and ordered judgment for plaintiff for the sum of $500, as stipulated by the parties. Judgment was so entered, and defendant appealed.

Independent of certain compensatory provisions of the charter of the city of St. Paul applicable to policemen and firemen in the service of the city, the question of plaintiff's relation to the compensation act is controlled by the decisions in State ex rel. v. District Court of St. Louis County, 134 Minn. 26, 158 N. W. 790, and State ex rel. v. District Court of St. Louis County, 134 Minn. 28, 158 N. W. 791. The latter case involved the status, with respect to the Compensation Law, of a fireman in the employ of the city of Duluth, and it was there held that those in that service were within the act. We adhere to that decision.

The Compensation Act as applied to the fire department service under the Duluth charter, including the manner of appointment and term of service, and like service under the St. Paul charter is the same, and the decisions referred to apply to the case at bar unless the situation is to be differentiated by the presence in the St Paul charter of a provision granting certain specific relief to injured firemen in the service of that city. The charter provisions are as follows;

"Sec. 52. All firemen or police officers injured in actual service and thereby rendered incapable of performing his duty shall receive full pay during the period of incapacity, not exceeding six months, and if incapacitated for a further period, one-half pay, not exceeding an additional period of six months."

[2] We fail to discover from the fact that relief was so provided by the city at the time of the passage of the Compensation Act, or in the measure or extent thereof, sufficient reason for declaring as a necessary implication of law that the Legislature intended to exclude from its benefits the firemen and policemen of St Paul. There is no express declaration to that effect in the Compensation Act. There is nothing in conflict between the relief granted by the city and that granted by the Compensation Act, and both may stand and be enforced without confusion or discord in results; or, as expressed by Mr. Justice Quinn in

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Markley v. City of St. Paul, 142 Minn. 356, 172 N. W. 215, the relief given by the St. Paul charter must be treated as additional compensation, the payment whereof may be avoided by the city only by a repeal of the provisions of the charter. The necessary result of that conclusion is that the Compensation Act constitutes the paramount law of the state applicable to employees of the city of St. Paul as well as to all other employees throughout the state at large not expressly excepted from its operation.

Every reason consistent with the intention of the Legislature in the enactment of the statute, as well as the interests of the policemen and firemen of the city of St. Paul, and other cities working under home rule charters where similar relief may be provided, fully justifies and in fact requires the conclusion stated. A construction of the act in harmony with plaintiff's contention would work an injustice to the employees named; clearly a result not in the mind of the Legislature. Injuries received by firemen and policemen, particularly the former, are in the great majority of instances accidental for which there is no redress at law.. The benefits provided for by the Compensation Act for such injuries are far greater and more substantial than given by the St Paul charter. Under the charter provisions injuries resulting in disability regardless of the character or duration draw the same relief. If a fireman suffers the loss of one or both legs, he will be entitled to full pay for six months and one-half pay for the succeeding six months and no longer; the same result follows if perchance he may by some explosion at a fire attended by him lose the sight of one or both his eyes; the loss of an arm or both arms brings the same compensation. Under the Compensation Act the loss of a leg entitles the injured employee to compensation measured under the present law by $66^2/_3$ per cent. of his daily wages for a period of 175 weeks; and for the loss of both legs the same compensation for 400 weeks; for the loss of a hand the same per cent. of the daily wage for the period of 200 weeks. The St. Paul charter makes no absolute allowance to the family of a fireman or policeman in case of death occurring in the course of his employment accidentally or otherwise; the granting of relief in that case being wholly left to the discretion of the city council. Section 355, City Charter. The Compensation Law gives in such case to the widow or other dependents $10 per week for 300 weeks. This, though perhaps inadequate, is definite and certain, but under the charter provisions may or may not equal the same, or may not be paid at all, depending upon the city council in each particular case. Other provisions of the Compensation Law grant specific relief measured in amount to correspond with the character of the disability, while under the St. Paul charter the relief is the same in all cases. It seems clear that the Legislature did not intend to create inequalities of the kind, and the charter provisions must therefore be held, as stated in the Markley Case, as additional relief, in no way affecting the Compensation Act.

[1] This conclusion is not affected by chapter 176, Laws 1919, enacted subsequent to this controversy, by which the Legislature expressly excluded from the Compensation Law all employees of cities working under home rule charters wherein provision for relief is made. But it may be remarked that the change in the law thus brought about was probably an oversight, for, if it continues in force, some injured fireman or policeman may suffer the loss of rights which otherwise he would be entitled to under that law.

Judgment reversed, with directions to the court below to order judgment in harmony with the views here expressed.

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MORGAN v. BUTTE CENTRAL MIN. & MILL. CO. ET AL.
(No. 4651.)

(Supreme Court of Montana. Dec. 13, 1920.)

194 Pacific Reporter, 496.

1. MASTER AND SERVANT—FINDINGS OF DISTRICT COURT ON RECORD IN COMPENSATION CASE REVIEWABLE.

As it is a maxim set forth in Rev. Codes, § 6178, that, when the reason for a rule ceases, so should the rule, the rule that the Supreme Court will not reverse the findings of the district court except where the evidence clearly preponderates against them does not attach on an appeal under the Workmen's Compensation Act from a judgment of the district court reversing an order denying compensation in a case heard in the district court on the record as made before the board and the briefs of counsel.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

2. MASTER AND SERVANT — FINDINGS OF INDUSTRIAL BOARD BINDING ON DISTRICT COURT REVIEWING RECORD IN COMPENSATION CASE.

In a proceeding under the Workmen's Compensation Act, the district court on an appeal from a decision of the Industrial Board, heard and determined on the record as made before the board and the briefs of counsel, should not reverse the findings of fact of the board except where the advice clearly preponderates against them.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT — VOLUNTARY CONTRIBUTIONS NO EVIDENCE OF DEPENDENCY WITHIN COMPENSATION ACT.

Voluntary contributions are not necessarily evidence of dependency within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

4. MASTER AND SERVANT — DEPENDENCY WITHIN COMPENSATION ACT DETERMINED BY CONDITIONS AT TIME OF INJURY.

In determining whether one is a dependent within the Workmen's Compensation Act, the board is not concerned with problematical future conditions, but only with the condition of claimant at the time of the injury and for a reasonable period prior thereto.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

5. MASTER AND SERVANT — CLAIMANT HELD NOT AN INVALID DEPENDENT "INCAPACITATED" WITHIN COMPENSATION ACT.

In a proceeding under the Workmen's Compensation Act by one claiming to be an invalid dependent, it is immaterial what is the cause of his infirmity, and, if he is able to support himself by his own effort in any branch of physical or mental endeavor, he cannot be said to be "incapacitated."

(For other cases, see Master and Servant, Dec. Dig. § 388.)

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6. MASTER AND SERVANT—FINDING THAT INVALID COMPENSATION CLAIMANT WAS NOT DEPENDENT JUSTIFIED BY EVIDENCE.

In a proceeding under the Workmen's Compensation Act by one claiming as an invalid dependent of the deceased, *held,* that the evidence did not clearly preponderate against a finding of the board that applicant was not a dependent.

(For other cases, see Master and Servant. Dec. Dig. § 405[5].)

Appeal from District Court, Silver Bow County; Edwin M. Lamb. Judge.

Proceeding by P. F. Morgan under the Workmen's Compensation Act to obtain compensation as a dependent for the death of a brother, Edward Morgan, opposed by the Butte Central Mining & Milling Company, the employer, and the Guardian Casualty & Guaranty Company, the insurer. An order denying compensation was reversed by the district court and the employer and insurer appeal. Reversed and remanded, with directions to enter judgment in accordance with the findings of the Industrial Board.

Kremer, Sanders & Kremer, of Butte, for appellants.
Galen & Mettler and E. G. Toomey, all of Helena, for respondent.

MATTHEWS, J. On July 12, 1916, one Edward Morgan, an employee of the defendant mining company, met death in an accident arising out of and in the course of his employment.. All of the parties hereto are subject to the provisions of "plan two" of the Workmen's Compensation Act (chapter 96, Laws of 1915). Decedent had no wife, child, father, or mother. P. F. Morgan, a brother 49 years of age, filed with the board, in the manner and within the time provided for by the act, a claim for compensation as a "minor dependent" on the ground that he was, at the time of the accidental death of his brother, an invalid dependent upon, and receiving support from, decedent. Numerous affidavits were filed in support of the claim, among them those of four physicians to the effect that claimant was in no condition to perform physical or mental labor.

The insurer contested the claim on the ground that, under the provisions of the act, a brother of an injured employee was entitled to compensation only when under the age of 16 years, and upon the further ground that claimant was not, at the time of the accident, nor a long time prior thereto, dependent upon the decedent, but, on the contrary, was an able-bodied man capable of earning his own living. A hearing was had and oral testimony introduced. Dr. Horst was the only physician called to the stand. The board commented at length upon, but did not decide, the question as to whether a brother over the age of 16 years could, under any circumstances, be awarded compensation, but found that claimant was not an invalid within the meaning of the term as used in the act, and rejected the claim.

An appeal was taken to the district court of Silver Bow county, and it was there stipulated that the matter should be heard and determined on the record as made before the board and the briefs of counsel. The district court in its findings declared that "the findings and conclusions of the board are not in accordance with either the facts or the law," set the action of the board aside, and awarded compensation. This appeal is from the judgment of the district court.

The first question which suggests itself to our minds, though not urged by counsel, is whether, under our act, claimant is entitled to compensation no matter what his physical or mental condition was at the time of the accidental death of his brother.

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Section 6 of the act provides that:

"Every employer and insurer who shall become bound by * * * plan Number two * * * shall be liable for the payment of compensation* * * to an employee who has elected to come under this act and who shall receive an injury arising out of and in the course of his employment, or, in the case of his death from such injury, to his beneficiaries, if any; or, if none, to his major dependents, if any; or, if none, to his minor dependents, if any."

The terms here used are defined in section 6 of the act:

"Sec. 6 (*l*). 'Beneficiary' means and shall include a surviving wife or husband * * * a surviving child or children under the age of sixteen years and an invalid child or invalid children over the age of sixteen years. * * *

"Sec. 6 (m). 'Major dependent' means if there be no beneficiaries, * * * the father and mother, * * * if actually dependent to any extent upon the decedent at the time of his injury.

"Sec. 6 (n). 'Minor dependent' means if there be no beneficiary, * * * and if there be no major dependent, * * * the brothers and sisters, if actually dependent upon the decedent at the time of his injury."

"Sec. 6 (*o*). 'Invalid' means one who is physically or mentally incapacitated."

Section 7 (a) then provides:

"In computing compensation to children and to brothers and sisters, only those under sixteen years of age, or invalid children over the age of sixteen years, shall be included, and, in the case of invalid children, only during the period in which they are under that disability * * * after which payment on account of such person shall cease.. Compensation to children, or brothers or sisters, * * * shall cease when such persons reach the age of sixteen years."

In the absence of the last clause quoted, the term "invalid" applies only to a child or children, and brothers and sisters over the age of 16 years are clearly not entitled to compensation, no matter how absolute their dependency.

How far the use of the phrase "except invalids," in parenthesis after "children or brothers or sisters, in the final clause of section 7 (a), qualifies the former declaration. contained in the same section, that "in computing compensation * * * to brothers and sisters, only those under sixteen years of age, shall be included," it is not necessary for us to here determine, as the cause was by the board, and will here be disposed of on other grounds, properly presented and urged in the brief and argument of counsel.

The evidence is undisputed that at the time of the injury Edward Morgan was contributing approximately $30 per month to the support of claimant. The only question before us, therefore, assuming that an invalid brother over the age of 16 years is entitled to compensation, is: Was the finding of the board that claimant was not, at the time of the injury, an invalid within the contemplation of the act, supported by any substantial evidence?

[1, 2] Counsel for claimant contend that, as the appeal is from the judgment of the district court, the rule that "the Supreme Court will not reverse the findings of the district court except where the evidence clearly preponderates against them" controls, and that the findings and decision of the board are only indirectly involved. The reason for the adoption of the rule quoted is that in cases where such a rule is applicable the trial court has had the witnesses before it and had the superior advantage of considering their evidence in the light of their demeanor on the stand and the manner in which they testified. Where, however, the trial court renders its findings on the identical record presented to the

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appellate court, the reason for the rule does not attach; and it is one of our maxims that, "when the reason of a rule ceases so should the rule itself." Section 6178, Rev. Codes. We are in as an advantageous position as was the district court on the appeal from the findings of the board. The rule contended for should, however, have governed the action of the district court. its position is analogous to that of a district judge, other than the one who presided at the trial, to whom a motion for a new trial has been submitted. In such a case this court has said:

"When a motion for a new trial for insufficiency of the evidence is submitted to a judge other than the one who presides at the trial, for the very reason that he cannot call to his aid a recollection of the demeanor of the witnesses, he ought not to go further than to determine upon the dead record the question whether there is a decided preponderance of evidence against the verdict or decision. If such is the case, a new trial ought to be granted; otherwise not." Gibson v. Morris State Bank, 49 Mont. 60, 140 Pac. 76, citing Orr v. Haskell, 2 Mont. 225, and Landsman v. Thompson, 9 Mont. 182, 22 Pac. 1148.

This rule was applied in Willis v. Pilot Butte Min. Co., 58 Mont. 26, 190 Pac. 124, which was also a case arising under our Compensation Act. In the opinion, after declaring that the action of the district court is that of review rather than a new trial, we said:

"Our duty, then, is but to determine whether the evidence before the board clearly preponderates against its findings, as adopted by the court; if not, we must affirm the judgment."

This is true whether the district court adopts or rejects the findings of the board on a review of the "dead record."

The rule almost universally adopted by the courts in jurisdictions having Compensation Acts is that the findings and decision of the commission or board cannot be reversed where there is any evidence to support them:

California: Frankfort Insurance Co. v. Pillsbury, 173 Cal. 56, 159 Pac. 150; Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721; Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35; Kirkparick v. Industrial Acc. Comm., 31 Cal. App. 668, 161 Pac. 274; Smith v. Industrial Acc. Comm., 26 Cal. App. 560, 147 Pac. 600.

Michigan: Bayne v. Riverside S. & C. Co., 181 Mich. 378, 148 N. W. 412, 5 N. C. C. A. 837; Shafer v. Parke-Davis Co., 192 Mich. 577, 159 N. W. 304; Papinaw v. Grand Trunk Ry. Co., 189 Mich. 441, 155 N. W. 545; Spooner v. Detroit Saturday Night Co., 187 Mich. 125, 153 N. W. 657, L. R. A. 1916A, 17, 9 N. C. C. A. 647; Ramlow v. Moon Lake Ice Co., 192 Mich. 505, 158 N. W. 1027, L. R. A. 1916F, 955; Hills v. Blair, 182 Mich. 20, 148 N. W. 243.

New York: Rhyner v. Hueber Building Co., 171 App. Div. 56, 156 N. Y. Supp. 903; Hendricks v. Seeman Bros., 170 App. Div. 133, 155 N. Y. Supp. 638; Goldstein v. Centre Iron Works, 167 App. Div. 526, 153 N. Y. Supp. 224; Prokopiak v. Buffalo Gas Co., 176 App. Div. 128, 162 N. Y. Supp. 288.

Wisconsin: Milwaukee Coke & Gas Co. v. Industrial Acc. Comm., 160 Wis. 247, 151 N. W. 245; First Nat. Bank v. Industrial Comm., 161 Wis. 526, 154 N. W. 847; Milwaukee v. Industrial Comm., 160 Wis. 238, 151 N. W. 247; Eagle Chemical Co. v. Nowak, 161 Wis. 446, 154 N. W. 636; Heileman Brewing Co. v. Shaw, 161 Wis. 443, 154 N. W. 631.

Massachusetts: In re Fierro's Case, 223 Mass. 378, 111 N. E. 957. In re Doherty's Case, 222 Mass. 98, 109 N. E. 887; In re Savage, 222 Mass. 205, 110 N. E. 283; In re Sanderson, 224 Mass. 558, 113 N. E. 355; In re Von Ette, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641.

Illinois: Armour & Co. v. Industrial Board, 273 Ill. 590, 113 N. E. 138; Parker-Washington Co. v. Industrial Board, 274 Ill. 498, 113 N. E.

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976; Chicago A. R. Co. v. Industrial Board, 274 Ill. 336, 113 N. E. 629; Sub. Ice Co. v. Industrial Board, 274 Ill. 630, 113 N. E. 979; Munn v. Industrial Board, 274 Ill. 70, 113 N. E. 110.

New Jersey: Blackford v Green, 87 N. J. Law, 359, 94 Atl. 401; Jackson v. Erie Ry. Co., 86 N. J. Law, 550, 91 Atl. 1035; Scott v. Payne Bros., 85 N. J. Law, 446, 89 Atl. 927; Bryant v. Fissell, 84 N. J. Law. 72. 86 Atl. 458.

Minnesota: State ex rel. Crookston L. Co. v. Court, 132 Minn. 251, 156 N. W. 278; State ex rel. Rainy Lake Co. v. Court. 128 Minn. 43, 150 N. W. 211; State ex rel. Nelson-Spelliscy Co. v. Court, 128 Minn. 221, 150 N. W. 623.

Washington: Sinnes v. Daggett, 80 Wash. 673, 142 Pac. 5.

Rhode Island: Weber v. American Silk Spinning Co., 38 R. I. 309, 95 Atl. 603, Ann. Cas. 1917E, 153, 11 N. C. C. A. 437.

Connecticut: Appeal of Hotel Bond Co.,. 89 Conn. 143, 93 Atl. 245.

In the last case cited the court said:

"Compensation Acts have had a common origin and a common history. and the great majority of the 24 thus far enacted in our states bear close resemblance to each other in essential features. In only 3 of the 24, we believe, is a retrial of * * * fact permitted on appeal from an award; and, unless the acts have expressly given a retrial, the courts have construed them to intend the contrary."

The authorities above cited merely apply to the findings and decision of the Accident Board the general rule governing the review of the evidence on appeals generally. That this is true is indicated in the decision in re Savage, supra, where it is said:

"The findings of the Industrial Accident Board are equivalent to the verdict of a jury or the findings of a judge."

The rules heretofore announced in this jurisdiction that (1) the Supreme Court will not reverse the findings of the district court in equity cases. except where the evidence clearly preponderates against them, and (2) where there is a substantial conflict in the evidence, in an action at law, the Supreme Court will not reverse the judgment on the ground of insufficiency of the evidence, are but modifications of the general rule above announced.

We can therefore go no further than to determine from the cold record whether the evidence clearly preponderates against the findings of the board, and must assume that the district court found that it does.

[3] The evidence is conflicting. While the claimant testified that he was entirely incapacitated from performing any labor at the time of the accident and for more than three years prior thereto, it appears without contradiction that at the very time he was employed in a clerical position, receiving approximately $4 per day for his services, and that he had been so employed for a period of six weeks prior to the accident. It is true that he established the fact that Edward Morgan was at the same time contributing to his support. But voluntary contributions are not necessarily evidence of dependency. Miller v. Riverside Storage Co., 189 Mich. 360, 155 N. W. 462.

[4] As proof of his dependency, claimant also offered proof to the effect that he had been injured in a mine in the year 1900, and that as a result of that injury he was at the time of the injury to his brother unable to perform labor in the mines and suffered from constant headaches and nervousness. Yet it is admitted that he worked in the mines at Butte for seven years thereafter and on the police force of that city for two years, and did not leave the police force because of incapacity, but in order to attend a medical college. As to his headaches and mental condition, Dr. Horst, called for the claimant, testified that he had examined the man and that he passed a pretty fair examination; that he

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found nothing much to warrant his condition; and that headache and nervousness would not, under ordinary conditions, incapacitate a man from work, although he added that, "if continued and persistent, he would eventually land in the insane asylum or die, because one cannot suffer from these things all the time and not feel wretched." The board was not, however, concerned with problematical future conditions, but only with the condition of claimant at the time of the injury and for a reasonable period prior thereto.

It also developed that claimant was in the habit of taking as high as 75 acetanilid tablets a day, for the relief of pain, which amount, the doctor testified, if taken by a man not accustomed to their use would produce death. And it must be remembered that the board had the claimant himself before it on the stand; he was, in effect, a living exhibit of his then condition, which was said to be worse than at the time of the injury to his brother. The board in its findings commented on his condition, in the light of the evidence adduced, as follows:

"On the witness stand he proved a competent, careful witness, with a strong, quick, active, virile mind; not a moment's hesitancy in answering questions; quick on dates and positive in his statements, indicating that he could fairly and reasonably be expected to fill with satisfaction any clerical position. He was on the witness stand for over an hour and a half,subjected to a thorough examination and a grueling cross-examination; yet there was not the slightest indication of exhaustion or undue nervousness, or any symptoms to indicate an invalid. He appeared strong physically, weighing close to 200 pounds (judging from appearance) and displayed exceptional mental ability."

[5] It is contended that claimant's condition is due to an injury received in 1900, while working in another state, and counsel, taking that injury as the basis, contend that incapacity means only inability to perform the labor the injured party was performing at the time of the injury, and cite many cases under compensation laws in support of their contention. But these cases refer, and can only refer, to disabled workmen seeking compensation for the injury resulting in disability, and can have no bearing on the incapacity of a dependent.

If a brother over the age of 16 years is a "minor dependent" under the provisions of our act, it can only be when such brother is an "invalid"—that is, "one who is physically or mentally incapacitated." It is immaterial what is the cause of his infirmity, on the other hand, if he is able to support himself by his own effort in any branch of physical or mental endeavor, he cannot be said to be "incapacitated."

[6] On the "dead record," we cannot say that the evidence clearly preponderates against the findings of the board, and are therefore forced to the conclusion that the district court erred in so finding.

The judgment and order appealed from are reversed, and the cause is remanded, with direction to the district court to enter judgment in accordance with the findings of the board.

Reversed.

Brantly, C. J., and Holloway, Hurly, and Cooper, JJ., concur.

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BOWMAN v. GIBSON ET AL.

(New York Supreme Court, Appellate Division, Third Department. January 5, 1921.)

185 New York Supplement, 546.

MASTER AND SERVANT — COMPENSATION FOR DEATH BY TUBERCULOSIS HELD NOT SUSTAINABLE BY STATUTORY PRESUMPTION, UNAIDED BY EVIDENCE.

Where an employee broke his leg September 10, 1918, and apparently recovered, but died from pulmonary tuberculosis August 7, 1919, he was not entitled to an award based on the presumptions of Workmen's Compensation Law, § 21, providing that in proceedings under the statute it shall be presumed that the claim is within the law, where there was no evidence that the employee died as the result of the accident.

(For other cases, see Master and Servant. Dec. Dig. § 405[4].)

Kiley, J., and John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Act by Ellen Bowman, for herself and minor children, for compensation for the death of Timothy D. Bowman, opposed by John W. Gibson, employer, and the Royal Indemnity Company, insurer. An award was made by the State Industrial Commission, and the employer and insurance carrier appeal. Reversed, and remitted to the commission.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Frank J. O'Neill, of New York City (Barnett Cohen, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

COCHRANE, J. The injured employee broke his leg, September 10, 1918. He was taken to a hospital where he received treatment for ten days. He was then taken home, and there received medical treatment for the fracture for a period of eight or ten weeks. He had then apparently recovered, and medical observation ceased. He did not, however, return to his work. Two or three weeks previous to August 7, 1919, a physician was called, who discovered that the employee was suffering with pulmonary tuberculosis, from which disease he died on the date last mentioned. The claim is resisted on the ground that no causal relation has been established between the accident and the death of the employee.

The commission has followed the objectionable practice of incorporating in its findings the facts contained in its opinion. That practice was condemned in Matter of Lorchitsky v. Gotham Folding Box Co. (decided November 16, 1920) 128 N. E. 899. Turning to the opinion, therefore, as we are required to do in order to find out what the commission decided, we find a very brief discussion of the medical testimony, concluding with this statement by the commissioner writing the opinion:

"I think this is a case that must follow the presumption of section 21 of the law, and I direct an award."

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The opinion was adopted as the opinion of the commission. If this opinion means anything, it means that the commission could not determine from the evidence that the tuberculosis was the result of the accident, and that in making the award the commission relied on a presumption supposed to be created by section 21 of the Workmen's Compensation Law (Consol. Laws, c. 67). The commission had no right to rely on such presumption. It has been so frequently held, both by the Court of Appeals and by this court, that the presumption created by that section does not relieve the claimant from the necessity of establishing his claim by legal evidence, that the citation of those decisions would be superfluous. However, one of the most recent decisions to that effect is the case above cited. If the commission could not decide from the evidence that the employee died as a result of the accident, it was its duty to dismiss the claim. It is immaterial on this appeal whether or not the evidence was such that the commission have found therefrom as a proper inference that the tuberculosis resulted from the accident. The commission makes it clear that it has not so found, but has erroneously relied on a presumption of liability which does not exist.

The award should be reversed, and the proceeding remitted to the commission.

Woodward and Henry T. Kellogg, JJ., concur.

KILEY, J. (dissenting). On September 10, 1918, claimant's intestate was engaged in his regular business in New York City, driving a truck on one of the streets of said city; one of the wheels struck a hole; the impact threw the driver to the street, causing a transverse fracture of the shaft of the right tibia. He was taken to the hospital at once; his leg bled profusely; he remained in the hospital until September 20, 1918, when he went home; the wound had not healed, but did not show any signs of infection. He was treated at home by a physician for eight or ten weeks. He does not seem to have had any regular medical treatment after that until August, 1919. He was unable to work all of that time, and after a while, before August, 1919, he grew thin and weak, and walked with a crutch or cane; he was poor, had five or six children, and the wife had to go out to work. The physician called about August, 1919, found him in an advanced stage of tuberculosis. He died August 7, 1919. The above was given as the cause of death. Much evidence was given upon the question as to whether the injury had any relation to the disease from which he died.

The commission found, in effect, that such injury did lower his resisting power and vitality, that a dormant tubercular condition was lighted up, and that the pulmonary tuberculosis from which he died was the direct result of his injuries, sustained when he fell from the truck to the street. He had never had any symptoms of tuberculosis, that any one had discovered, previous to about August, 1919. He had never been sick. He was 37 years old and had always worked. The widow and minor children were awarded compensation. The insurance carrier resists the payment of this award upon the single ground that the disease from which claimant's intestate died is not traceable, in any way, to the injury which was admittedly sustained. The facts in the opinion by a commissioner are incorporated in the conclusion of facts; he bases the right to an award upon presumptions, which he claims is permissible under section 21 of the Compensation Law.

In order to make applicable section 21 of the Workmen's Compensation Law, it must first appear that there was an accident arising out of and in the course of the employment, and incidental to such employ-

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ment, and that an injury resulted therefrom. If the injured party, after the apparent recovery from the specific injury, or while he is making an apparently good recovery from such injury, dies or has his earning powers diminished by reason of some or any of the diseases or ills to which humanity is heir, it must then appear that the injury activated or set in motion the germs, which are the basis of that particular disease. The commission has found that the injury "so lowered his resisting power and vitality that a dormant tubercular condition was lighted up, so as to cause him to die from pulmonary tuberculosis." The insurance carrier complains that there is no evidence in the record to sustain such finding, in that no evidence was given before the commission showing that "a dormant tubercular condition" existed before the injury.

The first requirement to make applicable section 21 is met; there was an accident arising out of and in the course of employment and incidental thereto, and injury was had. It further appears that this man was strong and healthy before the accident, worked every day, and supported a large and growing family; never known to cough or show any sign of lung infection; that by reason of this injury he was deprived of his exercise and former physical activity; and that after a few months he grew very thin and very weak. The medical testimony shows that there was a profuse hemorrhage at the seat of the injury, and that seems to have been considered important in reaching a conclusion on the disputed point. The attending physician got the history between the time he first treated him and his final treatment, just before death; it was to the effect that he caught cold and had some pain in both lungs. In his report he says the cause of death did not relate back to the injury. Upon his examination he says that patient's general condition was lowered by reason of the accident, and put him in a condition (physically) where he was liable to infection, and that the fracture, such as he had, was a serious matter, even after it had apparently healed.

The next or second physician called says he does not think there was any causal relation between the accident and the disease, and explains that in order to develop tuberculosis three factors are absolutely necessary, viz.: The proper soil for the inception of the bacilli; second, the bacilli; and, third, the exciting cause—and seems to base his conclusion of no causal relation upon the fact that the dormant tuberculosis, in his opinion, would have developed sooner than it did in this case. The last doctor called, answering a hypothetical question, said that the injury of itself could not be a competent producing cause. On cross-examination he says the factors appearing in this case are devitalizing immediately only; and he was then asked, if the germs of tuberculosis were present and dormant at the time of the injury, he would not have expected the disease to develop in a shorter time following the injury than the evidence discloses, to which he answered, "I don't know whether it would or not." Dr. Leuy was then examined. Dr. Oliver asking him this question:

"Assuming this man had latent tuberculosis, what was the cause of the acute exacerbation? A. From a fracture, it could have been a thrombus dislodged from the site of the fracture; he had quite a hemorrhage. It could have been his being detained in the house, and lack of exercise in a young man, and lowered vitality"

It is said that the findings in this case offend against the rule laid down in Lorchitsky v. Gotham Folding Box Co., supra, in that the commission in its findings of fact refers to the opinion of one of the commissioners. I have no quarrel with the rule that indicates to the commission that this court will not sustain an award where the opinion of one of the commissioners is incorporated in the decision as the basis

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of any of its findings, and that it must make findings of fact and conclusions of law, independent of any such opinion, to have such award sustained. It seems to me that this case differs, in that regard, from the Lorchitsky Case, ,supra. Here the commission does not attempt to incorporate the opinion, but has made separate and complete findings of fact, aside from the opinion of the commissioner, and then states as an addition that "the facts contained in the opinion of Commissioner ——— are to be made part of the conclusions of fact herein." The statement made by the commissioner in his opinion, that "I think this is a case that must follow the presumption of section 21 of the law, and I direct an award," is not a statement of fact, and of course is not incorporated in the award.

The findings of fact in this case, made by the commission upon the evidence, are very full, while the opinion in question merely recites a part of the evidence. An award cannot be based upon a presumption under section 21, if there is no evidence upon which it can operate; but, if there is evidence for and against the contention of the claimant, I understand the commission may then resort to section 21. There were specific findings of fact here, made upon the evidence, and upon evidence of probative force. The evidence shows causal relation between the injury and the disease that finally proved fatal to claimant's intestate.

The award should be affirmed.

John M. Kellogg, P. J., concurs.

FORBES v. EVENING MAIL ET AL.

(New York Supreme Court, Appellate Division, Third Department. January 5, 1921.)

185 New York Supplement, 592.

MASTER AND SERVANT — "PHALANGE" OF FINGER NOT "SUBSTANTIALLY LOST," WITHIN WORKMEN'S COMPENSATION LAW; "LOSS OF FIRST PHALANGE."

The major portion or more than one-half of a "phalange" of a finger, which means a finger bone, as distinguished from the flesh, must be removed before the same is "substantially" lost, so as to constitute a "loss of the first phalange," within Workmen's Compensation Law, § 15, subd. 3, and such loss is not made out where there is no showing that one-half or more of the flesh and bone has been removed.

(For other cases, see Master and Servant, Dec. Dig. § 385[12].)

Appeal from State Industrial Commission.

Proceeding by William Forbes under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the Evening Mail, the employer, and the American Mutual Liability Insurance Company, the insurance carrier. There was an award of compensation by the State Industrial Commission for the loss of one-half of the middle finger and one-half of the ring finger of the right hand, and the employer and insurance carrier appeal. Award reversed, and matter remitted to commission.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

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Clarence B. Tippett, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken. of Albany, of counsel), for State Industrial Commission.

HENRY T. KELLOGG, J. It is provided in subdivision 3 of section 15 of the Workmen's Compensation Law (Consol. Laws, c. 67):

"The loss of the first phalange of the thumb or finger shall be considered to be equal to the loss of one-half of such thumb or finger."

A phalanx or phalange is defined by Webster to be:

"In vertebrates, one of the digital bones of the hand or foot beyond the metacarpus or metatarsus."

It is defined by the Century Dictionary as follows:

"One of the bones of the fingers or toes; a digital internode, succeeding the metacarpal or metatarsal bones. collectively constituting the skeleton of the third and distal segment of the hand or foot."

In accurate speech, therefore, the loss of a phalange of a finger is the loss of a finger bone, and the loss of the flesh of a finger forms no part thereof. It was held in Mockler v. Hawkes, 173 App. Div. 333, 158 N. Y. Supp. 759, that "the amputation of the tip of the bone of the second finger" did not constitute a loss of the first phalange. It was held in Geiger v. Gotham Can Co., 177 App. Div. 29, 163 N. Y. Supp. 678. that "a traumatic amputation of one-eighth of an inch of the bone" of the finger did not constitute a loss of the first phalange. It is true that in Matter of Petrie, 215 N. Y. 335, 109 N. E. 549, an award made for the loss of one-half a finger was sustained on the theory of a loss of the first phalange, where only one-third of the bone was found to be amputated. That case must be interpreted, however, in the light of a further finding of the commission that the injury consisted of "third finger cut off near the first joint, or near root of nail." The Petrie Case furnishes us with the controlling rule:

"That the provisions of the statute providing compensation for the loss of a certain portion of a finger become operative and applicable when it appears that *substantially all* of the portion of the finger so designated has been lost."

In our case the loss is stated in the employer's first report of injury to be a loss of "pulp of middle and ring fingers." It is stated in the employee's claim for compensation to be "bone exposed on middle and ring fingers of right hand." It is stated in attending physician's report to be "amputation of pulp of right middle and ring fingers, with part of distal phalanx in each finger *chipped off*." The finger loss is not otherwise stated in the testimony, and is not further proven, except by the X-ray photographers which appear in the record. A comparison of the finger phalanges which are sound with those which have been chipped, as shown by these pictures, indicates that less than one-fourth of each of the injured phalanges has been amputated. It is evident that "substantially all" of a phalange cannot be removed, and "substantially all" of the same phalange be left after the removal. Necessarily, therefore, under the Petrie Case. the major portion or more than half of a phalange must be removed before the same is "substantially lost," and a "loss of the first phalange," within the meaning of the statute, is made out. Assuming, as nice wording. would compel us to assume, that a phalange is a finger bone, no such has been proven in this case

Assuming, as it seems to have been assumed in Thompson v Sherwood Shoe Co, 178 App. Div. 319, 164 N. Y. Supp. 869; and Tetro v. Superior Printing & Box Co., 185 App. Div. 73, 172 N. Y. Supp. 722, that the first phalange of a finger is all that part of a finger, wheth-

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er flesh or bone, which extends beyond the first joint, then equally has the claimant failed here to show a "loss of the first phalange." This is true, because it nowhere appears from the reports, the testimony, or the pictures that one-half or more of flesh and bone constituting the first phalange has been removed. The award was therefore erroneous.

The award should be reversed, and the claim remitted to the commission. All concur.

HOFFMAN v. VAN BENTHUGSEN ET AL.

(New York Supreme Court, Appellate Division, Third Department. January 5, 1921.)

185 New York Supplement, 539.

1. MASTER AND SERVANT—DEPENDENCY, WITHIN WORKMEN'S COMPENSATION LAW, DETERMINED BY CONDITIONS AT DEATH.

In determining whether claimant in a proceeding under the Workmen's Compensation Law is a dependent, it is conditions at the time of death which must be reckoned, and not conditions probable to occur in the future.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

2. MASTER AND SERVANT—FINDING OF MOTHER'S DEPENDENCY, WITHIN WORKMEN'S COMPENSATION LAW, HELD UNWARRANTED.

In a proceeding by a mother under the Workmen's Compensation Law to obtain compensation for the death of her son, facts *held* insufficient to show dependency; claimant obtaining money from a number of children and purchasing houses with part of it in her own name.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

Appeal from award of State Industrial Commission.

Proceeding by Mrs. Christine Hoffman under the Workmen's Compensation Act to recover compensation for the death of her son, William Hoffman, opposed by the Robert Van Benthugsen Company, the employer, and the Employers' Liability Assurance Corporation, Limited, insurance carrier. There was an award of compensation by the State Industrial Commission, and the employer and insurance carrier appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Bertrand L. Pettigrew, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, and Bernard L. Chientag, of New York City, of counsel), for respondent.

KILEY, J. The claimant is the mother of William Hoffman, who was an electrician helper, and worked as such for the appellant employer, whose place of business is 243 Canal street, New York City. He was 22 years old, and on the 9th day of December, 1919, while engaged at his regular employment for his empoyer, at Upper Nyack, N. Y., fell into the water and was drowned. The Industrial Commission has made an award to claimant, his mother, as a dependent at the time of his death,

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of $5.77 a week. The insurance carrier resists payment upon the ground that the evidence does not warrant the conclusion that claimant was dependent upon the deceased at the time of his death.

The evidence in this case shows that the claimant was the business end of a large family, and, at the time of the death of William, her husband earned $20 a week and gave it all to her; that William, the deceased, was earning $20 a week and that he gave it all to the claimant; her son Herman gave her $7 a week for his board; her son Charles gave her $7 a week for his board; she expected $10 a week from Henry; her son George pays her $15 to $18 a week. Her daughter, Margaret, was earning $10 a week, and gave it all to claimant; Ferdinand earned $10 a week, and gave it all to her; for all paying over $7 she purchased their clothes and paid car fare. She purchased two houses, one in which the family lived, a double house, for which she agreed to pay $5,050, and rents part of that house for $14.50 a month. Nine years before William's death she purchased another house, for which she agreed to pay $6,000, and for which she was receiving $40 or $41 a month rent. This property she had acquired, she had paid upon, out of this income, down to the time of William's death, sufficient so that she had an equity of $3,450 in the property, at the purchase price, which in 1919 must have advanced in value considerable over the sum, and she was making her payments regularly at the time of the hearing in March, 1920. The title was in claimant. She was 54 years old; her husband was 61 years.

[1, 2] If we could calculate with the future in view, this award might be upheld; but it is conditions at time of death, under the Workmen's Compensation Law (Consol. Laws, c. 67), with which we have to reckon. Turn these facts which way you will, the inference is irresistible that, because two of the boys anticipated marriage, thus decreasing her income, claimant anticipated that in the future she would not be able to save as much as she had in the past, to pay upon her real estate investments. Respondent's attorney, William V. Hagendorn, in a brief, cites as authority Hendricks v. Seeman Bros., 170 App. Div. 133, 155 N. Y. Supp. 638, Rhyner v. Huebner Bldg. Co., 171 App. Div. 56, 156 N. Y. Supp. 903, and Walz v. Holbrook, 170 App. Div. 6, 155 N. Y. Supp. 703, which comes perilously near sustaining respondent's contention. I think Birmingham v. Westinghouse Electric & Mfg. Co., 180 App. Div. 48, 167 N. Y. Supp. 520, Wilkes v. Rome Wire Co., 184 App. Div. 626, 172 N. Y. Supp. 406, and Frey v. McLoughlin Bros., Inc., 187 App. Div. 824, 175 N. Y. Supp. 873, are controlling. These authorities seem to be applicable to the facts presented here.

The award should be reversed, and the claim dismissed. All concur.

BRADY ET AL. v. HOLBROOK, CABOT & ROLLINS CORPORATION.

(New York Supreme Court, Appellate Division, Third Department. January 5, 1921.)

185 New York Supplement, 541.

MASTER AND SERVANT — RULING ON APPEAL FROM COMPENSATION AWARD LAW OF CASE ON SUBSEQUENT APPEAL.

Where court, on appeal from an award of compensation for the loss of a leg, ruled that the fracture resulting from the injury did not cause the loss of the leg, within the meaning of the Workmen's Compensation

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Law, but that loss was to be attributed solely to a cancer, and limited the compensable injury to the fracture, exclusive of the bone cancer or results flowing therefrom, such ruling was controlling on a subsequent appeal from an award again erroneously allowing for entire loss of the leg.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

Henry T. Kellogg, J., dissenting.

Appeal from Award of State Industrial Commission.

Proceeding by Joseph F. Brady under the Workmen's Compensation Law (Consol. Laws, c. 67) for compensation for personal injuries, opposed by the Holbrook, Cabot & Rollins Corporation, employer and self-insurer. There was an award of compensation, and the employer appeals. Award reversed, and matter remitted to the commission, with instructions to take evidence, if necessary, and make findings in accordance therewith.

See, also, 189 App. Div. 405, 178 N. Y. 504.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Adolph Hansen, of New York City, for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, and Bernard L. Shientag, of New York City, of counsel), for respondents.

KILEY, J. From the employer's claim for compensation, as appears in the record, we find the accident occurred on the 29th day of January, 1919, under the following circumstances: Claimant was at work for the appellant. employer, self insurer, in the new Broadway subway at Forty-Third and Forty-Fourth streets, New York City, and that his occupation was that of storeroom keeper. On the day in question he says he was walking along a dark passageway, where there was an incline, and that he miscalculated as to his exact location, and, stepping into space, fell down the incline and fractured the lower end of the bone in his right leg. Evidence shows that it was the femur. He was taken to the Roosevelt Hospital. There the injury was diagnosed as a "pathological fracture of the lower extremity of the right femur." After careful examination of the leg at seat of injury, including the X-ray, it was discovered that he had a well-developed bone cancer at the seat of injury; amputation of the leg at middle one-third of right thigh was immediately had; this was deemed necessary, because the growth so discovered, was malignant. The evidence given previous to May 5, 1920, was to the effect that the injury had nothing to do with the presence of the cancer and was not the cause of the amputation of the leg. Notwithstanding such evidence the commission made an award to claimant, as and for the loss of the leg. The employer appealed to this court. and the appeal was heard at the November term, 1919. The award was reversed. 189 App. Div. 405, 178 N. Y. Supp. 504. Mr. Justice Woodward, writing for the court (Mr. Justice Lyon dissenting), said that the damage caused by the cancer was not compensable; that the cancerous condition, existing before the injury, was the only justification for the amputation of the leg. It is suggested in the opinion that an award might have been made for the accident; but it is expressly held it could not be made for the loss of the leg.

As I read the former holding of this court (189 App. Div. 405, 178 N. Y. Supp. 504, supra), an award can be made as for a fracture of the lower extremity of right femur and the loss resulting therefrom

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and occasioned thereby, independent of, and not influenced by, the presence of the cancerous condition of the bone and the consequent amputation. The case was sent back to the commission, and some months after a hearing was had, at which Dr. Louy was examined and testified. Before the taking of testimony was commenced, Mr. Shientag, of counsel for the commission, said:

"My own feeling is that I want to ask Dr. Louy to testify what in his opinion was the probable period of disability in a case of this kind, and have those facts in the record, and go up to the Court of Appeals on it."

Dr. Louy did not see the injury, nor the claimant before amputation, and necessarily testified from the record previously made up, and upon hypothetical questions. He said the surgical disability would be three months, convalescing period six months additional, and that there would be a permanent defect, evidenced by shortening of the leg, involving the knee joint, causing a loss of function, which would be a vocational defect. He also said that from his past experience the condition which he found here would amount to about the loss of half the leg. The last award was for the entire loss of the leg, same as first made by the commission. The ruling of this court on the former appeal limited the compensable injury to the fracture, exclusive of the bone cancer or any results flowing therefrom. It is not ambiguous, and is controlling here.

The award should be reversed, and the case remitted to the commission, with instruction to take evidence, if necessary, and make findings in accordance therewith. All concur, except Henry T. Kellogg, J., who dissents and votes for dismissal.

JACK v. MORROW MFG. CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. January 5, 1921.)

185 New York Supplement 588.

1. MASTER AND SERVANT—CONSIDERATION OF MEDICAL OPINION WITHOUT OPPORTUNITY TO CROSS-EXAMINE ERROR.

Consideration of a written opinion of a physician, submitted after the close of the hearings, without opportunity to employer for cross-examination, is an error, compelling reversal of the award under the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 415.)

2. MASTER AND SERVANT—INJURY WHILE GOING TO MIDDAY MEAL, AFTER LEAVING PREMISES, NOT WITHIN COMPENSATION LAW; "COURSE OF EMPLOYMENT".

A servant injured by a passing vehicle is not in the course of his employment, within the meaning of Workmen's Compensation Law, § 3, subd. 4, if injured when going to his midday meal after leaving the employer's plant or premises.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other defifinitions, see Words and Phrases, First and Second Series, Course of Employment.)

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3. MASTER AND SERVANT — HEARSAY DECLARATIONS OF DECEASED EMPLOYEE INSUFFICIENT TO ESTABLISH FACT ESSENTIAL TO RECOVERY.

A fact essential to be proven, in order to support a claim for compensation for death under the Workmen's Compensation Law, such as accident on employer's premises, may not be shown by uncorroborated hearsay declarations of the deceased servant alone.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

Appeal from State Industrial Commission.

Proceeding by Emma Jack under the Workmen's Compensation Law to obtain compensation for the death of her husband, William H. Jack, deceased, opposed by the Morrow Manufacturing Company, the employer, and the Maryland Casualty Company, the insurance carrier. There was an award of compensation, and the employer and insurer appeal. Award reversed, nnd matter remitted.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Mandeville, Personius & Newman, of Elmira (E. W. Personius, of Elmira, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for State Industrial Commission.

HENRY T. KELLOGG, J. The claimant's husband came home from his work at the noon hour on November 7 1916, with a slight swelling or bruise on the calf of his right leg. He told his wife that when he was leaving the plant of his employer he was struck in the leg by a passing motorcycle ridden by a fellow employee. He remained at home that afternoon, but, returning to the plant on the following day, continued to work until November 13th, when his condition became such that Dr. Green was called to attend. This physician found his leg to be swollen, sensitive, and discolored, and noted a shortness of breath due to a congestion of the lungs. He attributed the congestion to insufficien circulation due to a disordered heart. The liver and kidneys of the claimant's husband became involved, and his condition rapidly became worse until December 3, 1916, when death resulted. Dr. Green gave as the cause of death "cardiac insufficiency".

[1] At hearings held by the Industrial Commission to try this claim, filed by the widow for her husband's death, it clearly appeared that the deceased had been suffering from a disorder of the heart for a period long antedating the alleged accident which injured his leg. Dr. Green testified that the leg injury aggravated the heart disorder and precipitated death. Other physicians testified positively that the injury was in no wise a contributing cause of death. After the hearings were closed Dr. Lewy, apparently at the instance of the commission, submitted a written opinion in which he stated:

"I must consider the injury a contributing factor only in decompensating a previously compensating diseased heart."

The Industrial Commission, in making an award, evidently relied greatly upon this opinion, for it found:

"The injuries that he received on November 7, 1916, were the producing cause of the cardiac decompensation and were the proximate cause of his death."

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The use by the commission of the statement made by Dr. Lewy, which was submitted after the hearings were closed, so that no opportunity for cross-examination of the declarant was offered, would of itself compel a reversal. Nestor v. Pabst Brewing Co., 191 App. Div. 312, 181 N. Y. Supp. 477. However, a more serious defect in the case of claimant appears.

[2, 3] The so-called accidental injury was not proven by any eyewitness. The declarations of the deceased in reference thereto were in part corroborated by the employer's first report of injury, but to the extent only of the following statement:

"Describe in full how the accident occurred.—Ran into by motorcycle ridden by fellow employee as they were going away from plant at noon."

It was necessary for the claimant to prove, either that the accident to her husband occurred on the premises of his employer, or away from the premises in the course of his employment. Subdivision 4, § 3, Workmen's Compensation Law (Consol. Laws, c. 67). The deceased was clearly not in the course of his employment when going to his midday meal after leaving the employer's plant or premises. McInerney v. Buffalo & Susquehanna R. R. Corp., 225 N. Y. 130, 121 N. E. 806. That the accident occurred upon the employer's premises finds support only in the declarations made by the deceased. On the other hand, the employer in its first report made the following statement:

"Did accident happen on the premises—On street outside of factory."

Since a fact, essential to be proven in order to support this claim, has been shown by hearsay declarations alone, the claim without further proof must necessarily fail. Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540; Belcher v. Carthage Machine Co., 224 N. Y. 326, 120 N. E. 735; Hansen v. Turner Construction Co., 224 N. Y. 331, 120 N. E. 693.

The award is reversed, and the claim remitted to the commission. All concur.

JOSEPH ET AL. v. UNITED KIMONO CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. January 5, 1921.)

185 New York Supplement, 700.

1. MASTER AND SERVANT — FALL DUE TO FAINTING, NOT CAUSED BY EMPLOYMENT, NOT AN INJURY WITHIN COMPENSATION LAW.

Where the fall from a window, which killed the employee, was caused by an attack of vertigo of fainting, but the vertigo or fainting was in no wise caused by his employment, his dependent mother has no claim for compensation under the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

2. MASTER AND SERVANT—INDUSTRIAL COMMISSION MAY NOT ADOPT THAT ONE OF EQUALLY PROBABLE INFERENCES WHICH SPELLS LIABILITY WITHIN COMPENSATION LAW.

Of two equally probable inferences as to the mode in which an employee fell to his death, the State Industrial Commission, as trier of the facts, may not adopt that which spells liability in preference to that which proves its opposite.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

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3. MASTER AND SERVANT — EVIDENCE INSUFFICIENT TO SHOW FALL CAUSED BY EMPLOYMENT, WITHIN COMPENSATION LAW.

Evidence *held* insufficient to justify the inference that the accident, a fatal fall from a factory window, arose from any cause connected with decedent's employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

John M. Kellogg, P. J., and Woodward, J., dissenting.

Appeal from State Industrial Commission.

Claim for compensation under the Workmen's Compensation Law (Consol. Laws, c. 67) by Esther Joseph and others, for the death of Matthew Joseph, the employer, against the United Kimono Company, the employer, and the Zurich General Accident & Liability Insurance Company, Limited, the insurance carrier. From an order of the State Industrial Commission. made on the 11th day of May, 1920, awarding the named claimant, as dependent mother, compensation at the rate of $5.77 weekly, the employer and insurance carrier appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Philip J. O'Brien, of New York City (John N. Carlisle, of Albany, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for State Industrial Commission.

HENRY T. KELLOGG, J. The work of the deceased employee was performed upon the ninth floor of a factory building. He was engaged as a foreman in working upon a machine and in handing out work to the women there employed. On the morning of the day of the accident he complained frequently of pains in his head. He nevertheless continued at work until the early part of the afternoon. At this time one of the factory hands saw him leave the room where he worked and go into an adjoining room. holding his hand to his head as he went. This room was used for showing the factory product, and was empty at the time. It was lighted by a single window, 7 feet high by 4 feet wide, which was usually kept closed. The window sill was 3 feet wide, and stood 2 feet 6 inches above the floor. In close proximity to it, and running along its entire width, was a radiator, which was 2 feet high and 8 inches wide. The deceased had frequently been seen eating his lunch sitting on the sill of the window. Within about five minutes of his leaving the workroom, one of his employers, observing that the women in a factory on the opposite side of the street were at its windows screaming out excitedly, looked down upon the street and saw the body of the deceased lying on the sidewalk directly below the showroom window.. One of the partners then rushed through the factory, crying out that the deceased had "jumped out," or "must have jumped out," the window. The deceased, when picked up. was found still to be alive, but died within a few minutes. After hearing the proof upon the claim filed for his death, the Industrial Commission made an award, finding, among other things, that the deceased "was afflicted with vertigo or fainting, and as a result he fell from the window to the street, and received injuries as a result thereof, from which he died one hour later."

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It having become firmly established that the occurrence of accidents causing compensable injuries may never be presumed, but must always be proven, the sole question here arising is whether the known facts of the case permitted the inference drawn by the commission that the deceased came to his death from an accident attributable to his employment. The distance from the floor to the top of the radiator and across the window sill to its outer edge was at least 6 feet and 2 inches, so that it is apparent that the deceased could not, while standing on the floor, and leaning out the window for the fresh air, accidentally have fallen through the opening. It might be reasoned that the deceased, in a crazed condition caused by the pains in his head, had rushed to the window and thrown himself therefrom. If this were the fact, then either the deceased consciously intended to commit suicide, or, if temporarily insane, was impelled to throw himself from the window by causes not attributable to his employment, so that in neither case could there be a recovery. It might be thought that the deceased stepped upon the sill to open the window, and, having raised it, fell down and rolled out through the opening over the ledge. It might be thought that the deceased, having opened the window, sat down upon the sill to rest, and voluntarily or involuntarily so moved that his body went over the edge. The difficulty with either set of facts, which might thus be surmised to have occurred, is that they leave unanswered the vital question: Did the deceased fall down, or roll off, or move off the window ledge accidentally, or by reason of an attack of vertigo or fainting?

[1-3] The Industrial Commission has found that the latter was the case; but, since the vertigo or fainting was in no wise caused by the employment, that answer to the question would be destructive of the claim. Minerly v. Kingsbury Construction Co., 191 App. Div. 618, 181 N. Y. Supp. 901; Neuberger v. Third Avenue Ry. Co., 192 App. Div. 781, 183 N. Y. Supp. 348. The alternative answer that the deceased accidentally fell or rolled off, without having been affected by vertigo or fainting, cannot be made, because the facts do not give rise to that inference with any greater certainty than to the inference drawn by the commission, and, it is a well-settled principle that, of two equally probable inferences, a trier of fact may not employ that which spells liability in preference to that which proves its opposite. It seems to me that from this meager proof no inference of fact can justly be made that the accident which occurred to the deceased arose from any cause connected with his employment, and therefore that the claim must fail.

The award should be reversed, and the claim dismissed.

Cochrane and Kiley, JJ., concur.

John M. Kellogg, P. J. (dissenting). On the authority of Santacroce v. Sag Harbor Brick Works, 182 App. Div. 442, 169 N. Y. Supp. 695, Lindquest v. Holler, 178 App. Div. 317, 164 N. Y. Supp. 906, Driscoll v. Henry Gillen & Sons, Lighterage, Inc., 187 App. Div. 908, 173 N. Y. Supp. 825, and 226 N. Y. 568, 123 N. E. 863, Vogel v. American Chicle Co., 190 App. Div. 797. 180 N. Y. Supp. 645, and Chludzinski v. Standard Oil Co., 176 App. Div. 87, 162 N. Y. Supp. 225, I dissent. It is not probable that the deceased intended to commit suicide; there is no suggestion that he was crazy. He was upon the ninth floor of a building, and evidently went to the window for fresh air to relieve his headache. He frequently sat in the window for luncheon and the air. He may have been careless, but the commission was justified in finding that the death was accidental. We cannot review the question of fact.

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In construing this remedial statute, where all reasonable intendments are in favor of the employee, I fear we are leaning backwards and adopting a more stringent rule than would prevail in an ordinary action of negligence. In death cases, where there is no eyewitness to the accident, it is impossible to prove the exact condition, inferences may play a controlling part, and slight inferences create a question of fact upon which a judgment may well stand. Noble v. N. Y. C. & H. R. R. R. Co., 20 App. Div. 40, 46 N. Y. Supp. 645, and 161 N. Y. 620, 55 N. E. 1098; Fordham v. Gouverneur Village, 160 N. Y. 541, 55 N. E. 290. This rule is upon the theory that the deceased cannot speak, but that if he could speak he probably would be able to give a good account of himself. Mullen v. Schenectady Ry. Co., 214 N. Y. 300, 305, 108 N. E. 412, and cases there cited.

In Santacroce v. Sag Harbor Brick Works, supra, an employee was working upon a pile of brick about 15 feet above the ground, and was seized with an attack of vertigo, or with some similar disorder, which caused him to fall to the frozen ground. It was held that the evidence justified the conclusion that he became dizzy and fell, and the award was affirmed by us unanimously. In Driscoll v. Henry Gillen & Sons, supra, an award for death benefits was sustained, where the captain of a lighter was last seen on January 29th, at 6 o'clock p. m., going towards his boat. His dead body was found in the water near the boat on May 2d.

In a common-law action the plaintiff can recover only upon a preponderance of evidence, and the Appellate Division, upon reviewing his judgment, may reweigh the evidence, and if it is satisfied that there is not a fair preponderance may reverse it. In compensation appeals we are denied that privilege. So far as the facts are concerned, we can only inquire whether there is any fact proved which in itself, or from reasonable inferences from it, tend to support the finding. If there is no fact or inference which justifies the finding, it is erroneous as matter of law and we may reverse it. Here, at the worst, some facts and some inferences from them indicate an accidental death as found. It was claimed before the commission that some other facts and some other inferences lead in the opposite direction; but we cannot enter upon that situation. Our power ceases when we discover that there are some facts and some inferences which tend to support the award. In a conflict as to the facts and the inferences to be drawn, the commission has a certain benefit from the presumption raised by section 21 of the law (Consol. Laws, c. 67).

I favor an affirmance.

Woodward, J., concurs.

KELLER v. REIS & DONOVAN, INC., ET AL.

(New York Supreme Court, Appellate Division, Third Department. January 5, 1921.)

185 New York Supplement, 741.

MASTER AND SERVANT — ELECTRICIAN, SLIPPING ON STREET WHILE GOING TO WORK, HELD NOT INJURED IN "HAZARDOUS EMPLOYMENT," WITHIN WORKMEN'S COMPENSATION LAW; "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

An electrician, who was injured by slipping on a city street while going to his work, was not "engaged" in a "hazardous employment" at the

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time of his injury, within the meaning of Workmen's Compensation Law, § 2, and section 3, subd. 4, so as to make the injury one arising out of and in the course of his employment, with section 10, though he was being paid at the time under an eight-hour day agreement between a labor organization and employers, whereby pay of employees outside of a city district commenced at 8 a. m. and at the boundary line of the district; the agreement being intended as protection to employees against loss of time, with no purpose to change the law.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Kiley, J., and John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding by Adam C. Keller under the Workmen's Compensation Law for compensation for personal injuries, opposed by Reis & Donovan, Incorporated, employer, and the Travelers' Insurance Company, insurance carrier. There was an award of compensation, and the employer and insurance carrier appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Benjamin C. Loder, of New York City (E. C. Sherwood and William B. Davis, both of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. The claimant, on the 12th day of September, 1919, slipped upon a curb in one of the public highways in Newark, N. J., and sustained a fracture of the lower extremity of the shaft of the fibula of the left leg, for which the State Industrial Commission has made an award covering the period from the time of the accident to the 9th of November, 1919, on which date the disability terminated. Ordinarily, of course, an employee is not entitled to compensation for injuries occurring upon the public highways, to which we are all exposed in common; but the claimant lived in the borough of the Bronx in the city of New York. and his employer engaged as a general electrical contractor, had offices at 8 West Fortieth street, New York, and at the time had a contract for the doing of some work in a building situated in Newark, N. J., and the accident occurred at about 20 minutes past 8 o'clock in the morning, after the beginning of work hours, under the provisions of an agreement between a labor organization and employers, among them the defendant here. The important question is, of course, whether there was "an accidental personal injury sustained by the employee arising out of and in the course of his employment" (Workmen's Compensation Law [Consol. Laws, c. 67] § 10), and this involves the question whether an agreement regulating hours and conditions of labor, entered into between a labor organization and employers, can operate to give a compensable case, where none would exist without it.

The agreement here under consideration provided that "the hours of labor shall be eight hours per day, to be performed within the hours of 8 a. m. and 5 p. m.," and that "all workmen shall be paid for the time actually at work in the borough of Manhattan, borough of the Bronx, and at all other points within a radius of ten miles from the City Hall." It was then provided that "a workman employed outside

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the city district," as above defined, "who does not live near his work, must be at the limit of the city district nearest to the place of work as near 8 o'clock as is possible, and shall proceed to the place by the shortest route," and while there is no specific provision for paying for the time thus lost to the employer, it is a fair inference that this was the purpose of the agreement; that it was intended that an eight hour day should prevail for all workmen within the scope of the agreement, those going outside to be paid for the time lost in traveling beyond the city territory. But this agreement did not attempt to provide that the employer should become an insurer of the workman against the risks incident to travel upon the public highways. It did not undertake to give to employees outside of the city district a greater degree of protection than those who worked within the district; it merely fixed an eight hour day and provided that those within a certain district must perform eight hours of labor, while those without such district, and subject to the agreement, must be at the district line at the hour fixed for service and must proceed by the nearest route to the place of employment. In other words, the eight-hour day of labor was not required of those who went outside the city district; they satisfied the terms of the agreement if they were at the boundary line nearest to the place of employment, and proceeded by the most direct route to the place of employment, and the spirit of the agreement is manifest in the further provision that "where a workman is employed outside the city district, and resides near such work, he shall report and quit at the regular time, and shall not be entitled to any car fare."

The whole purpose of the agreement was to equalize conditions of labor; to provide that the man going outside of the city district, with the exception above noted, should not be obliged to give more time to the employment than those within the district. The eight-hour day standard was to be subject to such a reduction of the time at labor as was necessary to reach the place beyond the nearest line of the city district. It was not an agreement that the employment should begin at 8 o'clock outside of the city, subjecting the employer to the burden of risks in no wise connected with his particular enterprise, but a concession from the eight hours prescribed for those within the city district. He was to get as near to the place of employment within the city district as possible at 8 o'clock in the morning, and he was not to be penalized for the time that it took him to go from that point to his place of labor; his wages were to be those provided for the eight-hour day, and while "all workmen shall be paid for the time they are actually at work" in the city district, outside they were to be paid for the eight hours, regardless of the time actually worked, provided they complied with the conditions named. If the employer did not like to lose this time, it was provided that he might direct the employee to board at the place where the work is located, but in that event the employer was to pay the board bill, when, of course, he would be entitled to the full eight hours work.

[1] From this analysis it is evident that the contracting parties did not contemplate increasing the liabilities of the employer by commencing the employment before the claimant had reached the place of labor. There was no intention of making better conditions for those who went outside the city district than those who worked within the district; it merely protected the man going outside from the hardship of getting up early enough in the morning to reach his employment by 8 o'clock. He was doing what his fellow laborers did in substance when he reached the city district boundary at the time they were called upon to go to work within that district, and beyond that he was allowed from his labor sufficient time to reach the place of employment without a sacrifice of any part of his day's wages. The agreement obviously

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sought an equalizing of the conditions of labor for the members of its union, with no purpose to change the provisions of the Workmen's Compensation Law in its relation to such members, and clearly no employer, acting freely, would enter into an agreement to become the insurer of his employees upon their way to work, for the very spirit of the statute is that it is to compensate for the accidents growing out of the employment, and which are properly chargeable against the industry as a part of the cost of production. The claimant may, for aught that we know, have a cause of action against the city of New ark for negligence in the care of its highways; but we are fully persuaded he has no claim against the enterprises conducted by his employer because of an accident happening to him upon the public highways of Newark, while he was doing no service for the employer.

[2] The provision of the statute is that "compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments" (Workmen's Compensation Law, § 2), and clearly the claimant was not "engaged" in a "hazardous employment" when he was walking along one of the highways of Newark, in the state of New Jersey, and doing nothing to advance the interests of his employer; that is not one of "the following hazardous employments mentioned in the statute. The act, to quote from a Massachusetts case (Madden's Case, 222 Mass. 487, 111 N. E. 379, L. R. A. 1916D, 1001), cited in Matter of Alpert v. Powers, 223 N. Y. 97, 101, 119 N. E. 229, "does not afford compensation for injuries or misfortunes, which merely are contemporaneous or coincident with the employment, or collateral to it. * * * The personal injury must be the result of the employment and flow from it as the inducing proximate cause. * * * The direct connection between the personal injury as a result and the employment as its proximate cause must be proved by facts before the right to compensation springs into being."

Nothing that the claimant was doing had any relation whatever to the employment; he was doing nothing for the employer. He was serving his own purpose of getting to the place of employment, under an agreement which protected him against loss of time, but which in no wise advanced the well-being of the employer, and the employment to which he was proceeding could in no possible sense be said to be a proximate cause of the accident. "Employment," says subdivision 5 of section 3 of the statute, "includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain," and " 'employee' means a person engaged in one of the occupations enumerated in section 2, or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer" (subdivision 4). The accident must be "in the course of his employment," only in a trade, business or occupation carried on by the employer"; and the facts in this case do not bring the claimant within these definitions prescribed by the statute. "Where an employee is injured through some act of his own, not an incident to his employment, and not authorized or induced by his employer in connection with his employment, the injury does not arise out of and in the course of his employment within the meaning of subdivision 7 of this section" (section 3). Gifford v. Patterson, Inc., 222 N. Y. 4, 117 N. E. 946, 6 A. L. R. 576. And we are clear that the State Industrial Commission is in error in making the award here under review.

The award should be reversed, and the claim dismissed.

Cochrane and Henry T. Kellogg, JJ., concur.

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KILEY, J. (dissenting). I am of the opinion that this award should be sustained. Subdivision 4 of section 3 of the Workmen's Compensation Law says:

" 'Employee' means a person engaged in one of the occupations enumerated in section 2 or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, *or in the course of his employment away from the plant of his employer,*" etc.

The employer was an electrical contractor and some of its work was electrical wiring. The claimant resided in the city of New York, and the principal place of business of his employer was also in New York City. On September 12, 1919, and previous thereto, the employer was doing a job of electrical wiring in Newark, N. J. The claimant had worked for this employer several years and was in his employ on the day aforesaid. It appears from the record, that at the time of this accident an agreement was in existence and operative, entered into between the electrical contractors' association and the inside electrical workers of Greater New York, to which the employer herein, and the claimant, employee (he being an inside electrical worker), were parties. It provides as follows:

"5. The hours of labor shall be eight hours per day, to be performed within the hours 8 a. m. and 5 p. m. on every day, excepting Saturday, Sunday, and on legal holidays. The hours on Saturdays shall be from 8 a. m. until 12 noon."

"12. All workmen shall be paid for the time they are actually at work in the borough of Manhattan, borough of the Bronx, and at all other points within a radius of ten miles from City Hall, which territory shall be known as the 'city district,' and shall receive all necessary fare exceeding ten cents.

"13. A workman employed outside the city district, who does not reside near his place of work, must be at the limit of the city district nearest to the place of work as near 8 a. m. as is possible, and shall proceed to the place by the shortest route. In returning he shall arrive at the aforesaid point as near to 5 p. m. as possible, but if directed by his employer to board at the place where the work is located, the necessary expenses for the board shall be paid by the employer.

"14. Where a workman is employed outside the city district, and resides near such work, he shall report and quit at the regular time, and shall not be entitled to any car fare."

This is important only, as showing the contract between claimant and his employer. It shows that his day and his pay commenced at 8 o'clock a. m. and at the New York City line; from the city line to Newark, N. J., claimant was on the employer's time and transported to his work or to the station, within three or four blocks of his work, at his employer's expense. If the railroad or trolley station was the work or place where claimant was performing service under his contract, then under Matter of Littler v. Fuller Co., 223 N. Y. 369, 119 N. E. 554, there would not be any question as to his right to compensation. While the evidence does not show, outside of the rules above quoted, from these it is inferable that his employer was paying claimant's car fare as far as the road ran toward the place where he was to render service. We have this situation: The time of injury was 8:20 a. m., while he was on the employer's time, and just after he left the conveyance on his way to the place of actual service. He slipped and fell while he was completing a small fraction of his journey on foot, made necessary because the conveyance did not go quite to his destination. I think he was in the course of his employment, under section 3, subdivision 4, of the Workmen's Compensation Law, and

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that the accident arose out of his employment.. It is too narrow a construction of the law not to so hold as to this little hiatus of three or four blocks, where he had to walk by force of circumstances to his work.

I favor affirmance.

John M. Kellogg, P. J., concurs.

SKEELS v. PAUL SMITH'S HOTEL CO. ET AL.

New York Supreme Court, Appellate Division, Third Department. January 5, 1921.)

185 New York Supplement, 665.

1. MASTER AND SERVANT—CONTRACTUAL RELATIONS BETWEEN INJURED EMPLOYEE AND EMPLOYER ESSENTIAL TO AWARD UNDER WORKMEN'S COMPENSATION LAW.

Without contractual relations between the injured employee and the company proceeded against as his employer, there is no foundation for the operation of Workmen's Compensation Law, § 2, cl. 1, § 3, subds. 3-7, and section 10.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

2. MASTER AND SERVANT—NO EMPLOYMENT WITHIN WORKMEN'S COMPENSATION LAW, WITHOUT HIRING.

There can be no employer or employee or employment as used in the Workmen's Compensation Law, without an act of hiring.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

5. MASTER AND SERVANT—SCINTILLA OF EVIDENCE INSUFFICIENT TO ESTABLISH RELATION ESSENTIAL TO AWARD UNDER WORKMEN'S COMPENSATION LAW.

A mere scintilla of evidence is insufficient on a jurisdictional question as the question of the existence of the relationship of employer and employee, to give the State Industrial Commission jurisdiction to award compensation for the employee's death.

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

6. MASTER AND SERVANT—COMPENSATION AWARD AGAINST COMPANY NOT NOTIFIED UNAUTHORIZED, THOUGH PROPRIETOR APPEARED AS WITNESS.

Where notice was not given a company, in a widow's proceeding for compensation for death of her husband under the Compensation Law, that it was to be charged with payment of award, no one making any such claim against it, the fact that the proprietor of the company appeared as a witness did not give the State Industrial Commission jurisdiction of the company.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

7. MASTER AND SERVANT—EVIDENCE HELD TO SHOW NO EMPLOYMENT JUSTIFYING COMPENSATION AWARD.

In a widow's proceeding under the Compensation Law for death of her husband, evidence *held* to show that there was no contract of employment between the deceased husband and the hotel company, alleged to have been the employer.

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

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Appeal from State Industrial Commission.

Claim for compensation under the Workmen's Compensation Law by Elizabeth Skeels, widow, on behalf of herself and infant children, for death of Myron J. Skeels, the deceased employee, against Paul Smith's Hotel Company, the employer, and the State Insurance Fund, insurance carrier. From an award of the State Industrial Commission, the employer appeals. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Francis B. Cantwell, of Saranac Lake, for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen, of counsel), for State Industrial Commission.

WOODWARD, J. Myron J. Skeels met his death while at work in cutting timber for wood pulp upon premises owned by the Paul Smith's Hotel Company, in the town of Brighton, Franklin county, on the 14th day of November, 1918, and the question necessary to the disposition of this appeal is whether he was an employee of that corportion at the time of his death.

On the 20th day of November, 1918, the claimant wrote a letter to the State Industrial Commission in which she says:

"Inclosed find notice of death of my husband who was killed working in the lumber woods for Paul Amell."

On the 29th day of November of the same year the claimant verified her formal claim, in which she stated that she made claim for compensation for—

"the death of Myron J. Skeels, who died on the 14th day of November, 1918, in the employ of Paul Amell, of Lake Clear, N. Y."

On the 30th day of November of the same year the claimant again wrote the State Industrial Commission, saying that—

"My husband was cutting wood by the cord, as all the men are for Mr. Amell, and did not contract to cut any amount, and he worked for Mr. Amell by the day at different times. Mr. Amell is getting the wood out for Paul Smith's Hotel Company," etc.

On the 4th of December following Mr. Amell, writing to the State Industrial Commission in reference to this claim, says:

"I did not have a written contract with Skeels, but had a verbal contract at a certain price per cord, and his partners, William Buckley and William Ryan, have since Skeels' death continued work by the cord."

And the letter closes with a declaration that—

"I was in no sense his employer, as he was an independent contractor."

On the 28th of December of the same year the Paul Smith's Hotel Company wrote the State Industrial Commission, saying that—

"Paul Amell is a pulpwood contractor, and has a verbal contract with this company to deliver pulpwood loaded on the cars at a certain price per cord, so that he is not on our pay roll. * * * Amell has no authority to hire help for this company, and Skeels had no authority to hire help for Amell."

A letter from Amell on the 9th day of January, 1919, continues his denial of responsibility. Buckley and Ryan make a joint affidavit to the effect that Skeels was engaged with them in a joint undertaking to cut pulpwood by the cord for Paul Amell at the Paul Smith tract, but make no suggestion that the Paul Smiths' Hotel Company had any connection

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with the matter. Alexander Liberty in an affidavit sets forth that he was a bookkeeper for Paul Amell, and that the decedent. Skeels, with Buckley and Ryan, was engaged in cutting this pulpwood by the cord for Amell, and Paul Amell makes an affidavit to the same effect on the 13th day of January, 1919, and on the same day Paul Smith, Jr., makes an affidavit in corroboration of those previously mentioned. Subsequently Paul Smith (whether Jr. does not appear) appeared before one of the deputy commissioners and testified to a like state of facts. At this same hearing the claimant was examined by the deputy commissioner, and in answer to leading questions said she did not know anything about the contractual relations between her husband and Paul Smith, or between her husband and Paul Amell; that she only knew that he worked at Mr. Smith's and Paul Amell was over him; that she always thought her husband worked for Paul Smith, and that she always consdiered that he "was one of his employees"; that she always thought his wages came from Paul Smith.

[1-3] Here we find the first subtle suggestion of Smith's relation to the death of Skeels. It is to be noted, however, that it makes no mention of thee Paul Smith's Hotel Company, which is a domestic corporation having a legal entity entirely distinct and apart from the individuals who compose it, and the record shows two Paul Smiths, one designated as "Paul Smith, Jr.," and the other merely as Paul Smith, and it must be obvious that the record up to this time does not disclose any contractual relations whatever between the Paul Smith's Hotel Company and the decedent, and without such a relationship there is no foundation for the operation of the Workmen's Compensation Law (Consol. Laws, c. 67). Workmen's Compensation Law, § 2, cl. 1; Id. § 3, subds. 3-7; Id. § 10; Palmer v. Van Santvoord, 153 N. Y. 612, 614, 47 N. E. 915, 38 L. R. A. 402; People ex rel. Gilmour v. Hyde, 89 N. Y. 11, 17. There can be no employer or employee or employment, as used in the Workmen's Compensation Law, without an act of hiring (People ex rel. Gilmour v. Hyde, supra), for these words have a distinct and well-defined meaning in the jurisprudence of the state, and must be deemed to have the same meaning when used in the statutes (Perkins v. Smith, 116 N. Y. 441, 23 N. E .21). In Kackel v. Serviss, 180 App. Div. 54, 167 N. Y. Supp. 348, followed in Tsangournos v. Smith, 183 App. Div. 751, 171 N. Y. Supp. 256, this court held that the jurisdictional fact of a contract of employment must be established by due process of law, by evidence which would be required to establish any other contractual relation, and that in the absence of such evidence no foundation was laid for the operation of the Workmen's Compensation Law.

[4] The determination of the State Industrial Commission that Paul Smith's Hotel Company should pay the award, without evidence to support it, is not due process of law. The action of the commission in making such a ruling, where there is no evidence of the existence of a contract of hiring, is an attempted exercise of an arbitrary power, not reaching the character of legislation. It is mere confiscation, and it is fundamental that every inhabitant of this state is entitled to retain his property until it has been judicially determined that some one else has a better right to it. Where the claim is that confiscation of property will result from the action of a commission in fixing rates, or otherwise, "the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both the law and facts" (Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 289, 40 Sup. Ct. 527, 528, 64 L. Ed. ——, and authorities there cited), and unless we find in this record some evidence of a probative character that the

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decedent was an employee of the Paul Smith's Hotel Company the award cannot stand. Our attention is not called to any such evidence. The learned Attorney General, in his brief, tells us that—

"The connection of the Paul Smith's Hotel Company with the job was by the fact that it had a superintendent by the name of Owens, who went around the woods to see that the wood was cut and cleaned up properly, and also to measure the wood, so that money could be advanced upon it, and to see that they cut in the proper locality and what trees to cut. This man was called the superintendent of the woods. Mr. Amell says that he was there to measure the wood and give instructions what to do and how to do the work. Mr. Amell was himself a poor man, not able to pay any award, and in view of the fact that his principal, Paul Smith, advised him not to take out any insurance, we think that the defendant should be held to pay the award."

[5] No evidence is produced that Paul Smith was the principal of Mr. Amell; the uncontradicted testimony is that Mr. Amell had a verbal contract for cutting the pulpwood timber on the hotel property tract at a given price per cord, and that Owens was the man who had charge of measuring the wood as it was cut, and of seeing to it generally that Amell performed the conditions of the contract. There is not a particle of evidence that Owens had any control over Skeels, or that Amell had any control over the manner in which Skeels performed his work, except to confine him to a particular piece of land. Skeels was, by all the evidence, engaged in a joint enterprise with two other men in the cutting of pulpwood under a subcontract with Amell, and the fact that he entered into an agreement which did not entitle him to compensation from Amell, or that Amell was too poor to pay compensation, does not warrant holding the Paul Smith's Hotel Company for the amount of this award. The only foundation on which an award can lawfully be made against the Paul Smith's Hotel Company is evidence that Skeels was an employee of that corporation, and there is no evidence of this. The testimony of the claimant that she always supposed her husband worked for Mr. Smith clearly does not reach the dignity of a scintilla of evidence that the Paul Smith's Hotel Company employed the decedent, and a mere scintilla of evidence is no sufficient upon a jurisdictional question, such as is here involved. Matter of Case, 214 N. Y. 199, 203, 108 N. E. 408, and authorities there cited.

The Legislature itself could not determine that a man was an employee, for the purpose of taking property from the alleged employer, where no such relation in fact existed—certainly not after the accident had occurred. "The true interpretation of these constitutional phrases is," say the court in Wynehamer v. People, 13 N. Y. 378, 393, dealing with "law of the land" and "due process of law,"—"that, where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him, not by an act of the Legislature, but in the due administration of the law itself, before the judicial tribunals of the state. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or at least it cannot be created by legislative act which aims at their destruction. Where rights of property are admitted to exist, the Legislature cannot say they shall exist no longer; nor will it make any difference, although a process and a tribunal are appointed to execute the sentence." The right to contract, the right to determine whether one shall be an employer or an employee, is an essential element of that liberty guaranteed by our constitutional system, and there is no power in the Legislature to determine, or to authorize any

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tribunal to determine, that that relation exists where the parties themselves have not expressly or impliedly consented to occupy that relationship.

[6] In the case here under consideration no notice was given to the Paul Smith's Hotel Company that it was to be charged with the payment of an award; no one made any such claim against it. The fact that Paul Smith appeared as a witness does not give the court or tribunal jurisdiction of the Paul Smith's Hotel Company, and the rule is well settled that—

"No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party." Scott v. McNeal, 154 U. S. 34, 46, 14 Sup. Ct. 1108, 1112 (38 L. Ed. 896).

[7] There was no jurisdiction in the Workmen's Compensation Law, except of accidents to employees, and while the State Industrial Commission probably has power to determine the question of employment primarily it cannot be permitted to charge an individual or corporation with an award where the undisputed evidence shows that there was no contract of employment.

The award appealed from should be reversed, and the claim dismissed. All concur.

STRINGHAM v. ASHTON, ET AL.

New York Supreme Court, Appellate Division, Third Department. January 5, 1921.)

185 New York Supplement, 554.

MASTER AND SERVANT—PHALANGE OF FINGER HELD NOT LOST, WITHIN WORKMEN'S COMPENSATION LAW; "LOSS OF FINGER OR PHALANGE."

A sawyer, who lost about one-third of the motion in the terminal or distal joint of the index finger, did not lose the use of such finger or phalange, within Workmen's Compensation Law, § 15, subd. 3, if his finger or phalange could fulfill to any reasonable extent some of its natural functions in any employment or vocation for which he was adapted, although the injury seriously interfered with the prosecution of his vocation as a sawyer; and even an award of partial loss of use could not stand simply under a finding that the vocational function of the phalange was destroyed.

(For other cases, see Master and Servant, Dec. Dig. § 385[12].)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding by Herbert P. Stringham under the Workmen's Compensation Law to obtain compensation for personal injuries, opposed by Jay E. Ashton. the employer, and the Fidelity & Casualty Company of New York, insurance carrier. There was an award of compensation, and the employer and insurance carrier appeal. Award reversed, and matter remitted to commission.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

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Nadal, Jones & Mowton, of New York City (Edward P. Nowton, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

COCHRANE, J. On the hearing before the commission a physician testified that the injury to the claimant consisted in a limitation of the motion of the terminal or distal joint of the index finger of the right hand. He said:

"This limitation which is about one-third of the motion of the terminal joint interferes with the closing of the index finger of the right hand. * * * It will interfere with the function of that finger permanently; he cannot bring it clear down. * * * It doesn't interfere with the function of the finger except in closing."

In other words, the claimant has lost about one-third of the motion in the terminal or distal joint of the index finger. On the foregoing evidence, which is all there is on which to base a finding as to the nature of the injury the commission has found as follows:

"Said injuries and the consequences heretofore described totally destroyed the useful vocational function of the distal phalange of his right index finger, and the said injuries produced a permanent condition equivalent to the loss of 50 per cent. of his right index finger."

—and has made an award accordingly.

"Permanent loss of the use of a * * * phalange shall be considered as the equivalent of the loss of such * * * phalange" and "the loss of the first phalange of the thumb or finger shall be considered to be equal to the loss of one-half of such thumb or finger." Workmen's Compensation Law (Consol. Laws, c. 67) § 15, subd. 3.

The above finding indicates that the award was made under the foregoing provisions of the statute; but clearly such provisions do not justify the award, because there has been no loss either of the distal phalange or of the use thereof, the evidence showing that there is no interference with the function of the finger, except that there has been a loss of about one-third of the motion of the terminal or distal joint. The claimant cannot bring the end of the index finger down into the palm of his hand. The commission, in order to make the award, found it was the *"vocational"* function of the phalange which was destroyed. This was improper. The claimant was a sawyer by occupation. The fact that the injury may have seriously interfered with his prosecution of his vocation as a sawyer does not estalish that he has lost the phalange of his finger or the use of it. If his finger or phalange could fulfill to any reasonable extent some of its natural functions in any employment or vocation for which he was adaptive, the use of such finger or phalange is not lost. Matter of Grammici v. Zinn, 218 N. Y. 322, 114 N. E. 397.

Said section 15, subd. 3, further provides that for the partial loss of the use of a finger or phalange compensation may be awarded for the proportionate loss of the use of such finger or phalange. The commission does not seem to have made the award under that provision; but, if it had done so, its finding that it was the vocational function of the phalange which was destroyed would vitiate such award.

The award should be reversed, and the matter remitted to the commission. All concur, except John M. Kellogg, P. J., who dissents.

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INDUSTRIAL COMMISSION OF OHIO v. GLENN. (No. 16500.)

(Supreme Court of Ohio. Dec. 14, 1920.)

129 Northeastern Reporter, 687.

(Syllabus by Editorial Staff.)

MASTER AND SERVANT—COMPENSATION CLAIMANT'S APPEAL AFTER DENIAL OF REHEARING UNDER RULES HELD BARRED BY STATUTORY LIMITATION.

Where the Industrial Commission has rejected a claim for compensation, and claimant has not appealed to the court of common pleas within 30 days as required by Gen. Code, § 1465—90, the fact that by the rules of the commission an application for rehearing might be made, even after the expiration of 30 days, does not entitle a claimant to appeal to the court of common pleas within 30 days after denial of an application for a rehearing filed nearly two years after the rejection of the claim.

(For other cases, see Master and Servant, Dec. Dig. § 417 [4½].)

Error to Court of Appeals, Columbiana County.

Proceeding under the Workmen's Compensation Act by Charles Glenn to recover compensation for a personal injury. A denial of an award by the Industrial Commission was reversed in the court of common pleas, the reversal affirmed by the Court of Appeals, and the Industrial Commission brings error. Reversed and rendered.

John G. Price, Atty. Gen., R. R. Zurmehly, of Columbus, Walter W. Beck, Pros. Atty., of Salem, and Jesse C. Hanley, Asst. Pros. Atty., of East Liverpool, for plaintiff in error.

P. M. Smith, of Wellsville, and W. B. Moore, of Woodsfield, for defendant in error.

PER CURIAM. The application of Charles Glenn for compensation for an injury claimed to have been the result of a fall from a ladder, while in the course of his employment, was filed with the Industrial Commission. Upon consideration the commission rejected the claim, on the ground that the disability which was the basis thereof was not caused by an injury sustained in the course of his employment. This finding was made and the claim rejected by the commission on November 12, 1915. From such action an appeal was filed by the claimant on October 9, 1917, in the court of common pleas of Columbiana county, the county wherein it is claimed the injury was inflicted.

It is the contention of the commission, in the courts below, that the action was barred by reason of the lapse of time, the claimant having failed to appeal from the final action of the commission within 30 days after notice thereof. The finding and judgment of the court of common pleas were adverse to that contention and the same were affirmed by the Court of Appeals.

After this matter was at issue before the Industrial Commission, the statute and rules of the commission were amended. Since such amendments in no wise affect the question of law presented in this case, and for convenience only, we will refer to the statute and rules as now in force.

The provisions of section 1465—90, General Code, are as follows:

"In case the final action of such board denies the right of the claimant to participate at all" or to continue to participate "in such fund on the ground that * * * the accident did not arise in the course of employment, * * * the claimant, within thirty (30) days after the notice

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of the final action of such board, may, by filing his appeal in the common pleas court of the county wherein the injury was inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it."

The commission pursuant to the provisions of section 1465—44, General Code, authorizing it to adopt rules to govern its procedure, has made provision for the filing of applications for rehearing of claims denied by the commission; such rule provides that, within 30 days after being notified of the final action of the commission adverse to the claimant, the claimant may file an application for a rehearing, and thereupon the claim will be again assigned for hearing, and the claimant notified as in the case of original hearings. Such rule further provides in substance that when more than 30 days have elapsed between the date of the original hearing and the date of filing the application for a rehearing the commission will fix the time and place for hearing the application for rehearing, and if it then appears that substantial justice has not been done a rehearing will be granted; but if upon hearing such application the commission is of the opinion that substantial justice was done at the original hearing the claim for rehearing will be denied.

In this case an application for a rehearing was not filed until August 7, 1917, and such application was denied September 25, 1917. The appeal in this case was filed within 30 days thereafter, but not within 30 days after the claim was disallowed. In fact, as these dates disclose, no application for a rehearing was filed until nearly 2 years subsequent to the rejection of the applicant's claim by the Industrial Commission.

These rules of the commission do not take away any right conferred upon the claimant by law; rather they extend the time for consideration of the applicant's claim and give further opportunity to present proofs before a final order is made. This, however, upon the condition that such application for rehearing is filed within 30 days. If that be done, then, under the rules of the commission, its final order is deferred until the conclusion of the further hearing. But when the final order is made, if thereby the applicant's claim be rejected on either of the grounds specified in section 1465—90, General Code, the applicant within 30 days after being notified of such final action may appeal to the common pleas court, as prescribed in said section. Clearly if the appeal be not taken within such 30 days the court of common pleas does not acquire jurisdiction to hear and determine the action.

The further rule wherein it is provided that the commission will consider an application for a rehearing, even though filed subsequent to said 30 days, evidence a desire and purpose upon the part of the Industrial Commission to give most careful consideration to every claim, and it cannot be held that the adoption of such rule by the commission serves to repeal the limitation prescribed by the Legislature.

The view taken by counsel for the applicant would permit an appeal, no matter how many years subsequent to the rejection of such claim by the Industrial Commission, provided that an application for a rehearing was filed and the same denied by the Industrial Commission within 30 days prior to the filing of such appeal. The claimant cannot by the mere act of filing such application for rehearing, which is denied, revest himself with a right which he has lost under the express terms of the very statute upon which he must rely for any relief whatever. The argument of counsel for applicant, that the 30-day period for appeal does not begin to run until the final order, that the final order is the last order, that there is no limitation of time for filing an application for rehearing, and that action by the commission refusing to grant such rehearing is their last order, travels in a circle, and, if adopted, would completely wipe out any and all limitations upon time for appeal.

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It can readily be seen, as urged upon the hearing, that if the rule of the commission could have the effect of indefinitely extending the time for filing an appeal, it would become necessary for the commission to amend its rules, so that there could be no application for a rehearing filed subsequent to 30 days, thus working an injury instead of conferring a benefit, upon those in whose interest the Workmen's Compensation Act was passed.

In our opinion the Industrial Commission, by the adoption of such rules, attempted to afford the widest latitude possible for a fair and full investigation of every claim, and that is commendable, but it has not the power to extened the time for appeal expressly fixed by statute; nor has this court such power. The limitation has been fixed by a legislative provision which is clear and explicit, and if the time for appeal so prescribed is too short the Legislature should so amend the law as to afford a proper period for such purpose. That limitation as fixed by the statute in force is 30 days. The application in this case was filed nearly 2 years after the order of the commission disallowing the claim. The common pleas court did not have jurisdiction to entertain the appeal.

This view requires the reversal of the judgment of the Court of Appeals, and, proceeding to render the judgment which the Court of Appeals should have rendered, the judgment of the common pleas court is reversed, and on the undisputed facts judgment is rendered for the plaintiff in error.

Judgment reversed, and judgment for plaintiff in error.

Nichols, C. J., and Jones, Matthias, Johnson, and Robinson, JJ., concur.

Hough, J., not participating.

BLAKE v. WILSON.

(Supreme Court of Pennsylvania. Dec. 31, 1920.)

112 Atlantic Reporter, 126.

1. MASTER AND SERVANT — AGREEMENT RESTRICTING REVIEW IN COMPENSATION CASE DOES NOT PRECLUDE DETERMINATION OF ISSUE PRESENTED BY RECORD.

Agreement between counsel that only issue involved in appeal in workmen's compensation case was the constitutionality of the statute does not preclude the court from considering question of whether the work in which employee was engaged was casual in character, and not in the regular course of the business of the employer, as required by Workmen's Compensation Act 1915, § 104, where the record before the court was sufficient for determination of such question.

(For other cases, see Master and Servant, Dec. Dig. § 418[5].)

3. MASTER AND SERVANT—COMPLETING FARM BUILDING "CASUAL EMPLOYMENT" WITHIN WORKMEN'S COMPENSATION ACT; "BUSINESS."

Where a teacher on vacation was employed by a farmer to complete the construction of a silo by putting on a roof and painting it, his employment was "casual in character, and not in the regular course of the business of the employer," within Workmen's Compensation Act 1915, § 104, and he was therefore excluded from the benefits of the act, an employee's engagement being "casual" in character when it comes about by

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chance, fortuitously, and for no fixed duration of time, and "business" meaning the conduct of such business as is of usual, if not daily, occurrence and observation.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

(For other definitions, see Words and Phrases, First and Second Series, Business.)

Appeal from Court of Common Pleas, Lawrence County; S. Plummer Emery, President Judge.

Proceedings under the Workmen's Compensation Law by Mintie Blake for compensation for death of her husband, Garrett H. Blake, opposed by Effie M. Wilson, employer.. From judgment dismissing claimant's appeal from order of Workmen's Compensation Board disallowing claim, claimant appeals. Affirmed.

Argued before Brown, C. J., and Stewart, Moschzisker, Frazer, Walling, Simpson, and Kephart, JJ.

William McElwee, Jr., of New Castle, for appellant.

Martin & Martin, of New Castle, for appellee.

STEWART, J. [1] On the argument of this appeal it was suggested by the court to counsel that another question than that raised by the assignments of error, which challenge the constitutionality of the act entitled, "A supplement to an act entitled 'The Workmen's Compensation Act of 1915,' " approved June 3, 1915 (P. L. 777), would seem necessarily to arise because of its fundamental character, and which had not been adverted to, namely, whether the work in which the employee was engaged when he met with the accident which resulted in his death was casual in character, and not in the regular course of the business of the employer, as required by section 104 of the Workmen's Compensation Act of 1915 (P. L. 736). Inasmuch as all the facts necessary for a proper consideration of the question appeared, and since there was no occasion for further delay, counsel on each side submitted at bar a brief. In appellant's brief the consideration of the question suggested is objected to because the several counsel had agreed in writing, in order to save the printing of the testimony taken before the referee, that the only issue involved in the appeal was the constitutionality of the act of assembly approved June 3, 1915 (P. L. 777), entitled "A supplement to an act entitled 'The Workmen's Compensation Act of 1915,' " exempting from the provisions of the original act "domestic servants and agricultural laborers," and that the testimony taken before the referee was not material to the adjudication of the issue involved in this appeal. This objection is fully met by what was said in Canole v. Allen, 222 Pa. 156, 70 Atl. 1053, as follows:

"Where the record of the case shows departure from established rules and procedure, affecting only the rights of the parties to the action, and no specific complaint is made with respect thereto, we assume that the departure was made by and with mutual consent—conventio legem vincit. Not so, however, where the departure manifests a clear disregard of recognized public policy, or is in violation of expressed statutory provisions. Restrictions so imposed are not subject to the pleasure of the parties or the power of the courts. In such case this court will take notice of error whether assigned or not."

And, further, the question suggested needs for its determination nothing outside of the record before us. The one question to be considered arises in connection with a single finding of fact by the referee,

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and it is one of law purely. Because to our mind it is the governing question, upon the solution of which the facts of this appeal depend, we shall give it first consideration.

The appeal is from a judgment of the court of common pleas of Lawrence county, to which court an appeal had been taken from an award by the Workmen's Compensation Board disallowing a claim of appellant for compensation for the injuries sustained by her husband while in the employ of the appellee, which injuries resulted in his death. From the opinion of the Compensation Board dismissing the claim we extract the following:

"The avowed purpose of this appeal, as stated by counsel for the claimant, is for the purpose of challenging the constitutionality of the act of June 3, 1915 (P. L. 777), exempting domestic and agricultural workers from the provisions of the Workmen's Compensation Act of June 2, 1915. * * * One of the grounds of the appeal is as to the following language: 'On November 12, 1918, Garrett H. Blake was employed by the husband of Effie M. Wilson, who was running the farm, to paint this silo which Garrett H. Blake agreed to do for about $15,' etc.

"Under the amended Compensation Act we will modify this finding of fact for the purpose of this appeal and find that Effie M. Wilson was the owner of the said farm, was operating it in her own behalf, and that her husband was her authorized agent in employing, the said Garrett H. Blake to perform the said work; in other words, there is no question about the responsibility of Effie M. Wilson as owning and operating her own farm and liability for the exemption under consideration is unconstitutional."

No other facts are needed than those we have there. The concluding sentence states a legal proposition, the affirmance of which would negative the suggested question which we are about to consider, as will readily be seen, and may therefore be passed.

[2] The Workmen's Compensation Act of 1915 by section 104 expressly excludes from the operation of its provisions "persons whose employment is casual in character and not in the regular course of the business of the employer." The person injured was a workman in the employ of the appellee, a married woman, the owner of the farm upon which she resided and which she operated in her own behalf. Outside the operation of her farm she was engaged in no other business activity. She had begun the construction of a silo upon this farm, the work on which had been interrupted for some time. What remained to complete it was to roof the struction and paint it. She engaged the husband of the claimant to finish the job, and it was while he was so engaged that he met with the accident that caused his death. Was the employment in which he was so engaged casual in character, and not in the regular course of the business of his employer? It may be conceded that the several terms in the exemption clause above quoted are so far ambiguous as to be fairly susceptible of more than one meaning. When such uncertainty arises in Legislature enactments, the duty of interpreting the meaning of the Legislature, as it may be derived from the language used, devolves upon the court. The one rule which the court is allowed to apply in such case is limited to a consideration of the objects of the enactment, its purpose, and the appropriateness of the language used to the supposed purpose, in view of the Legislature. There can be no two views as to the general purpose of the act in question.. All will agree that its primary and general purpose was to substitute a method of accident insurance in place of common-law rights and liabilities for substantially all employees, except such as are by express terms or necessary implication excluded from its operation. It corresponds so far as general purpose is concerned, with a like act in Massachusetts, of which it has been said in the case of Young v. Duncan, 218 Mass. 346, 106 N. E. 1:

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"It was a humanitarian measure enacted in response to a strong public sentiment that the remedies afforded by actions of tort at common law and under the Employers' Liability Act had failed to accomplish that measure of protection against injuries and of relief in case of accident which it was believed should be afforded to the workman. It was not made compulsory in its application, but inducements were held out to facilitate its voluntary acceptance by both employers and employees."

It will be helpful perhaps to keep in mind this general purpose of the enactment when we come to consider the special purposes of the act in exempting certain employees from its operation and the language employed in their designation.

[3] We pass to the question: Is the language used in denoting exceptions to the act appropriate to the supposed purpose the Legislature had in view? A primary and general purpose of the act was, as we have said, to afford a workman a measure of protection against injuries and relief in case of accident, which was denied under existing law. The exception of certain classes of labor in the act is conclusive that it was not intended by the act to extend its benefits to all of the laboring classes. It is with only so much of the act as defines the exceptions that we are concerned with in the present inquiry, and the inquiry may be limited still further to only so much of the exceptions as have been held applicable to the present case, and this would limit the consideration to the words "exclusive of persons whose employment is casual in character and not in the regular course of the business of the employer." We have said that the words here employed to designate the class excluded are so far ambiguous—that is to say, lacking in precise and definite meaning—as to be fairly susceptible of more than one meaning. But this does not answer the present inquiry. Whatever else by construction they may be made to embrace, the only question is: Do they with sufficient clearness, not by forced construction, but allowing the words used their common and popular meaning, include in the exception the employee who meets with an accident while engaged in doing the work he had engaged to do, but which in character is casual and outside the regular course of his employer's business? This is to be resolved by interpretation rather than by construction. Interpreting the meaning of the words used, having regard to the connection in which they are used, we think it apparent that two conditions were in the legislative thought, which, however, because of the conjunction used connecting them, must both concur, neither of itself being sufficient to constitute an exception. We have then the two conditions to consider: (1) The casual employment, (2) the regular course of the employer's business. Allowing the words used in these several phrases their ordinary meaning, do they appropriately designate such employee as was the complainant's husband at the time he received his injury, or are they in any sense contradictory? We think that the expression "casual in character" had a distinct reference to the engagement or contract to render service, and an implied reference, as well, to a distinction that naturally arises when the service stipulated for is outside the regular business of the employer; so that both are included in the exception. The injured employee was by occupation a school-teacher, but not for the time being engaged at his regular employment, in consequence of temporary suspension of the schools, when he undertook to complete the silo. The character of his employment may well be regarded as casual, considering not only that it was out of the line of his regular employment, and occurred only because of the temporary suspension of that employment, but as well because of the accident, or whatever it was, that had occasioned the suspension of the work on the silo that left it incomplete, and the very limited time that would be required to complete the work for which he engaged. We can

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conceive of cases where the contract for the service engaged might be in its character casual, and yet the employment within the course of the business of the employer. To make certain of the exclusoin of such, the act further provides "and not in the regular course of the business of the employer." An employee's engagement is casual in character when it comes about by chance, fortuitously, and for no fixed duration of time. In this case it was the concurrence of two fortuitous events that gave rise to the employment, the expiration of the school term, and the convenience of the employer for a resumption of work on the silo. There is nothing in the facts to warrant a belief that such contingency was foreseen.

The question remains: Was the employment itself in the regular course of the employer's business? In the case of Marsh v. Groner, 258 Pa. 473, 102 Atl. 127, L. R. A. 1918F, 213, we found occasion to place interpretation upon the phrase "in the course of the regular business of the employer," as used in this act. The claim in that case was for compensation for injuries received by a person employed by a married woman, as owner of her house, who was engaged in remodeling it, and had employed a workman to do some plastering in connection therewith. While the workman there was so engaged the scaffolding on which he was standing gave way, and in the fall he sustained the injury he complained of. It was nowhere suggested that, aside from the remodeling of her home, the woman sought to be charged with liability had anything of a business character to engage her time and attention. It was contended that the mere circumstance of the owner being engaged in the work of enlarging her home, the time consumed in this work—the best part of a year—constituted her a person engaged in regular business and made her liable under the act to any employee who might be injured while engaged upon such work. In the opinion in that case, sustaining the rejection of the claim by the court below, we said:

"What gives rise to the question is the indefiniteness and want of precision of meaning of the word 'business' as it occurs in the act. It is a word which embraces a wide variety of subjects. and being without a technical or precise meaning, excluding any other, it may convey an entirely different meaning in one connection from what it imports when used in another. In such cases when, as here, no help can be derived from the context and none from the use of the same word in other sections of the act, the interpreter has no other recourse than to the presumption that the word was used in the popular sense, if that be found agreeable; that is, not contradictory to the object and intention of the lawmaker.

"Statutes are presumed to employ words in their popular sense, and when the words used are susceptible of more than one meaning, the popular meaning will prevail. Where the meaning involves no absurdity and is not in conflict with the other parts of the act, it is the only one that can be presumed to have been intended, and there is no room for construction. Cooley on Constitutional Limitations, pl. 68. There are few words more current in our speech than the word 'business'; few that include a greater variety of subjects and yet none which, in popular speech, has greater or more marked singleness in denotement. When one's business is the subject of common speech, no one can be in doubt as to the reference. It would be a very exceptional person—we do not know how to otherwise describe him—who would not understand that the reference is to the habitual or regular occupation that the party was engaged in with a view to winning a livelihood or some gain. These objects are necessarily implied when one's business is spoken of. * * * What we have said as to the popular understanding of the word 'business' is just what Webster defines it. 'Some particular occupation or employment habitually engaged in for livelihood or gain.' The points of difference between

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the employment the defendant was engaged in and the business which is contemplated by the act and understood in common parlance are so marked that the two, cannot be confounded; one cannot be the equivalent of the other. The defendant's employment was not in any way dependent on patronage; it had not for its object profit or gain, but simply her own personal gratification and comfort; it was not regular or habitual, but it terminated with the completion of the one thing that engaged her attention at the time, and there is not the slightest indication that she contemplated resuming or doing a like service for another, nor indeed that she had ever attempted anything of the kind before. Other points of difference can readily be suggested, but those are quite sufficient for our purpose. Our conclusion is that the defendant was not engaged in any business within the proper meaning of that term as used in the act, and therefore the claimant when injured was not employed in the manner prescribed by the act. His employment, like that of his employer, was casual in character."

With such understanding of the legislative meaning of the word "business" as it is here employed, it ought not to be difficult to interpret the true meaning of the phrase "in the regular course of the employer's business." With the particular object determined, the regular course of the business can only refer to the experience and custom in the conduct of the business as is of usual, if not daily, occurrence and observation. It is suggested that, if such had been the meaning the Legislature had intended to convey, an apter expression would have been "in the course of the regular business of the employer." We think, on the contrary, such change in phraseology would have made the thought obscure. Not only so, but there can be no warrant for transposition of the terms; the meaning, as it stands, is not doubtful when it is considered that the word "regular," as it is used, does not qualify the word "business," but the course of the conduct of that business; when that is "regular," the condition of the act has been met.

Upon this further review of the act we see no reason why we should not adhere to the interpretation of the clause we have given in the case above cited. We are supported in this conclusion by recent decisions in other states where a similar law exists in which like language is used, notably in New York, Michigan, and California, in which states the phrase "not in the regular course of the business of the employer" has received judicial interpretation. In Pelton v. Johnson, 179 App. Div. 949, 165 N. Y. Supp. 1103, the Appellate Division unanimously reversed an award and dismissed the claim in a case in which it was sought to hold a hotel proprietor liable for injuries for a carpenter who was engaged in repairing his hotel. In Holbrook v. Hotel Co., 200 Mich. 597, 166 N. W. 876, the Supreme Court of Michigan says:

"It would seem that the occasional renovating of rooms of a building,or the building itself, owned and occupied by the owner as a house, with paint or paper or both, is not the usual course of the trade, business, profession, or occupation of the owner, unless he is himself in the business of painting and decorating."

To the same effect is Casualty Co. v. Pillsbury, 172 Cal. 748, 158 Pac. 1031. There a machinist was employed by a farmer merely to repair a tractor, and it was held that the repairing of the tractor was not in the usual course of the occupation of the farmer. In that opinion it is said by court:

"It was no more farm labor [because the work was done on a farm] than it would have been if the machine had been taken to [the machinist's] shop * * * and there repaired."

Because of the views expressed in this opinion, we have reached the conclusion that the claim for compensation in this case falls within the exceptions expressed in section 104 of the Workmen's Compensation

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Act of 1915 (P. L. 736), because the employment in which the injury was sustained was casual, and not in the regular course of the employer's business. It was therefore properly refused, and we now so decide. Even though we were to agree with appellant in the contention so vigorously pressed that the act entitled "A supplement to an act entitled 'The Workmen's Compensation Act of 1915,' to exempt domestic servants and agricultural workers from the provisions thereof," approved June 3, 1915, is unconstitutional—as to which we express no opinion—it would be without result in the present controversy, since, leaving out of consideration the supplement, there is that in the general act, sufficient to defeat the claim, and it is upon its provisions exclusively that we rest our decision.

Judgment is affirmed.

The foregoing opinion written by Mr. Justice Stewart was adopted by the court after his death and is now filed as its opinion.

LINCOLN ET AL. v. NATIONAL TUBE CO.

(Supreme Court of Pennsylvania. Dec. 31, 1920.)

112 Atlantic Reporter, 73.

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT INAPPLICABLE TO MINORS IN FORBIDDEN EMPLOYMENT.

Workmen's Compensation Law 1915 *held* not applicable to injuries to minors engaged in employment in violation of statutes prohibiting employment of minors therein.

(For other cases, see Master and Servant, Dec. Dig. § 366.)

Appeal from Court of Common Pleas, Allegheny County; Marshall Brown, Judge.

Action by William B. Lincoln, a minor, by his next friend and mother, Anna Lincoln, and another, against the National Tube Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before Brown, C. J., and Walling, Simpson, and Kephart, JJ.

John G. Frazer and Reed, Smith, Shaw & Beal, all of Pittsburgh, for appellant.

H. Fred Mercer, of Pittsburgh, for appellees.

SIMPSON, J. William B. Lincoln, a minor, by his next friend and mother, Anna Lincoln, and Anna Lincoln, in her own right, brought suit against the National Tube Company, alleging the minor had been assigned by defendant to operate a hoisting machine, in express violation of the statutes of the state, and had been seriously injured while so doing. Judgments having been entered on the verdicts rendered for plaintiffs, defendant appealed upon two grounds: First, was the only right of recovery that provided by the Workmen's Compensation Law of June 2, 1915 (P. L. 736)? and, second, was the crane upon which the minor was working, a hoisting machine within the meaning of section 5 of the act of May 13, 1915 (P. L. 286)?

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[1] Notwithstanding the able argument of the junior counsel for appellant, we are not satisfied the court below erred in deciding the former act did not apply to the case of minors engaged in work for which, by statute, their employment was expressly forbidden. Certain clauses in it furnish opportunity for a plausible argument to the contrary; but in terms it relates only to those employers who "shall by agreement, either expressed or implied, * * * accept the provisions" thereof. Since no legal contract could be made by or for the minor to do this kind of work, and as such a contract could not be legally "renewed or extended by mutual consent, expressed or implied," it is clear the Workmen's Compensation Law does not cover the case; and this conclusion is rendered still further necessary by the fact that the two statutes were adopted at the same session of the Legislature, and, if possible, each must be given full effect without one infringing upon the domain of the other. White v. City of Meadville, 177 Pa. 643, 35 Atl. 695, 34 L. R. A. 567; Duffy v. Cooke, 239 Pa. 427, 86 Atl. 1076, Ann. Cas. 1915A, 550. Our conclusion as above operates so to do.

Moreover, it cannot be supposed the Legislature intended to make such contracts illegal, and at the same time to give to them all the force and effect of legal contracts, so far as civil liability for injuries to minors is concerned. To so hold would tend to encourage and not discourage the practice which the statute has declared illegal; for, in the event of an injury, the employer would suffer no more in the case of an illegal than of a legal employment.

In New Jersey and Iowa the same conclusion is reached on substantially similar provisions (Hetzel v. Wasson Piston Ring Co., 89 N. J. Law, 201, 98 N. W. 306, L. R. A. 1917D, 75; Secklich v. Harris-Emery Co., 184 Iowa, 1025, 169 N. W. 325), the statutes in the other states whose opinions are cited or quoted by counsel being so widely variant from ours as to make their decisions valueless as precedents here, though, partially from a different standpoint, they are in accord with the conclusion reached by us.

[2] Nor are we impressed by appellant's contention that the crane, upon which the minor was working, was not a hoisting machine within the meaning of the law. Admittedly it was employed in hoisting heavy materials, and the mere fact that thereafter it was to be used in carrying them to a new place of deposit did not deprive it of its character as a hoisting machine. "Elevators, lifts, or similar contrivances" may also be "hoisting machines" within the meaning of the statute, but since the dangers to minors, which the Legislature was endeavoring to prevent, are those arising from the use of machines employed in hoisting, as was this crane, we cannot limit the language, as appellant asks us to do, to those machines more properly called "hoists," or decide the court below erred in not charging the jury as a matter of law, as the second assignment says he should have done, that the crane was not a hoisting machine. Indeed defendant's own foreman, when asked about it, said it was a machine used for hoisting pipe, and that the minor was assigned to use it for this purpose.

The judgments of the court below are affirmed.

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LINDWAY v. PENNSYLVANIA CO.

(Supreme Court of Pennsylvania. Dec. 31, 1920.)

112 Atlantic Reporter, 40.

3. MASTER AND SERVANT—EMPLOYER OPPOSING COMPENSATION PROCEEDINGS HAS BURDEN OF PROVING ENGAGEMENT IN INTERSTATE COMMERCE.

In a workmen's compensation proceeding, the employer has the burden of proof as to the employee's engagement in interstate commerce at the time of the injury.

(For other cases, Master and Servant, Dec. Dig. § 403.)

Appeal from Court of Common Pleas, Beaver County; George A. Baldwin, President Judge.

Proceedings under the Workmen's Compensation Act by Elizabeth Lindway for compensation for the death of her husband, John Lindway, opposed by the Pennsylvania Company, employer. Compensation was denied and the decision was affirmed by the court of common pleas, and the claimant appeals. Reversed and remanded, with directions.

Argued before Brown, C. J., and Stewart, Moschzisker, Frazer, Walling, Simpson, and Kephart, JJ.

Moorhead & Marshall, F. G. Moorhead, and John G. Marshall, all of Beaver, of appellant.

Wm. A. McConnel, of Beaver, for appellee.

MOSCHZISKER, J. Elizabeth Lindway, widow of John Lindway, who was killed while in the employ of defendant railroad company, presented a claim for compensation to the proper authorities. The referee disallowed the claim. on the ground that John Lindway was engaged in interstate commerce at the time of the accident which caused his death. This decision was affirmed by the Workmen's Compensation Board, and again by the court of common pleas, whereupon claimant entered the present appeal.

The material findings of the referee are as follows:

(1) John Lindway was employed by defendant company as an oil distributor at its yards located in Freedom, this state. (2) He was killed during the course of his employment on November 13, 1917. (3) "The defendant is a railroad company, whose lines extend from a point in Pittsburgh, Pa., to points in Ohio; it does both an interstate and intrastate business, and deceased, at the time he sustained the injury which resulted in his death, was attempting to open a valve on the top of an oil tank car, so that the oil in the tank could be run into the reservoir tank of the defendant company, later to be used by the defendant company in supplying oil for filling lamps, torches, etc., for the engines and cabooses of the defendant company's trains, both interstate and intrastate indiscriminately; the furnishing of oil for the lamps and torches was necessary to the proper transportation of the trains of the defendant company." (4) At the time of his death, Lindway was "engaged in work necessary to carry on the interstate commerce of the defendant company."

On these findings the referee concluded:

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"The defendant being a railroad company, engaged in carrying both interstate and intrastate commerce, and the deceased at the time of his death having been engaged in work necessary to the carrying on of interstate commerce by the defendant company, the deceased was therefore engaged in interstate commerce, and the liability of the defendant company, if any, is covered by the provisions of the federal Employers' Liability Act; the Workman's Compensation Act of Pennsylvania does not apply."

It is evident from this record that each of the tribunals which have passed upon the case reached the ultimate conclusion of fact and law—that deceased was engaged in interstate commerce when killed—on the theory that he was then doing an act necessary to the maintenance of that character of traffic, according to the mode it was being carried on by defendant agency, and that, in this sense, Lindway was working on an instrument of interstate commerce, when about to handle the oil, at the time of the fatal accident. Hence they all decided that his widow must depend on the federal law for relief.

Thus the question is presented: Do the underlying facts found by the referee, when judged in the light of the governing authorities, warrant the ultimate conclusion reached?

[1, 2] In this class of cases we must accept the decision of the Supreme Court of the United States as our guide. The latest utterance from that tribunal, on this branch of the law, dealing with facts which at all approximate those at bar, is Chicago, B. & Q. R. R. Co. v. Harrington, 241 U. S. 177, 179, 36 Sup. Ct. 517, 518 (60 L. Ed. 941). There a member of a switching crew was killed while engaged in switching a car of defendant's coal to a shed, where the coal was to be stored, for the purpose of supplying, "as needed," locomotives "engaged or about to be engaged in interstate and * * * intrastate traffic." Justice Hughes, in deciding that, under these circumstances, the deceased was not engaged in interstate commerce, said:

"The only ground for invoking the federal act [U. S. Comp. St. §§ 8657–8665] is that the coal thus placed was to be used by locomotives in interstate hauls."

After which, he said that the work in question "was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use," and that this was not "so closely related" to interstate commerce "as to be practically a part of it." which he stated is the test.

It will be noted that, in the matter above quoted, Justice Hughes expressly states that the "only" ground for invoking the federal act was that the article being handled was intended for interstate traffic. In view of this specific statement, the sole distinction which we can see between the case just cited and the one now before us, is that in the present instance claimant's husband was killed when engaged in storing oil, which was to be subsequently used in both interstate and intrastate commerce, while in the case cited the person affected met his death when engaged in storing coal for like uses. Of course, this is a distinction without a difference, so far as the question of law here involved is concerned; therefore, the ruling authorities govern the facts at bar in favor of appellant.

There seems to be a distinction made in the United States Supreme Court decisions between accidents happening to one while working on, or with, things which are in actual common use as instrumentalities of both interstate and intrastate commerce (see Waina v. Pa. Co., 251 Pa. 213, 96 Atl. 461; Pedersen v. Delaware, L. & W. R. R. Co., 229 U. S. 146, 333 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153), and those occurring to persons while employed or working on things then being put in position for such common use in the future (see Harrington Case, supra, Raymond v. C., M. & St. Paul R. R. Co., 243 U. S. 43, 37 Sup. Ct.

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268, 61 L. Ed. 583, and New York Cent. R. Co. v. White, 243 U. S. 188, 192, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629). As already indicated, we think the latter class of authorities must be accepted as our guide in the present instance, and under them the judgment appealed from is wrong.

Where one, at the time of his injury, is employed on "instruments" or "facilities" which are, by him, being then "kept in readiness for use" in both kinds of commerce (as in Erie R. R. v. Collins, 253 U. S. 77, 85, 40 Sup. Ct. 450, 64 L. Ed. ——), as distinguished from being put in position for such use in the future, his case seems to fall within the interstate traffic class. Although the line between the two classes is a narrow one, as previously said, our understanding of the recent decisions of the United States Supreme Court brings the present case within the principle of the authorities last cited in the preceding paragraph, particularly C., B. & Q. R. R. Co. v. Harrington.

In Erie R. R. Co. v. Szary, 253 U. S. 86, 89, 90, 40 Sup. Ct. 454, 64 L. Ed. ——, the employee was injured almost immediately after sanding certain interstate locomotives; and the Supreme Court said that, while some of the injured man's duties may not have been directly connected with interstate traffic, yet, under the circumstances of the case, "the acts of service were too intimately related and too necessary for the final purpose to be distinguished in legal character." It is true that Mr. Justice McKenna, in the course of his opinion, refers to the fact that one of Szary's duties was to prepare sand for use on locomotives; but this so called "preparation" might well be classed as part of the use of the article, rather than preparation in the sense of putting it in position for future use, as in the present case. Then, moreover, as previously shown, Szary was not injured while drying sand, but in returning to the sandhouse after having worked on interstate locomotives.

To return to the case at bar, as to the duties of the injured man, the court below, in its opinion, states them more broadly than either the findings of the compensation authorities or the evidence warrants. Deceased had charge of the tank and his duty required him to see that oil was placed in it, but, so far as appears, he did not distribute the contents thereof; his duty required only that he keep records showing "where (the oil) went" and "who took it."

[3] One other matter may be referred to. The evidence does not disclose, and there is no finding, whether the tank car brought oil from points within or without the state of Pennsylvania. When an effort was made to ascertain this fact, defendant's witness said he did not know, and, upon inquiry as to whether or not the records of the railroad would show it, he said that all such records had been burned up; which answer, of course, made against defendant, who carried the burden of proof. Hall v. Penna. R. R. Co., 257 Pa. 54, 64, 100 Atl. 1035, L. R. A. 1917F, 414.

The assignments of error are sustained, the judgment is reversed, and the record is remitted to the court below, with directions to return it to the compensation authorities, so that they may proceed to adjudicate the case in accordance with the law as expressed in this opinion.

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STAHL v. WATSON COAL CO. ET AL.

(Supreme Court of Pennsylvania. Dec. 31, 1920.)

112 Atlantic Reporter, 14.

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT: RULE AS TO REVIEW OF FINDING OF FACT STATED.

The question whether there is evidence to sustain a finding of fact by the Workmen's Compensation Board is a reviewable one of law, but, if such evidence appears, the finding is conclusive, although the referee and board might well have decided the point differently, and the court would possibly have done so.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT: RULE AS TO REVIEW OF FINDING OF FACT STATED.

Where the point as to whether decedent was injured in the course of his employment is sought to be inferred from certain basic or underlying facts, which are said to have been proved, the question whether there is evidence to support them is a reviewable one of law, but, if such evidence appears, the finding is a nonreviewable one of fact; and, if the basic facts are not disputed, the question whether or not the point sought to be deduced from the basic facts may fairly be inferred therefrom is a reviewable one of law; but, if the inference can be made, the finding is a nonreviewable one of fact, though the referee or board might well have concluded differently, and the court would possibly have done so.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—EVIDENCE HELD TO SUPPORT FINDING THAT DECEASED WAS NOT KILLED IN COURSE OF EMPLOYMENT.

Evidence that deceased, a special officer to patrol mining company's property, was struck and killed by a train, after leaving work, about 1,200 feet from the mine, *held* sufficient to support finding that he was not killed in the course of his employment, although the company had an interest in the property on either side of the railway at the point of the accident.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Court of Common Pleas, Indiana County; T. N. Langham, President Judge.

Proceeding under the Workmen's Compensation Act by Sarah Minerva Stahl against the Watson Coal Company, employer, and Ætna Life Insurance Company, insurance carrier, to recover for the death of claimant's husband while an employee of defendant. From judgment of the court of common pleas for plaintiff, overruling ruling dismissing the petition by the referee and Workmen's Compensation Board, the defendant employer and the insurance carrier appeal. Judgment of the court below reversed, and that of the Workmen's Compensation Board reinstated and affirmed.

Argued before Brown, C. J., and Stewart, Moschzisker, Frazer, Walling, Simpson, and Kephart, JJ.

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Clarence Burleigh and William A. Challener, both of Pittsburgh, for appellant.

James L. Jack and S. M. Jack, both of Indiana, Pa., for appellee.

SIMPSON, J. Plaintiff filed a petition under the Workmen's Compensation Law of June 2, 1915 (P. L. 736) praying an award in her favor because of the death of her husband while an employee of defendant. The referee, to whom the case was referred found as a fact that decedent was not injured in the course of his employment, and therefore dismissed the petition. This ruling was affirmed by the Workmen's Compensation Board; but on appeal to the court of common pleas it was held to be a "mixed finding of law and fact," and, without considering how much of it was law and how much was fact—though only by so doing could the court determine the extent of its jurisdiction to review the finding—it reversed the referee and board on this vital point and entered a judgment for plaintiff; whereupon defendant prosecuted this appeal.

[1, 2] The extent to which the courts may go in reviewing a finding of fact in cases of this character ought to be well understood; but, as it seems to be a subject of perennial dispute, it may not be inappropriate to again state it as succinctly as possible. If the vital point in dispute is claimed to have been established by direct proof, the question whether or not there is evidence to sustain it is one of law and may be reviewed; but if such evidence appears the finding becomes one of fact and is not the subject of review, though the referee and board might well have decided the point differently, and the court would possibly have done so. In the present case the ultimate fact as to whether or not decedent was injured in the course of his employment, as defined by the act, is not claimed to be possible of establishment by direct evidence, and hence this may be dismissed from further consideration. Where, as here, this vital point is sought to be inferred from certain basic or underlying facts which are said to have been proved, the question whether or not there is evidence to support them is one of law and may be reviewed; but if such evidence appears the finding is one of fact and is not the subject of review. In the present instance the basic facts, as stated by the referee, are not disputed. The question whether or not the vital point sought to be deduced from the basic facts may fairly be inferred therefrom is one of law and may be reviewed; but, if it can be, the finding is one of fact, and is not the subject of review, though the referee and board might well have concluded differently, and the court would possibly have done so. All our decisions under the act of 1915 sustain these conclusions, but reference need only be made to McCauley v. Imperial Woolen Co., 261 Pa. 312, 104 Atl. 617, and Flucker v. Carnegie Steel Co., 263 Pa. 113, 106 Atl. 192.

[3] A single question arises, therefore: Can the ultimate conclusion that decedent was not killed in the course of his employment be fairly inferred from the basic facts found by the referee and approved by the board? They are as follows: Decedent was employed by defendant as a special officer to patrol its property at and near its mine, and to arrest suspicious persons trespassing thereupon or loitering thereabouts. He had no regular hours of employment, but was subject to be called at any time. On November 10, 1918, he went to work about 6 p. m. and continued until about 3 a. m. the next day, at which time he said he was going home, and took his dinner bucket and left the plant. He was struck and killed by a train of the Pennsylvania Railroad Company, and he and his dinner bucket were found about 7 a. m. in a ditch on its right of way, which he frequently used in walking to and from his home. The place where his body was found was about 1,200 feet from defendant's mine, but it had an interest in the property on either side of the railroad at this point.

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If we were to agree with the court below that, in view of the characted of decedent's services and his proximity to defendant's property at the time and place he met his death, the referee and board might have found he was still attending to the duties of his employment while on his way home (though there is no finding that either on this or any other occasion he was expected to or did perform or undertake to perform any services for defendant after he started therefor), this would not be sufficient to sustain the court below in overruling their conclusion; for it was not the only inference which could fairly be drawn from the basic facts. On the contrary, a permissible, and indeed the natural, inference is that decedent had for the time being quit the employment, had left the company's property, was doing nothing for it, but was simply carrying out his announced intention of going home. This being so, under the principles hereinbefore stated, the court erred in overruling the conclusive finding of fact of the referee and board on this point.

The judgment of the court below is reversed, and that of the Workmen's Compensation Board is reinstated and affirmed.

VODOPICH v. TROJAN MINING CO. (No. 4732.)

(Supreme Court of South Dakota. Jan. 15, 1921.)

180 Northwestern Reporter, 965.

1. MASTER AND SERVANT — COMPENSATION; CLAIMANT NOT REQUIRED TO ESTABLISH RELEASE INDUCED BY FRAUD AS CONDITION TO HAVING CAUSE REOPENED.

Though it is the plain intent of the Workmen's Compensation Law that, while fraud or misrepresentation in obtaining release shall be a ground for setting it aside, an injured employee is not required to establish the fact that an agreement for release of further liability was entered into by reason of the fraud or misrepresentation of the employer before he can have the cause reopened.

(For other cases, see Master and Servant, Dec. Dig. § 382)

2. MASTER AND SERVANT—EQUITABLE GROUNDS FOR SETTING ASIDE RELEASE BY COMPENSATION CLAIMANT MUST BE ESTABLISHED BEFORE CAUSE CAN BE REOPENED.

Where an injured employee's agreement releasing further liability is signed and approved by the Industrial Commissioner under Rev. Code 1919, § 9467, equitable grounds for setting aside the release must be established before the cause can be reopened.

(For other cases, see Master and Servant, Dec. Dig. § 382.)

3. MASTER AND SERVANT—DEVELOPMENT OF PAIN AFTER SIGNING OF RELEASE JUSTIFIES REOPENING OF COMPENSATION CASE.

If an injured employee believed the results of his sprain were ended at the time he signed release, but it afterwards developed that further pain and suffering were attributable to the sprain, the fact would justify reopening of the case under the Workmen's Compensation Act (Rev. Code 1919, §§ 9448, 9467).

(For other cases, see Master and Servant, Dec. Dig. § 382.)

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4. MASTER AND SERVANT—CLAIMANT MUST SHOW INJURY PROXIMATELY CAUSING FURTHER DISABILITY BEFORE HE CAN RECEIVE FURTHER COMPENSATION.

It is incumbent on an injured employee to show that his injury was the proximate cause of his present further disability before he is entitled to further recovery under the Workmen's Compensation Act, after reopening of the case to set aside his release given the employer after which the further disability developed.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

5. MASTER AND SERVANT — EVIDENCE HELD TO SHOW THAT PAIN SUBSEQUENT TO RELEASE BY COMPENSATION CLAIMANT WAS NOT CAUSED BY INJURY.

Evidence *held* to support the decision of the Industrial Commission that there was no fraud in the securing by the employer of the release signed by the injured employee, and that the pain suffered by the employee subsequent to the release was caused by flat feet, instead of the sprain, which was his original injury.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

6. MASTER AND SERVANT — INDUSTRIAL COMMISSIONER EMPOWERED TO MAKE DETERMINATION AS TO REOPENING OF COMPENSATION CASE.

Under the powers granted the Industrial Commissioner by the Workmen's Compensation Act (Rev. Code 1919. §§ 9464, 9466, 9476), the commissioner had power to determine whether an injured employee who had released his employer had made such a showing of fraud in the release and of subsequently developed injury as would justify the reopening of the case; it being within the spirit of the act for him to make such decision, instead of putting the parties to the expense of a board of abitration.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

7. MASTER AND SERVANT — ERROR OF COMMISSIONER IN DETERMINING APPLICATION TO REOPEN COMPENSATION CASE WITHOUT REFERENCE TO ARBITRATION BOARD HARMLESS.

Any error of the Industrial Commissioner in himself determining application of an injured employee who had released his employer to reopen the case without having the matter referred to a board of arbitration *held* harmless to the employee, in view of the Workmen's Compensation Act (Rev. Code 1919, § 9474), giving the commissioner revisory power over the decision of a board of arbitrators.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

8. MASTER AND SERVANT — COMPENSATION CLAIMANT, SUBMITTING QUESTION TO COMMISSIONER, CANNOT COMPLAIN IT WAS NOT REFERRED TO BOARD OF ARBITRATION.

Where an injured employee in his petition to reopen the case after he had released his employer did not ask that the question of reopening the case be submitted to a board of arbitration, but appeared with counsel before the Industrial Commissioner and submitted the matter to him, such employee should not, on appeal to the Supreme Court, be permitted to complain that the Industrial Commissioner determined the matter himself without referring it to a board of arbitration.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Whiting, J., dissenting.

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Appeal from Circuit Court, Lawrence County; James McNenny, Judge.

Proceedings for compensation under the Workmen's Compensation Act by Matt Vodopich, the employee against the Trojan Mining Company, the employer, wherein petition was filed for setting aside on the ground of fraud release signed by the employee. The petition was denied by the Industrial Commissioner, and the decision reversed by the circuit court on appeal and from the judgment of the circuit court the employer appeals. Judgment of the circuit court reversed.

W. G. Rice, of Deadwood, for appellant.
E. A. Steinback, of Lead, for respondent.

GATES, J. On May 13, 1918, Vodopich, respondent, suffered a sprained ankle from accident while in the employ of appellant. He received the legal compensation and medical relief required by the Workmen's Compensation Law (Rev. Code 1919, §§ 9436–9491) from that date until October 15, 1918, on which date he returned to the employ of appellant at the same wages he received prior to the accident. He continued in such employ until the latter part of February, 1919. On October 17, 1918, he signed a complete release of any further claim upon appellant on account of such injury, and made no claim for further compensation until March, 1919. In June, 1919, a petition was filed with the Industrial Commissioner asking that the release be set aside on the grounds of fraud and misrepresentation in its procurement, and that the matter be reopened and heard before a board of arbitration. A hearing was had upon said petition, and much testimony taken. The Industrial Commissioner found that there was no evidence of fraud in the securing of the release, and that the pain then suffered by respondent was caused by flat feet, instead of the sprain, and denied the petition. Upon appeal the circuit court of Lawrence county reversed that decision, and remanded the cause for further proceedings. From the judgment of the circuit court the mining company has appealed to this court.

It is claimed by appellant that in order to justify the reopening of the cause it was incumbent upon respondent to show that the release was procured by misrepresentation, and that he signed the same without knowing its contents. This is not the law as applied to the Workmen's Compensation Act. Section 9448, Rev. Code 1919, provides:

"No contract or agreement, express or implied, no rule, regulation or other device, shall in any manner operate to relieve any employer in whole or in part of any obligation created by this article except as herein provided."

Section 9467, Rev. Code 1919, provides:

"If the employer and employee reach an agreement in regard to the compensation under this law, a memorandum thereof shall be filed with the Industrial Commissioner by the employer or employee, and unless the commissioner shall within twenty days, notify the employer and employee of his disapproval of the agreement, by registered letter sent to their addresses as given on the memorandum filed, the agreement shall stand as approved and be enforecable for all purposes under the provisions of this article."

[1-3] We are of the opinion that it is the plain intent of the Workmen's Compensation law that, while fraud or misrepresentation in obtaining the release would be a ground for setting it aside, yet an injured employee is not required to establish the fact that an agreement for release of further liability was entered into by reason of the fraud or misrepresentation of the employer before he can have the cause reopened. Where such an agreement is signed and approved by the Industrial Com-

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missioner under the provisions of section 9467, Rev. Code 1919, equitable grounds for setting aside the release must be established before the cause can be reopened. Foley v. Detroit United Ry., 190 Mich. 507, 157 N. W. 45. If in this case the employee believed the results of the sprain were ended at the time he signed the release, but it afterwards developed that further pain and suffering were attributable to the sprain, that would justify the reopening of the case. Bradbury, Workmen's Compensation (3d Ed.) pp. 1137–1149.

[4] Appellant further contends that it would next be incumbent upon respondent to show that the injury was the proximate cause of his present disability, before he could be entitled to further recovery. With this contention we agree. Section 9490, Rev. Code 1919, provides:

"In this article unless the context otherwise requires: * * * 'Injury' or 'personal injury' shall mean only injury by accident arising out of and in the course of the employment and shall not include a disease in any form except as it shall result from the injury."

[5] Assuming, without deciding, that if respondent was afflicted with flat feet at the time of the injury and that if the injury accelerated or brought on the present painful condition of his right foot, such disability would be held to be the proximate result of the injury, yet respondent did not sustain the burden upon him of showing that the condition of flat feet resulted from or was accelerated by the injury. One physician was of the opinion that the condition of flat feet was of long standing. There was no testimony to the effect that respondent did not have flat feet prior to the accident. Aside from respondent's own testimony as to present pain, and that it was occasioned by the accident, the evidence of these several physicians was to the effect that, while the accident might possibly have accelerated or increased the painful condition arising from flat feet, it was to the effect that the accident had not done so. We cannot say therefore that the clear preponderance of the evidence was against the finding of the Industrial Commissioner. In fact we think it supports his decision.

The Industrial Commissioner heard the evidence from the mouths of the witnesses. He observed their demeanor. He was in better position to judge as to credibility of the witnesses than was the trial court, or than is this court. In Day v. Sioux Falls Fruit Co., 177 N. W. 816, we said:

"The sufficiency of the evidence before the Industrial Commissioner, on the question of dependency, is not subject to review, by an appellate court, where there is any reasonable or substantial evidence tending to establish the findings of the commissioner."

The same rule applies to the matter in hand. We do not doubt that if that decision had been handed down prior to the judgment of the trial court herein its judgment would have been an affirmance of the decision of the Industrial Commissioner. Another decision supporting the views of this court herein and in Day v. Sioux Falls Fruit Co., supra, besides those cited in the latter case, is Milwaukee Coke & Gas Co. v. Industrial Commission, 160 Wis. 247, 151 N. W. 245, where the court said:

"There is evidence in the case which supports the findings of fact made by the commission, hence it cannot be said that the board acted without or in excess of its powers, even though this court, if trying the fact, might reach a different conclusion. If there is any substantial, credible evidence supporting the findings of the commission, the courts cannot interfere."

She, also, Jackson v. Iowa Telephone Co. (Iowa) 179 N. W. 849.

It is urged that the Industrial Commissioner should, as a matter of course, have reopened the cause, and should have submitted the matters decided by him to a board of arbitration for decision.

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[6] This was not a claim for compensation in the first instance. Whether the original claim was adjusted by agreement under the provisions of section 9467, Rev. Code 1919, or by arbitration under the provisions of sections 9468, 9471 does not appear. It is unimportant which method was followed. The present application to reopen the case did not involve a dispute as to the amount of compensation. The question was whether the applicant made such a showing before the Industrial Commissioner as would justify the reopening of the case. We are of the opinion that under the powers granted the Industrial Commissioner by sections 9464, 9466, and 9476 he had the power to make that determination, and that it is within the spirit of the Workmen's Compensation Act for him to make that decision, instead of putting the parties to the expense of a board of arbitration to make it.

[7, 8] But even if he ought to have submitted that question to a board of arbitration, his determination was error without prejudice. By section 9474 the Industrial Commissioner is given revisory power over the decision of a board of arbitrators. In view of his decision we must presume that upon review he would have decided as he did; consequently it does not appear that any prejudice resulted to applicant by his taking unto himself the determination of the question. Furthermore, while in his petition to reopen the case appellant did ask that the question be submitted to a board of arbitration. yet he and his counsel appeared at the hearing before the Industrial Commissioner, and submitted the matter to him. No objection was made to the hearing of the petition by the commissioner instead of by a board of arbitration. Therefore applicant ought not at this time to be heard to complain thereof.

The judgment of the trial court is reversed.

WHITING, J. (dissenting). I am of the opinion that, as a matter of course, the commissioner should have created a board of arbitration to consider respondent's claim for compensation; and that he should not have assumed the right to pass upon the very matters which the law contemplates shall be determined by such a board. In this case the commissioner went into every question that would properly have been before a board of arbitration. My colleagues hold that section 9474 gives the commissioner revisory power, and that, inasmuch as we must presume that he would, upon revision, have overturned any determination of a board, if it had chanced to differ from his views, the error, if any, in not creating a board, "was error without prejudice." If my colleagues are correct, it would never be reversible error for the commissioner to refuse to submit a claim to arbitrators and hear and determine it as sole arbitrator.

The evidence shows: That respondent was afflicted with flat feet prior to the accident; that while it may be that the pain in the right foot originated from the flat feet, yet, that he is suffering a disability because of pain in that foot; that he suffers no pain in the left foot; that he has received no accident to the right foot other than the one that resulted in the sprain; that this injury must have been a severe one, as indicated by the length of time he suffered from the sprain, and that, while the pain may be traceable to flat feet rather than to the sprain, yet the original cause thereof is traceable back to the accident and not elsewhere. There is not a doctor or other party who testified that, in his opinion, respondent would now be suffering these pains if it had not been for such accident.

I am of the opinion that the views of the trial judge, as expressed in his statements found in appellant's brief, are sound; that respondent is entitled to have a hearing before a board of arbitration; and that it is for such board of arbitration to determine the cause of this disability.

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JOHNSON COFFEE CO. v. McDONALD ET AL.

(Supreme Court of Tennessee. Dec. 31, 1920.)

226 Southwestern Reporter, 215.

1. MASTER AND SERVANT — INJURY WHILE RETURNING WITH LUNCH TO EMPLOYER'S PREMISES HELD TO "ARISE OUT OF AND IN COURSE OF EMPLOYMENT" WITHIN COMPENSATION LAW.

Where an employer permitted his employees to eat their lunch upon the premises, the death of an employee which occurred while she was returning to her place of work in an elevator operated by her employer, after having procured her luncheon outside, for the purpose of eating it within the place of work, arose out of and in the course of her employment within Workmen's Compensation Law, § 2.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT — DEPENDENCY WITHIN COMPENSATION LAW DETERMINED AS OF TIME OF ACCIDENT.

Dependency entitling parties to compensation under the Workmen's Compensation Law is to be determined as of the time of the accident, unaffected by subsequent conditions.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

3. MASTER AND SERVANT — COMPENSATION LAW GIVEN BROAD CONSTRUCTION.

The Workmen's Compensation Law should be given a broad construction to accomplish its purpose to provide for dependents of the employee.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

4. MASTER AND SERVANT — CHILDREN WHOSE FATHER IS LIVING MAY BE ALLOWED COMPENSATION AS BEING DEPENDENT UPON MOTHER.

Workmen's Compensation Law, § 30, subsecs. 9–13, dealing with the question of compensation to be paid in death cases, recognize that dependency as a matter of fact may exist on the part of a husband or children upon the wife and mother, so that the court may find the children actually dependent upon the mother, though their divorced father was still living and had not been relieved of his obligation to support them, and had secured employment as a means of supporting them after the mother's death.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

5. MASTER AND SERVANT—CONCLUSIVE PRESUMPTION OF DEPENDENCY ON FATHER DOES NOT EXCLUDE PROOF OF ACTUAL DEPENDENCY ON MOTHER.

The provision of Workmen's Compensation Law, § 30, creating a conclusive presumption that children under 16 are wholly dependent on the father, means that compensation shall be paid to such children for the death of the father, whether they are as a matter of fact dependent upon him or not, but does not exclude proof in proceeding to recover compensation for the death of the mother that the children were in fact dependent upon her earnings, though the father was still living.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

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Error to Circuit Court, Hamilton County; Oscar Yarnell, Judge.

Proceedings under the Workmen's Compensation Law by Pearl McDonald and others against the Johnson Coffee Company, employer, to recover compensation for the death of Mrs. Cora McDonald, employee. From an award of compensation by the circuit judge, the employer prays an appeal in the nature of a writ of error directly to the Supreme Court. Judgment affirmed.

W. H. Watkins, of Chattanooga, for Johnson Coffee Co.

Jones & McGhee, of Chattanooga, for Pearl McDonald and others.

SMITH, S. J. This case arises under the Workmen's Compensation Law (chapter 123, Acts of 1919). An award having been made by the circuit judge, an appeal in the nature of a writ of error has been prayed directly to this court, as provided by section 32 of said act.

The facts, which are either admitted in the answer to the petition or developed by the proof, are uncontroverted, and are as follows:

On January 28, 1920, Mrs. Cora McDonald, who was employed as a packer by the Johnson Coffee Company of Chattanooga, Tenn., left the building in which she was employed, went across the street, procured some lunch, and as she was going to the third floor of said building to eat her lunch, the elevator, which was operated by some one on the outside thereof, did not stop at the third floor, but ran past the same, and Mrs. McDonald, becoming excited, attempted to get off the elevator, but fell into the elevator shaft and was killed.

It is admitted that the Coffee Company allowed its employees to eat their lunch during the noon hour on the premises, and that Mrs. McDonald was so engaged at the time she met her death. She was earning $8 a week at the time of her death, and her daughter, Pearl McDonald, a girl about 17 years old at that time, was likewise earning $8 a week in the employ of the Coffee Company, the earnings of the mother and daughter being pooled for the support of the mother, the daughter Pearl, a daughter Alice McDonald, 12 years of age, and a son, George McDonald, about 8 years of age.

On May 6, 1918, Mrs. McDonald obtained a divorce from her husband, W. M. McDonald, who lived in Georgia, but did not contribute to the support of his wife or three children, except that he would at times buy shoes for the children or send little sums of money to them to obtain gifts at Christmas. There is no conflict in the evidence that Mrs. McDonald was actually supporting the children, and had been doing so for a number of years prior to her death. On the day following her death, her divorced husband, W. M. McDonald, returned from Georgia and obtained employment at the Milne Chair Company, at Chattanooga, where his daughter Pearl also obtained employment, and together they were earning about $30 a week at the time this case was heard in the court below, whereas Mrs. McDonald and Pearl McDonald were jointly earning $16 a week prior to Mrs. McDonald's death.

The proof shows that W. M. McDonald, the father, works intermittently, due to his bad health, being at times able to work only a few days.

The court below found that the injury which caused Mrs. McDonald's death arose out of and in the course of her employment as defined by subsection (d), § 2, of chapter 123, Acts of 1919, and that Pearl McDonald, who will be 18 years old on February 15, 1921, Alice McDonald, who will be 18 years old on September 8, 1925, and George McDonald, who will be 18 years old on May 1, 1930, were dependent upon Mrs. Cora McDonald at the time of her death. The court awarded them the sum of $5 a week for a period not to exceed 400 weeks, during dependency, which award was for the amount and in the form prescribed by subsection 16 of section 30.

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The Coffee Company contends:

(1) That the injury which resulted in Mrs. McDonald's death did not arise out of and in the course of her employment; and (2) that the three children were not dependent upon their mother, because their father was alive, was under a legal obligation to support them, and, as a matter of fact, after the mother's death obtained employment in Chattanooga with a view of helping to support the children, although admittedly he had not done so for years before the mother's death, and that, as by section 30 of the act a conclusive presumption is created, children under the age of 16 years are wholly dependent upon the father, and, as there is a prima facie presumption that children between 16 and 18 years of age are dependent upon the father, there was no evidence on which the award of the circuit judge could be based.

[1] As to the first point, the cases arising under Workmen's compensation laws are practically unanimous in holding that injuries received by employees while in the act of leaving, or preparing to leave, the place of employment to get lunch or refreshment, or while eating lunches on the premises, as allowed by the employer, arise out of and in the course of employment. Terlecki v. Strauss, 85 N. J. Law, 454, 89 Atl. 1023; Rayner v. Furniture Co., 180 Mich. 168, 146 N. W. 665, L. R. A. 1916A, 22, Ann. Cas. 1916A, 386; Clem v. Chalmers Motor Co., 178 Mich. 340, 144 N. W. 848, L. R. A. 1916A, 352; In re Sundine, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318, and note.

In the case of Re Sundine, supra, it was held that an injury suffered by an employee upon stairs which were not under the employer's control, but afforded the only means of going to and from the workroom, while leaving the premises for the purpose of procuring a luncheon, arose out of and in the course of the employment within the meaning of the Workmen's Compensation Act. Appended to this case, as reported in L. R. A. 1916A, 318, is a note citing numerous English cases, all holding that injuries received during lunch hours on the premises of the employer are to be considered as incidental to and arising out of and in the course of the employment.

In the recent case of Armstrong v. Redford, [1920] A. C. 757, decided on March 26, 1920, the House of Lords held that, where a girl employed as a machinist left the work where she was employed during the dinner hour and went to a canteen on the premises for lunch, and after finishing her dinner, and while hurrying back to work, slipped on a flight of stone steps leading from the canteen into the street, whereby she broke her ankle, this was an injury arising out of and in the course of her employment.

In Bradbury's Workmen's Compensation (3d Ed.) 523–528, a large number of cases bearing on the question as to whether injuries at meal time are accidents arising out of and in the course of employment are collected and discussed, and the following rule is deduced:

"Where an employer provides a place for his employees to eat, or directs or permits them to go to a place for that purpose, he owes to them the same duty of protection from danger there that he does at the place where such employees work."

In Harper's Workmen's Compensation, § 40, p. 83, the law is thus stated:

"The following interruptions have been held proper, and not to take the workman out of the employment: Going to order lunch, and injured while still on the premises; a workman taking advantage of an opportunity afforded by the employer to eat his meals on the premises, or at the place of his work, and this regardless of whether he is paid for the time taken at meals or not. An injury to an employee on his way to lunch at the noon hour, as a general rule, arises out of the employment, and it has been held to make no difference if the accident happens off the

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premises of the employer, if the employee uses premises which he has a right to use, and which provide the only available way to reach the point to which he goes for lunch."

We are therefore of the opinion that under the undisputed facts the trial judge correctly held that the injury which resulted in Mrs. McDonald's death arose out of and in the course of her employment.

[2] As to the second contention, the law is that under workmen's compensation acts dependency means reliance for support upon workmen's earnings at the time of injury or death, and not at any time thereafter. The condition of things then existing is determinative, and the courts will not consider subsequent events as affecting the right of dependents to compensation, provided they were dependent within the meaning of the act at the time of the injury or death.

In Pryce v. Navigation Co., [1902] 1 K. B., 221, the English Court of Appeals, speaking through Collins, M. R., said:

"Where the deceased's earnings were the only source of support, and the widow was wholly dependent upon them at the time of the death of the husband, the condition at the time of the death governed, and not the conditions which arose afterwards."

In Bott's Case, 230 Mass. 152, 119 N. E. 755, it appeared that the dependent widow of a deceased employee to whom compensation had been awarded in accordance with the terms of the act during the period covered by the award married a man whose earnings were sufficient for the support of both of them. The court held that it was manifest from the facts found that the woman was no longer dependent for her support upon the payments received under the act, and said:

"The ascertainment of dependence is made as of the time of the injury to the deceased employee. It cannot be made as of any other time. * * * No provision is made by the act for inquiry into any subsequent change in her condition of dependency. She may become heiress to a fortune after his death and thus be utterly independent of the payments provided by the act. But there is no provision for an adjudication of that fact."

Newton v. Rhode Island Co. (R. I.) 105 Atl. 363, Birmingham v. Westinghouse Electric Co., 180 App. Div. 48, 167 N. Y. Supp. 520. In re Yeople, 182 App. Div. 438, 169 N. Y. Supp. 584, and Miller v. Riverside Storage Co., 189 Mich. 360, 155 N. W. 462, are in accord with the above-cited cases, and hold that under workmen's compensation acts the question of dependency is to be determined as of the date of the injury or death, unaffected by subsequent conditions. See, also, 1 Honnold on Workmen's Compensation, § 80.

The case of State ex rel. Radisson Hotel v. District Court, 143 Minn. 144. 172 N. W. 897, 4 Workmen's Compensation Law Journal, 418, is strikingly similar in its facts to the case at bar.

It there appeared that the deceased, Mrs. Meakins, was accidentally killed by falling in an elevator shaft while in the employ of the hotel company, and that she left surviving her three minor children, who were actually dependent upon her for support at the time of her death, as the father of the children had deserted his family about three years before and had not since that time supported them.

In holding that the three children were wholly dependent upon their mother at the time of her death and were entitled to compensation under the act, the court said:

"A woman may have obtained a divorce and have been awarded the care and custody of the children on the ground of the husband's misdeeds, and his situation may be such that there is no hope of ever compelling him to contribute to the support of his children, or he may have deserted his family, as in this case. Is this statute to be so construed that, if the mother, thus left, in an effort to earn a living for herself and

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children, is accidentally killed while working in an employment where the Workmen's Compensation Act applies, the children should fare worse than would be the case had their father been killed under the same circumstances and the mother had previously voluntarily, without cause, deserted him and the children?"

[3] The purpose of the Workmen's Compensation Law is to provide for the dependents of the employee who accidentally meets with injury or death in the employment, and, to accomplish the beneficent purpose intended, the law should be given a broad rather than a narrow construction.

[4, 5] Subsections 9, 10, 11, and 12, and 13 of section 30, c. 123, Acts of 1919, which deal with the question of compensation to be paid in death cases, all clearly recognize that dependency, as a matter of fact, may exist on the part of a husband or children upon the wife and mother, leaving such dependency to be established by proof. The provision of section 30 which creates the conclusive presumption that children under the age of 16 years are wholly dependent on the father means that compensation shall be paid to such children whether the father does or does not as a matter of fact support them, but it is not the law that, if in fact such children are dependent upon the mother by reason of the desertion of his family by the father, or his refusal or physical inability to support the children, such dependency cannot be shown and established by proof.

The rule invoked by the Coffee Company as to the conclusive presumption of dependency of minor children on their father would in a great many cases, including the case at bar, work grave injustice to the children and be directly at variance with the facts of the case.

It has been held in numerous cases that the legal obligation to support is not so determinative of the question of dependency as to preclude the offering of evidence to show actual dependency when such legal obligation to support has not in fact been performed, and in several states where the act, as does our act, creates a conclusive presumption, the courts have construed it, not as rendering inadmissible evidence of actual dependency, but rather as a rebuttable presumption sufficient to impose the burden of proof upon either the employer or insurance carrier. The principle underlying these holdings is that, as the legal obligation to support his family rests on the father, it will be presumed, in the absence of evidence to the contrary, that this obligation has been discharged and performed, but if in fact minor children are dependent on some one other than the father, such dependency can be shown by the evidence, and, if shown, an award will be made in favor of such children for an injury to or death of the person, other than the father, on whom they are as a matter of fact dependent. In re Carroll, 65 Ind. App. 146, 116 N. E. 844; Parson v. Murphy, 101 Neb. 542, 163 N. W. 847, L. R. A. 1918F, 479. Sweet v. Sherwood, 40 R. I. 203, 100 Atl. 316; Purdy v. Watts, 91 Conn. 214, 99 Atl. 496.

Applying the above-cited authorities to the facts of this case, we hold that the three minor children of Mrs. McDonald were wholly dependent upon her at the time of her death and the subsequent return of the father and his securing employment, as a means of help to support the children after the mother's death, did not affect their right to compensation under the act.

It results that there is no error in the judgment of the court below, and the same is affirmed.

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UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MD., v. PARSONS. (No. 9378.)

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 16, 1920. Rehearing Denied Nov. 20, 1920.)

226 Southwestern Reporter, 418.

1. MASTER AND SERVANT — COMPENSATION CLAIMANT, SUING DEFAULTING INSURER, HELD ENTITLED TO JUDGMENT IN LUMP SUM FOR AMOUNT ALREADY DUE.

Under Vernon's Ann. Civ. St. Supp. 1918, art. 5246–45, on insurer's noncompliance with an award of the Industrial Accident Board, the injured employee is entitled to judgment in lump sum for compensation already due, and judgment for his weekly installments during the balance of the compensation period, but not to a lump sum judgment for the entire period.

(For other cases, see Master and Servant, Dec. Dig. § 416½, New, vol. 11A Key-No. Series.)

2. MASTER AND SERVANT—JUDGMENT AGAINST DEFAULTING COMPENSATION INSURER HELD "FINAL JUDGMENT."

A judgment in an action against the insurer for noncompliance with award of Industrial Accident Board, awarding plaintiff a lump sum for accrued weekly payment, and providing that he recover others as they accrue, though providing that as to payments subsequently to accrue the court may have authority, on application and showing, etc., to diminish, increase, or revoke so much of said judgment as pertains to future payments, is a "final judgment," from which an appeal may be taken; it disposing of all the issues before the court (citing Words and Phrases, Second Series, Final Decree or judgment).

(For other cases, see Master and Servant, Dec. Dig. § 418[2].)

3. MASTER AND SERVANT — FINDING OF COMPENSATION INSURER'S DEFAULT WARRANTED.

Evidence in action for noncompliance with award of Industrial Accident Board *held* to warrant finding that the insurance carrier did not, prior to the action, in good faith attempt to comply with the award.

(For other cases, see Master and Servant, Dec. Dig. § 416½, New, vol. 11A Key-No. Series.)

4. MASTER AND SERVANT — COMPENSATION INSURER'S TENDER SHOULD INCLUDE INTEREST ON AWARD.

Though letter from Industrial Accident Board, or a member thereof, to insurance carrier, stated that the award would be complied with up to a certain time by payment thereof, tender thereof was not a full legal tender; it not including interest on deferred payments, to which the injured employee was entitled.

(For other cases, see Master and Servant, Dec. Dig. § 391¼.)

5. MASTER AND SERVANT — COMPENSATION CLAIMANT'S SUIT AGAINST INSURER TO MATURE ENTIRE CLAIM ON AWARD AUTHORIZED.

Under Vernon's Ann. Civ. St. Supp. 1918, art. 5246–45, injured employee may mature his entire claim and bring suit thereon, as well where there has been no payment on the award of the Industrial Accident Board, as where, after a payment, there has been default.

(For other cases, see Master and Servant, Dec. Dig. § 416½, New, vol. 11A Key-No. Series.)

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6. MASTER AND SERVANT—AMOUNT DUE UNDER COMPENSATION AWARD HELD MATURED.

For injured employee to authorize his attorney to file suit for the whole amount due under award of Industrial Accident Board is in effect a maturing on his part of the amount due.

(For other cases, see Master and Servant, Dec. Dig. § 416½, New, vol. 11A Key-No. Series.)

Appeal from District Court, Tarrant County; R. E. L. Ray, Judge.

Action by W. R. Parsons against the United States Fidelity & Guaranty Company, of Baltimore, Md., and others. From a judgment against the named defendant, it appeals, and plaintiff brings cross-appeal. Affirmed.

Seay, Seay, Malone & Lipscomb, of Dallas, for appellant.

C. W. Massie, of Ft. Worth, for appellees.

BUCK, J. This suit was brought by W. R. Parsons against the J. W. Thompson Construction Company, the United States Fidelity & Guaranty Company of Baltimore, Md., and the Industrial Accident Board of the state of Texas, for the purpose of maturing an award made by the Industrial Board, and invoking attorney's fees and penalty. Upon demurrer, the construction company and the Industrial Accident Board were dismissed from the case. and the cause of action proceeded against the United States Fidelity & Guaranty Company, aforesaid.

On July 5, 1918, appellee, while working for the Thompson Construction Company at Ft. Worth, was injured by the turning over of an automobile in which he was riding. On or about July 13th, the appellant paid the appellee $9.52 as a weekly payment on the policy. This check was handed the appellee by the insurance company's physician in Ft. Worth. At the time of its receipt, the doctor told the appellee to return each week and he would receive a like check. When he went back the next week, the appellee was told that there was no check for him, that he had put the case in the hands of lawyers, and that he would let the lawyers collect it. The claim was filed before the State Industrial Accident Board, and, a hearing having been had, the said board on November 22, 1918, rendered judgment to the effect that the said Parsons' injuries were permanent; that his average weekly wages at the time of his injury were $16.86, and hence that his rate of compensation was $9.52; that said Parsons was entitled to recover from the United States Fidelity & Guaranty Company compensation at the rate of $9.52 from and after the 13th day of July, 1918, up to and including the date of the judgment, and to continue thereafter in the future during the existence of said total incapacity, and until and unless altered, changed, or modified by subsequent agreement between the parties within and in accordance with the provisions of the Employers' Liability Act (Vernon's Sayles' Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91), or until and unless changed, altered, or modified by subsequent order, judgment, or decree of the Industrial Accident Board, but in no case to exceed the maximum period of 401 weeks from and after July 5, 1918. Said board further allowed the plaintiff's attorney, C. W. Massie, compensation, in the way of attorney's fees, of $100, to be paid out of the weekly payments awarded the plaintiff at the rate of 15 per cent. thereof until said fee should be paid. The defendant gave notice of appeal, but never perfected said appeal. Negotiations by way of correspondence were carried on between the attorneys of the plaintiff and of the defendant until February 27, 1919, when plaintiff filed suit in the Seventeenth district court of Tarrant county against the defendant and other parties whose dismissal from the

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suit has heretofore been noted. In the petition plaintiff sought for a recovery of the entire claim, which he recited to be $3,808, for $500 as attorney's fee, and for other sums in the way of damages, to the total amount of $5,000.

The defendant United States Fidelity & Guaranty Company (hereinafter called defendant) answered by a plea to the jurisdiction of the court, setting up the facts of the issuance of the policy by it to the Thompson Construction Company, of injuries received by the plaintiff while in the employ of the construction company, of an agreement reached between the plaintiff and the defendant, whereby the latter agreed to pay the former $9.52 a week, which was alleged to be 60 per cent. of the plaintiff's average weekly wages (though in fact $9.52 does not appear to be 60 per cent. of $16.86, plaintiff's weekly wages), the filing of his claim by the plaintiff with the Industrial Accident Board, and the judgment of said board, from which no appeal had been taken within the time prescribed by the Employers' Liability Act. The defendant pleaded that the judgment of the said Industrial Accident Board was final, because the plaintiff did not give notice of the appeal therefrom within 20 days of said judgment, nor did he file suit within 40 days, after having duly notified the defendant of his intention. Defendant further pleaded that on February 15, 1919, it tendered to C. W. Massie, attorney for plaintiff, a draft for the compensation due up to that date, which said draft was made payable to W. K. Parsons and C. W. Massie; that C. W. Massie refused to accept said draft, saying it was a week short, and that it should also have been made payable to W. R. Parsons; that thereafter said Massie filed a motion with the Industrial Accident Board, stating that defendant had refused to pay the compensation, and requested the board to file with the commissioner of insurance and banking a certificate that defendant had failed to pay the award of the board, or to take an appeal therefrom, in order that said commissioner might revoke or forfeit the license or permit of the defendant to do business in Texas. It was further alleged that after investigation the board wrote the plaintiff's attorney that it found that the draft of February 15th was tendered as payment in good faith of the amount due by defendant up to February 10th; that the mistake as to the initials of the claimant would have been rectified by the defendant, and that defendant would have made payment of the draft, and would have continued to comply with the terms of the award, if it had been permitted to do so by the plaintiff; that thereafter defendant had been advised by the Industrial Accident Board that on March 8, 1919, there would have accrued and become due and payable on this award a total of $314.16; that defendant, promptly upon receipt of said advice, tendered the money to plaintiff, but that, notwithstanding this tender, the plaintiff filed suit on March 27, 1919, though in fact suit was filed February 27th.

The cause was submitted to the jury on special instructions, in answer to which the jury found: (1) That the defendant, after the award by the Industrial Accident Board, hereinafter called the board, failed or refused without justifiable cause to continue to make said payments promptly as they matured. (2) That the plaintiff prior to the filing of the suit had matured the entire claim or amount due him from the defendant. (3) That the defendant had not in good faith attempted to comply with said award of the board, by payment of same before the plaintiff had matured or attempted to mature the entire claim. (4) That the defendant had not in good faith attempted to comply with said award before the filing of the suit. Upon these answers, on motion of the plaintiff, the court entered judgment for plaintiff in the lump sum of $4.679.71, divided as follows: $3,798.48, amount of principal due; $455.81, damages; and $425 as attorney's fee. On the last day of the term of court, the court entered a corrected and final judgment, awarding plaintiff $580.72 as accrued weekly payments, $69.69 as 12 per cent. penalties, and

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awarded C. W. Massie $200 as attorney's fee, making a total of $850.41. The judgment further provided that the plaintiff should have and recover from the defendant weekly payments of $9.52 a week for a period of 339 weeks, beginning September 27, 1919, and execution should issue for the collection of said installments as they matured, subject, however, to the further provision that, on the application of any person interested, showing a change of conditions, mistake, or fraud, said award as to future payments might be diminished or increased as awarded within the maximum or minimum provided for in the Workmen's Compensation Act of Texas (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91) or that said court might change or revoke said judgment according to the provision of said act. From this judgment both parties have appealed.

[1, 2] Appellee, plaintiff below, attacks this second judgment, and prays that the first judgment rendered, awarding plaintiff the lump sum of the entire claim, as a present recovery, be substituted for the judgment later rendered by the court. He urges that the second judgment is not a final judgment, in that by its terms it is subject to change or modification. Article 5246—44, V. S. Tex. Civ. Stats., 1918 Supp., provides that in case of recovery the same shall not exceed the maximum compensation allowed under the provisions of this act; that in the absence of an appeal, perfected within the time prescribed, the said award should be binding upon all parties thereto. Article 5246—45 provides that if the association, or insurance company, as here, shall fail or refuse to bring suit to set the award aside, and shall fail to obey or comply with the same, the claimant shall be entitled to bring suit in any court of competent jurisdiction to collect the full amount of said award, together with 12 per cent. penalty and attorney's fee. An injured employee, suing an indemnity company in which the employer was insured, in the absence of agreement is entitled to judgment in lump sum for the compensation already due and his weekly installments during the balance of the time in which he is entitled to compensation, but not to a lump sum judgment for the whole period. U. S. Fidelity & Guaranty Co. v. Parker, 217 S. W. 195; Roach v. Employers' Ins. Ass'n, 195 S. W. 328; Am. Indemnity Co. v. Hubbard, 196 S. W. 1011; Gen. Accident, Fire & Life Assur. Corp., Limited, v. Evans, 201 S. W. 705.

In Roach v. Employers' Ins. Association, supra, it was held that where the Industrial Accident Board had made a final ruling and decision in adjusting of the claim, and where neither party had perfected his appeal therefrom within the time prescribed, said award would be final as between the parties, and that, in a suit by a claimant to mature the award, he would have to recover on the award according to its terms, and not in a "lump sum." We believe that this is a final judgment, from which an appeal may be taken, although it provides that as to payments subsequently to accrue, the court may have authority, upon application of any party interested, and upon a showing of mistake or fraud, or changed conditions, to diminish or increase or revoke so much of said judgment as pertains to future payments. The judgment disposed of all the issues before the court. Words and Phrases, Second Series, p. 538. Appellee's assignments are overruled.

[3] Appellant complains that the judgment should be reversed, in that the evidence shows that the defendant in good faith did attempt to comply with the terms of the award made by the board. The evidence shows that some time after the accident, probably after the award by the board, the adjuster of the defendant company came to the hospital where plaintiff was confined and offered to renew the weekly payment checks, and that plaintiff refused to accept such payments, saying that he had put the matter in the hands of his lawyer now, and that $9.52 a week was not sufficient to keep him up. Then negotiations by correspondence dragged on between the attorneys until February 15, 1919, when defendant sent the Baltimore draft for $276.08, payable to W. K. Parsons and

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C. W. Massie, which it was claimed was full payment "to date." Massie presented this check to the bank, which refused to cash it, because of the mistake of initial of plaintiff, and a Mr. Sandidge, of the bank, further testified that the usual collection charge or exchange on this kind of paper was 25 cents. As we figure it, this amount was the principal sum due up to February 5, 1919, and hence was not in full payment to February 15th, as claimed. Moreover, plaintiff was entitled to collect 6 per cent. interest on accrued payments. This was not offered. Nor was any money or check offered at any time before trial, as we understand the record, which constituted a payment of the sum of the weekly payments past due, with accrued interest. Hence we overrule this assignment.

[4] Under the second assignment, it is urged that a letter of February 27, 1919, was written by the board to defendant's attorneys, a copy of the letter being sent to plaintiff's attorney, in which the writer, J. H. Fowler, of the board, informed defendant's attorneys that if the defendant would pay the plaintiff $267.16, and C. W. Massie, as his attorney, the sum of $47.12, by such payments the award theretofore made by the board would be complied with up to March 8th following. C. W. Massie testified that he received his copy of this letter the day after he filed suit. It appears that a verbal tender was made of this amount, which plaintiff's attorney stated he would have refused, though he did not remember that the tender was made. No tender which included the accumulated interest is claimed to have been made, nor was there any offer to pay the costs already accrued by the filing of the suit. Though the board, or one of its members, might have said in a letter that in their opinion such payment of $314.28 would be a complete compliance with the terms of the award theretofore made, yet the fact remains that plaintiff was entitled to interest on the deferred payments, and any tender which did not include the interest was not a full legal tender. The assignment is overruled.

[5] We overrule appellant's third assignment. Article 5246—45, Vernon's Supp. 1918, provides that where the board has made an award, and the association or defendant company shall thereafter fail or refuse to continue to make the payment promptly, the injured employee or his beneficiaries shall have the right to mature the entire claim, and that suit therefor may be brought in any court of competent jurisdiction, in any county where the accident occurred or where the claimants reside. It is urged that this provision contemplates only cases where some of the payments have been made. We do not think so, though in the present case defendant was credited by the board and in the trial court with the payment made prior to the award. Such a construction of this part of the act would encourage the association and indemnity insurance companies to refuse to make the initial payment, and thereby preclude the claimant from applying to the courts for redress.

[6] Nor do we agree with the contention, made in the fourth assignment, that the evidence does not justify the submission of issue No. 3, to wit:

"Do you find that the plaintiff matured the entire claim or amount due under said award prior to the filing of this suit?"

Plaintiff testified that he authorized his attorney to file suit for the whole amount due. This was in effect a maturing on his part of the amount due.

All assignments are overruled, and the judgment is affirmed.

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SOUTHERN SURETY CO. v. HENDLEY.

(Court of Civil Appeals of Texas, Galveston. Nov. 18, 1920. Rehearing Denied Dec. 16, 1920.)

226 Southwestern Reporter, 454.

1. MASTER AND SERVANT — DISTRICT COURT REVIEWING DECISION ON COMPENSATION CLAIM HAS JURISDICTION TO TRY ISSUES OF DISABILITY AND RIGHT TO LUMP SUM SETTLEMENT.

Under the Workmen's Compensation Act (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91), district court, on appeal from a judgment of the Industrial Accident Board refusing to commute weekly payments into a lump sum, has jurisdiction to try the questions of totality and permanence of injury as well as the right to lump sum payment, presented as issues before the board.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

2. MASTER AND SERVANT—INDUSTRIAL ACCIDENT BOARD CANNOT, BY MAKING CONTINGENT JUDGMENT FOR COMPENSATION, DEPRIVE DISTRICT COURT OF JURISDICTION ON APPEAL.

The Industrial Accident Board cannot, in refusing to commute weekly payments into a lump sum, deprive the district court of jurisdiction by making the judgment contingent and providing that further applications for commutation into a lump sum may be made.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

3. MASTER AND SERVANT — COSTS PROPERLY ADJUDGED AGAINST APPEALING COMPENSATION INSURER.

Where an insurer appealed from a judgment of the district court reversing a judgment of the Industrial Accident Board. refusing to commute weekly payments into a lump sum. the costs of suit were properly adjudged against appellant.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

Appeal from District Court, Harris County; Ewing Boyd, Judge.

Proceedings under the Workmen's Compensation Act by G. T. Hendley against the Midland Bridge Company, the employer, and the Southern Surety Company, insurance carrier. Compensation was awarded by the Industrial Accident Board, and from a judgment reversing a denial of an application for payment in a lump sum on claimant's appeal to the district court the insurance company appeals. Affirmed.

Andrews, Streetman, Logue & Mobley, of Houston, for appellant.
Guynes & Colgin and L. H. Kenner, all of Houston, for appellee.

LANE, J. In a claim of appellee properly pending before the Industrial Accident Board of Texas, said board found that the questions involved had not been settled by agreement of the parties, and further found as follows:

"(1) That on the 12th day of June, 1918, the Midland Bridge Company was a subscriber to the Employers' Liability Act, and on said date carried a policy of insurance with the Southern Surety Company.

"(2) That on said 12th day of June, 1918, G. T. Hendley was an employee of said Midland Bridge Company, and as such employee was covered by said policy of insurance.

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"(3) That on said date and while in the course of his employment the said G. T. Hendley sustained an injury to his back and head in the manner to the extent set down in the report of accident, claim compensation and other papers now of record in this case.

"(4) That as a result of said injuries the said G. T. Hendley became totally incapacitated for work from and after the 12th day of June, 1918. and such total incapacity still exists and will continue in the future for an indefinite period of time.

"(5) That the average weekly wage of the said G. T. Hendley at the time of and prior to sustaining said injuries was $37.50, and he is therefore entitled to compensation, during the period of total incapacity, at the maximum rate of $15 per week.

"That the application for a lump sum settlement should be denied, without prejudice to the claimant or to any subsequent relief of said application."

And upon such finding ordered and adjudged as follows:

"It is therefore ordered, adjudged, and decreed by the Industrial Accident Board that the said G. T. Hendley do have an recover of, from, and against the Southern Surety Company, in full settlement of his claim against said company, a weekly compensation at the rate of $15 from and after the 20th day of June, 1918, up to and including the date of this order and continuing thereafter during the existence of such total incapacity and until and unless altered, changed. modified, and terminated by subsequent amicable agreement between the said G. T. Hendley and the Southern Surety Company, within the provisions of the Employers' Liability Act, and until and unless altered, changed, or modified by subsequent award, order, judgment, or decree of this board; provided that the period covered by such compensation shall in no event exceed 401 weeks from and after June 12, 1918, and that said Southern Surety Company be credited with any and all amounts that they may have heretofore paid on this compensation.

"It is further ordered, adjudged, and decreed by the Industrial Accident Board that the application for a lump sum settlement filed thereby by the claimant be at this time denied, without prejudice to the claimant and without prejudice to subsequent application therefor."

Within 20 days after the rendition of said order and decision the claimant gave to the adverse party and said board notice that he would not abide by such ruling and decision, and within 20 days after giving such notice he brought this suit in the Fifty-Fifth district court of Harris county against the Southern Surety Company, alleging. in substance, that plaintiff was, at the time of the injury complained of, an employee of the Midland Bridge Company, a subscriber under the provision of the Employers' Liability Act of Texas, and that said Bridge Company was the holder of a policy of insurance issued by the Southern Surety Company providing for payment of compensation to injured employees under the terms and provisions of the Texas Employers' Liability Act; that he had been permanently injured and incapacitated in the course of his employment; that he had complied with all the requisites of said act, and had in due and proper time and manner applied to the Industrial Accident Board for an award for his said injuries; that said board had made for him the award as hereinbefore shown. He further alleged that he was dissatisfied with such award, in that said board denied his application for a lump sum settlement of the amount awarded. He prayed for a decree setting aside the ruling and decision of said Accident Board, and for a recovery against the Southern Surety Company for the full amount of his claim in a lump sum.

The defendant Southern Surety Company answered by general demurrer and general denial.

Plaintiff's attorney intervened and prayed for one-third of any award made to the plaintiff as attorney's fee.

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The cause was tried before a jury upon special issues, in response to which they found as follows: (1) That plaintiff suffered a total incapacity as a result of the injuries received; (2) that such total incapacity will continue permanently; (3) that the award made by the Industrial Accident Board would result in a manifest hardship and injury to the plaintiff; (4) that a reasonable sum for the attorney's fee in this cause is $1,000.

The court thereupon rendered the following judgment:

"It appearing to the court from the foregoing verdict of the jury that the plaintiff would suffer manifest hardships and injustice would otherwise result if a lump sum settlement were denied him, and that this is a special case where a lump sum payment should be made, the court is of the opinion that the plaintiff, G. T. Hendley, is entitled to recover herein against the Southern Surety Company; and it further appearing to the court that the defendant, after the occurrence of the injuries to the plaintiff herein, paid said plaintiff the sum of $360 and that said defendant is entitled to such credit; and it appearing to the court that the sum of $570, at the rate of $15 per week, became due the said plaintiff by the said defendant to the date of trial, and that said plaintiff is entitled to recover such amount together with legal interest from date hereof; and it further appearing to the court that from date of trial there was yet to mature, and owing to said plaintiff by said defendant, the sum of $5.085, representing 339 weeks at the rate of $15 per week, and that in order to arrive at a lump sum payment hereof the same should be discounted at the rate of 6 per cent. per annum:

"It is therefore ordered, adjudged, and decreed by the court that the plaintiff, G. T. Hendley, do have and recover of the said defendant Southern Surety Company the sum of $570, with 6 per cent. interest, as aforesaid, as amount owing said plaintiff as past-due installments; and it is further ordered, adjudged, and decreed that the plaintiff, G. T. Hendley, do have and recover of the said Southern Surety Company in a lump sum the amount of $4.251.17, with legal interest, together with all costs of court; that it is further ordered, adjudged, and decreed that Guynes & Colgin and L. H. Kenner, as attorneys for said plaintiff, be awarded the sum of $1,000 as against said plaintiff as attorney's fees out of the amount herein recovered by plaintiff."

The Southern Surety Compny has appealed, and by its first and second assignments insists that the court erred in refusing its request for an instructed verdict in its favor and in rendering judgment for appellee for reasons: First, "because the court was without jurisdiction to modify the award of the Accident Board in respect to the matter of a lump sum commutation of the weekly payments"; second, because the ruling and decision of the Accident Board was not a final decree, but, to the contrary, by its provisions it leaves open the opportunity for the claimant to present a later application for a lump sum settlement, and, there being no final decree rendered by the Accident Board, no jurisdiction would lie in the district court to adjudicate the issue attempted to be presented; and, third, that, since there was no controversy between the parties except the demand of appellee for a lump sum settlement, there was no basis for jurisdiction of the district court to try the issue sought to be presented.

[1] We cannot agree to any of these contentions.. By the pleadings of the parties and the evidence the question of totality and permanence of injury, as well as the right to a lump sum settlement, were presented as an issue, and we think the district court had jurisdiction to try any one or all such issues. It is provided by the Workmen's Compensation Act (General Laws of Thirty-Fifth Legislature, pp. 269-294 [Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91]):

"In cases where death or total permanent incapacity results from any injury, the liability of the association may be redeemed by payment of a

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lump sum by agreement of the parties thereto, subject to the approval of the Industrial Accident Board hereinafter created. This section shall be construed as excluding any other character of lump sum settlement save and except as herein specified; provided, however, that in speial cases where in the judgment of the board manifest hardship and injustice would otherwise result, the board may compel the association in the cases provided for in this section to redeem their liability by payment of a lump sum as may be determined by the board." Part 1, § 15.

"All questions rising under this act, if not settled by agreement of the parties interested therein and within the terms and provisions of this act, shall, except as otherwise provided, be determined by the board. Any interested party who is not willing and does not consent to abide by the final ruling and decision of said board shall within twenty days after the rendition of said final ruling and decision by said board give notice to the adverse party and to the board that he will not abide by said final ruling and decision. And he shall within twenty days after giving such notice bring suit in some court of competent jurisdiction in the county where the injury occurred to set aside said final ruling and decision and said board shall proceed no further toward the adjustment of such claim, other than as hereinafter provided; provided, however, that whenever such suit is brought, the rights and liability of the parties thereto shall be determined by the provisions of this act, and the suit of the injured employee or person suing on account of the death of such employee shall be against the association if the employer of such injured or deceased employee at the time of such injury or death was a subscriber as defined in this act."

Again:

"If any party to any such final ruling and decision of the board, after having given notice as above provided, fails within said twenty days to institute and prosecute a suit to set the same aside, then said final ruling and decision shall be binding upon all parties thereto." Part 2, § 5.

We are of the opinion that by this act the district court was empowered to take cognizance of and try the cause as presented by the pleadings, and, under the pleadings and evidence and the findings of the jury, to render the judgment it did render. We cannot believe that it was the intention of the Legislature to vest in the Accident Board the power to destroy or suspend the jurisdiction conferred upon the district court by the act in question, by making a ruling and decision such as the one under discussion, which may not become conclusive until the expiration of the time for which the claimant is authorized to draw a weekly award, for, if such decision has the effect to suspend the jurisdiction of the district court indefinitely, it may entirely destroy such jurisdiction and thereby leave undetermined the question of the totality and permanence of the injury as well as the right of the claimant to a lump sum settlement.

[2] The claimant was demanding at the hands of the Accident Board that it find that he was totally incapacitated and that such total incapacity would continue permanently. He also asked that the board find that he was, at that time, entitled to a lump sum settlement. These prayers were finally refused and a contingent judgment entered. As before said, we are of the opinion that the Industrial Accident Board cannot, under law, deprive the district court of its jurisdiction, by deciding and rendering its award for the time being only and subject to modification. If it can do this, it may, by repeated judgments of like character, forever close the doors to an appeal to the tribunals provided by law. The appeal for the purpose of seeking relief in the form of a lump sum settlement is a great right; to deny an appeal by rendering an award for the time being only would be to destroy the spirit of the law, while the injured employee would be groaning under harsh and oppressive conditions and suffering injustice by having his appeal adjudicated away by the Indus-

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trial Accident Board, which would hold within its hands the power to grant or deny it; this right to an appeal is fixed by law and not by order of the Industrial Accident Board. When the question involves one of manifest injustice, the holding in abeyance the relief prayed for by temporary order would be subversive of the very intention of the law, its spirit, and purpose, and the object sought to be accomplished by the law would become impossible of attainment. U. S. Fidelity & Guaranty Co. v. Davis, 212 S. W. 239, at page 243.

In the case cited the Accident Board qualified its award by stating that it was subject to modification or termination in accordance with the provisions of the Workmen's Compensation Act, and on appeal to the district court it was held that it had acquired jurisdiction of all issues involved in the case. On appeal to the Ft. Worth Court of Civil Appeals, the court said:

"The act does not specifically vest in a court trying such a case as this the power given to the Industrial Accident Board by section 15, pt. 1, copied above, to approve any agreed lump sum settlement, nor the power given that board by section 12d, copied above, to review, terminate, diminish, or increase an award of compensation previously made, but we are of the opinion that the court is, by implication, vested with such power, in view of the provision of section 5, pt. 2, p. 283, of the act, to the effect that, 'whenever such a suit is brought the rights and liability of the parties thereto shall be determined by the provisions of this act.' "

We deem it unnecessary to pursue this discussion further. Assignments 1 and 2 are overruled.

[3] We overrule the third and last assignment, as we think the court properly adjudged the costs of this suit against appellant.

The judgment is affirmed.

Affirmed.

LITTSOS v. INDUSTRIAL COMMISSION OF UTAH ET AL.

(No. 3501.)

(Supreme Court of Utah. Dec. 8, 1920.)

194 Pacific Reporter, 338.

1. MASTER AND SERVANT—INDUSTRIAL COMMISSION'S DETERMINATION OF EXTENT OF COMPENSATION CLAIMANT'S INJURY NOT REVIEWABLE.

On an application by an injured employee for additional compensation, after he had received compensation for forty-three weeks, where the employment and the fact that the accident arose out of the employment were undisputed, the determination by the Industrial Commission as to whether the condition of the employee at the time of his application arose from his injury, or from another cause, was merely a determination of the extent of applicant's injury, which is not reviewable as a jurisdictional finding.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT — COMMISSION'S FINDINGS IN COMPENSATION CASE CONCLUSIVE IF SUPPORTED BY EVIDENCE.

Findings by the Industrial Commission on an issue within its jurisdiction are conclusive under Comp. Laws 1917, § 3148, as amended by Sess. Laws 1919, c. 63, and are not reviewable by the Supreme Court unless there is no substantial competent evidence to sustain the finding.[1]

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

[1] Utah Fuel Co. v. Industrial Commission, 194 Pac. ——.

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3. MASTER AND SERVANT — CAUSE OF COMPENSATION CLAIMANT'S MENTAL CONDITION QUESTION OF FACT NOT REVIEWABLE.

Where the Industrial Commission denied compensation because the employee's disability was due to his mental condition rather than to the accident, its determination whether the mental condition itself was caused by the accident was a decision on a question of fact, and not reviewable where the evidence was conflicting.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Proceedings under the Workmen's Compensation Act by Louis Littsos for additional compensation from the Hansen Live Stock & Feeding Company. Petition denied by the Industrial Commission, and applicant brings certiorari. Affirmed.

R. S. Farnsworth, of Ogden City, for plaintiff.

Dan B. Shields, Atty. Gen., and R. B. Porter, of Salt Lake City, for defendant.

WEBER, J. While working for the Hansen Live Stock & Feeding Company, at Ogden, November 30, 1918, applicant fell from a pile of baled hay and was injured. Maximum weekly compensation was paid him for a period of 43 weeks. On October 11. 1919, an application was filed with the Industrial Commission for an adjustment of the claim. A hearing was had, and on October 29, 1919, the commission denied the application for additional compensation. The commission found from the evidence:

"That, about 2½ years prior to the accident, the applicant suffered a hernia for which he underwent an operation, and at the time of the accident he was wearing a truss, and, while the commission is of the opinion from the evidence that the applicant is now suffering partial disability, the commission is inclined to attribute this to the inactivity of the applicant and the condition of his mind, rather than to the accident itself."

A petition for a rehearing was thereafter filed by the applicant and granted. Further hearing was had on December 12, 1919. In May, 1920, the applicant was examined, with his consent and at the request of the commission, by three physicians who rendered separate reports under oath. On May 27, 1920, additional compensation was again denied, the commission finding from the evidence:

"That the disability from which the applicant is suffering at this time resulted from an operation for a left inguinal hernia, which appears to have been of long standing and not chargeable to the accident of November 30, 1918."

Applicant seeks, by writ of certiorari, to have the findings of the commission vacated for the following reasons:

"(1) The commission acted without and in excess of its powers in holding that his disability is due to the inactivity and condition of your petitioner's mind, instead of the pain and suffering resulting from said injuries, and said finding is not sustained by the evidence but is contrary thereto.

"(2) That said commission acted without and in excess of its powers in holding that his disability was due to an old hernia of long standing, instead of the result of said injuries on the said 30th day of November, 1918.

"(3) That said Industrial Commission acted without and in excess of its powers in holding that said petitioner is not entitled to any compensation beyond said 43 weeks after said November 30, 1918, for the

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reason that said conclusion is not sustained by, but is contrary to, the finding and the evidence that said petitioner still suffers from partial disability.

"(4) That said finding and decision is contrary to law and the spirit of the act creating said commission and providing compensation for injured employees."

[1, 2] Counsel for applicant contends that whether an injury results from an accident is jurisdictional, and that therefore the findings of the commission on that issue are reviewable. It is conceded that the relationship of employer and employee existed between the applicant and the Hansen Live Stock Company; that both were subject to the provisions of the Industrial Commission Act. It is also conceded that applicant was injured in the course of his employment. The only issue before the Industrial Commission was as to the extent of applicant's injury. We do not regard that as jurisdictional. If anything is within the jurisdiction of the commission, it is the question as to the extent of the injury which the commission is certainly given power to determine, and, unless there is no substantial competent evidence to sustain the findings and conclusions of the commission, the findings and conclusions are by Comp. Laws Utah, 1917, § 3148, as amended by Sess. Laws 1919, c. 63, subd. c, p. 165, made final, and are not reviewable by this court. Utah Fuel Co. v. Ind. Com., 194 Pac. —, decided this term.

[3] It is argued that the mental state of the applicant is a neuresthenic condition due to the injuries sustained by him. Again, the commission had to deal with a question of fact regarding which the evidence was conflicting. The commission's decision on this question is therefore final and not reviewable, as we have repeatedly held.

The decision of the Industrial Commission is therefore affirmed.

Corfman, C. J., and Frick, Gideon, and Thurman, JJ., concur.

MILLER SCRAP IRON CO. ET AL. v. INDUSTRIAL COMMISSION ET AL.

(Supreme Court of Wisconsin. Jan. 11, 1921.)

180 Northwestern Reporter, 826.

1. MASTER AND SERVANT—WIDOW'S COMMON-LAW ACTION AGAINST WRONGDOER NOT WAIVER OF COMPENSATION FROM EMPLOYER UNDER COMPENSATION ACT.

Act of widow of deceased employee, his administratrix, in bringing a common-law action against the superintendent of the employing company, who was driving the automobile in which the employee was riding at the time of the accident, to recover damages for his death under How. Ann. St. Mich. 1912, §§ 13702, 13703, *held* not to have waived her right to claim compensation from the employer under the Workmen's Compensation Act, despite St. 1919, § 2394—25, subd. 2.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

2. MASTER AND SERVANT — COMPENSATION ALLOWABLE WITHOUT FINDINGS AS TO FACTS CONSTITUTING NO DEFENSE.

Where the facts pleaded before the Industrial Commission by the employer and insurer as defense to a widow's application for compensa-

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tion for the death of her husband constituted no defense. the commission was not required to make findings with reference thereto, and its failure so to do is immaterial.

(For other cases. see Master and Servant, Dec. Dig. § 416.)

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Proceeding for compensation under the Workmen's Compensation Act by Mary Boncher, as widow of Joseph Boncher, the deceased employee, opposed by the Miller Scrap Iron Company, the employer, and the Georgia Casualty Company, the insurer. Compensation was awarded by the Industrial Commission, the award confirmed by the circuit court, and from its judgment, confirming the award and order of the Industrial Commission refusing to vacate the award, the employer and insurer appeal. Judgment affirmed.

This is an appeal from a judgment confirming an award of the Industrial Commission made September 22, 1919, and confirming an order of the Industrial Commission made November 24, 1919, refusing to vacate said award of September 22d. The award was for $3,000 in favor of Mary Boncher and against the Miller Scrap Iron Company and Georgia Casualty Company, as compensation under the Workmen's Compensation Act for the death of Joseph Boncher, husband of Mary Boncher, while in the employ of the Miller Scrap Iron Company. The accident resulting in death occurred in the state of Michigan, where and while Boncher was in the employ of the Miller Scrap Iron Company. The parties were residents of the state of Wisconsin, where the contract of employment was made, and where the principal services under such contract of employment were to be performed. Both parties were subject to the provisions of the Workmen's Compensation Act (St. 1919, §§ 2394—1 to 2394—97).

Shortly after the death of Joseph Boncher, Mary Boncher procured the appointment of an administratrix of his estate in the county court for Brown county, and the administratrix commenced and prosecuted a common-law action against the Miller Scrap Iron Company and Herman Miller, who was superintendent of said company, and who was driving the automobile in which Joseph was riding at the time of the accident, to recover damages for the death of said Joseph Boncher, basing the action upon a statute of the state of Michigan, providing for damages in case of death by wrongful act, similar to our section 4255. A judgment was obtained in the lower court, which was reversed in this court (Anderson v. Miller Scrap Iron Co., 169 Wis. 106, 170 N. W. 275, 171 N. W. 935) as to the defendant Miller Scrap Iron Company for the reason that the liability of said company for the death of Boncher was governed by the terms of the Wisconsin Workmen's Compensation Act. At the request of the plaintiff in that action, and for no other reason, judgment was also reversed as to Herman Miller. The case was remanded to the municipal court of Brown county, where Herman Miller moved to dismiss the action upon its merits as to him. Thereupon the plaintiff in that action tendered the prosecution thereof to the Miller Scrap Iron Company, which was declined. The Miller Scrap Iron Company, as well as the plaintiff, however, resisted the motion to dismiss the action as to Herman Miller, but the motion was granted.

After the decision of this court in the common-law action Mary Boncher applied to the Industrial Commission for compensation. The Miller Scrap Iron Company and the Georgia Casualty Company, its insurer, were made respondents, and they filed separate answers. The substance of the defense made by each of the respondents (appellants here) was that by the commencement of the common-law action by the administratrix of the estate of Joseph Boncher, Mary Boncher had waived her

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right to compensation under the Workmen's Compensation Act. On September 17, 1919, the Industrial Commission made an award granting compensation to Mary Boncher in the sum of $3,000. On September 22, 1919, the commission having discovered that part of the first award did not run against the Georgia Casualty Company as well as the Miller Scrap Iron Company, an amended award was made, correcting the error in that respect. On September 27, 1919, the present plaintiffs applied to the Industrial Commission for an order vacating the award, basing the application on the ground that after said amended award, and on the 24th day of September, 1919, the common-law action had been dismissed as to Herman Miller in the municipal court of Brown county, which action prejudiced the rights of these plaintiffs, and which prejudice resulted from the acts of Mary Boncher in having prosecuted the action to judgment and then having such judgment voluntarily reversed as to him. The application was denied. Separate actions were then commenced in the circuit court for Dane county to review the awards of September 17th and 22d and the order refusing to vacate the same. These actions were later consolidated. From a judgment of the circuit court for Dane county confirming the orders and awards of the Industrial Commission, plaintiffs bring this appeal.

Richmond, Jackman, Wilkie & Toebaas, of Madison, for appellants.

John J. Blaine, Atty. Gen., J. E. Messerschmidt, Asst. Atty. Gen., and Kaftan & Reynolds, of Green Bay, for respondents.

OWEN, J. (after stating the facts as above). [1] It is appellants' contention that the award made by the Industrial Commission should be vacated and set aside because the prosecution of the common-law action by the administratrix of the estate of Joseph Boncher against the Miller Scrap Iron Company and Herman Miller to recover damages for his death operated as a waiver on the part of Mary Boncher of any claim for compensation against the Miller Scrap Iron Company under the Workmen's Compensation Act (sections 2394—25 to 2394—31, inclusive). Their argument in this behalf is based on the provisions of subdivision 2 of section 2394—25, which provides that—

"The commencement of an action by an employee against a third party for damages by reason of an accident covered by sections 2394—3 to 2394—31, inclusive, or the adjustment of any such claim, shall operate as a waiver of any claim for compensation against the employer."

It is to be observed that the expressed terms of this statutory provision do not provide that the commencement of an action by a personal representation of a deceased employee against a third person shall operate as a waiver, on the part of the personal representative, of any claim for compensation against the employer for the death of the employee. Appellants contend that, although not so expressly stated, nevertheless the statute should be so construed in order to carry out the manifest legislative intent. Our views with reference to this will appear as we proceed.

The original action brought by the administratrix was based on sections 13702 and 13703 of Howell's Michigan Statutes, which provided, in effect, that whenever the death of a person shall be caused by wrongful act which would. if death had not ensued, have entitled the party injured to maintain an action therefor, the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death, which shall be brought by and in the name of the personal representatives of such deceased person. It was also provided that the amount recovered in any such action should be distributed to the persons and in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate. The money

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recovered in an action so authorized constitutes assets of the estate. Findlay v. Chicago & Grand Trunk Railway Co., 106 Mich. 700, 64 N. W. 732; Carbary v. Detroit United Railway, 157 Mich. 683, 122 N. W. 367. The widow had no peculiar interest in the money which might have been recovered in that action. Her interest therein was no different from that of her interest in any other personal property asset of the estate. Heirs, whether dependent or not, were entitled to participate in the amount recovered. The trial of that action, therefore, was entirely with the administratrix. She was subject to no direction or control, except by the court which appointed her. If this cause of action constituted an asset of the estate, it was the duty of the administratrix to prosecute it if it seemed to be the beneficial thing to do from the standpoint of the estate. The widow enjoyed no power of direction or control over the action of the administratrix in this respect. If this be true, it is difficult to perceive why anything which the administratrix might have done in that action should be construed as a waiver on the part of the widow to compensation under the Workmen's Compensation Act.

It was the duty of the administratrix to act for the benefit of the estate, and not for the benefit of the widow. If there was a conflict between the interest of the widow and the interest of the estate, she had but one course to pursue, and that was to be faithful to the interest of the estate without regard to its effect upon the interest of the widow. Counsel for appellant seem to appreciate this legal truth, but they rely upon the fact, as asserted by them, that Mrs. Boncher had procured the appointment of the administratrix, had induced the commencement of the common-law action, had participated in that case throughout, and had controlled the same, and after judgment was obtained against Herman Miller she had procured a reversal of such judgment, to the prejudice of the Miller Scrap Iron Company and the Georgia Casualty Company. Of course as a matter of law Mrs. Boncher had no control whatever over that action. The administratrix had absolute control over it, and Mrs. Boncher had no legal power or control over the administratrix. It matters not what the moral influence of Mrs. Boncher was over the administratrix or the extent to which the administratrix deferred to the requests, suggestions, and advice of Mrs. Boncher in the prosecution of that case. Whatever was done by the administratrix was done upon her own responsibility in a legal sense, and she alone can be held to an account of the manner in which she had discharged her duties towards the estate.

Compensation under the Workmen's Compensation Act belongs exclusively to the dependents of the deceased, in this case his widow. Such compensation does not become assets of the estate, and the administrators of the estate have nothing to do with it. The liability of Herman Miller and that of the Miller Scrap Iron Company are not only distinct liabilities arising from different considerations, but they are liabilities to different parties. The liabilty of Herman Miller is to the estate of the deceased under the Michigan statute. The liability of the Miller Scrap Iron Company is to the widow under the Wisconsin Workmen's Compensation Act. There is no logic which will justify the conclusion that the prosecution of the action by the administratrix against Herman Miller for the benefit of the estate can operate as a waiver by the widow of her right to compensation, under the Wisconsin Workmen's Compensation Act, against the Miller Scrap Iron Company. The language of the statute does not expressly declare a waiver under such circumstances, and the foregoing considerations are sufficient reasons for us to decline to so construe it. Waiver is generally defined as the voluntary relinquishment of a known right, and it must be predicated upon the conduct of the party charged therewith. To say that Mrs. Boncher waived her right to compensation because the administratrix prosecuted the common-law action would be a misuse of the term. The action of the administratrix cannot

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constitute waiver on the part of Mrs. Boncher according to the ordinary significance of that term. If it was the legislative intent to deprive Mrs. Boncher of compensation, the Legislature most signally failed to express that intent, and it would be judicial usurpation for us to supply it by construction. The equities of this case occasion no regret for the conclusion which we feel imperative, and if the legislative intent is otherwise than here determined, there is ample opportunity for an early amendment of the statute.

[2] It follows that the facts pleaded before the Industrial Commission by the plaintiffs here as a defense to the application for compensation constituted no defense thereto. Such facts constituting no defense, the Industrial Commission was not required to make findings with reference, thereto, and its failure so to do, which plaintiffs assign as error, is wholly immaterial. It mattered not whether those facts were true or false, and the Industrial Commission properly disregarded them in arriving at its conclusions and award.

Judgment affirmed.

Kerwin, J., took no part.

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TOWN OF STEPHENSON, MARINETTE COUNTY, v. INDUSTRIAL COMMISSION ET AL.

(Supreme Court of Wisconsin. Jan. 11, 1921.)

180 Northwestern Reporter, 842.

1. MASTER AND SERVANT — COMPENSATION ACT LIBERALLY CONSTRUED.

A provision of the Workmen's Compensation Act should be liberally construed, to afford workmen a remedy for meritorious claims.

(For other cases. see Master and Servant, Dec. Dig. § 348.)

2. MASTER AND SERVANT—NEGOTIATIONS WITH WRONGDOER NOT A "CLAIM," WAIVING COMPENSATION FROM EMPLOYER.

Negotiations by employee of town, injured while working on its road by being shot by one or the other of two nearby campers firing at a target, *held* not to have constituted a "claim" against a third person for damages, within Workmen's Compensation Act (St. 1917, § 2394—25, subd. 2), operating as a waiver of any claim for compensation against the employing town; "claim" meaning a demand of some matter of right made by one person upon another to do or to forbear to do some act or thing as a matter of duty (citing Words and Phrases, "Claim").

(For other cases, see Master and Servant, Dec. Dig. § 358.)

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Action by the Town of Stephenson, Marinette County, to review an award under the Workmen's Compensation Act by the Industrial Commission in favor of Herman Schelk, an injured employee. From a judgment setting aside the award, the Commission and the employee appeal. Reversed and remanded, with directions.

Action to review an award of the Industrial Commission, given under the Workmen's Compensation Act (section 2394—3 to 2394—31, Stats.) by which the plaintiff town was ordered to compensate the defendant, its employee, for injuries. The trial court set aside the award, and the employee brings this appeal.

Appellant was in the service of the respondent town on July 18, 1918, working upon a road which was considerably used for travel. It appears to have been in a region sparsely settled and frequently by hunters in season. It was not hunting season, however, in July. Near by, but hidden by brush from the portion of the road where appellant was at work, was a place where it appeared fishermen and sportsmen frequently camped. There was evidence that shooting, probably target shooting, was frequently heard in the neighborhood. Appellant had heard none near this camping place, however, in the three days he had worked there, until the injury occurred, and never gave it a thought that he might get shot there.

While appellant was working he heard a shot, and heard the bullet pass near him. He called out, with the intention of attracting the attention of the shooters; but a second shot was heard, and the bullet struck him. causing the loss of an eye. Appellant went in the direction of the shooting, and found two campers, one McDonald and one Stibbe, who admitted having fired the shots. They had both fired several shots with a 22-caliber rifle at a target in front of the brush, not knowing that there

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that there was a road behind it, and thinking that there would be nobody there. They did not know which of them had fired the shot which struck appellant.

The campers took appellant in their automobile to medical attendance and a hospital. They voluntarily paid the medical and hospital expenses themselves, without informing appellant until later. It appears to have been nearly a year after the injury before appellant took further action, except to inform the chairman of the town about his injury. Then he consulted a lawyer or two. It does not appear very clearly just what advice he received, except an opinion that McDonald and Stibbe could be held liable and advice that there might be doubts about recovery from them. He knew that there was a Compensation Act under which there would be possibility of his recovering compensation from the town; a lawyer he consulted seems to have suggested proceeding under it. He desired to escape antagonizing the town, however, and figured he was going to make McDonald and Stibbe pay for it instead. He really did not intend to make claim against the town until after certain occurrences which led up to the claim on which the present award was given.

With this the situation the appellant went to one of the men who did the shooting. The exact language used does not clearly appear, but the upshot of it was that he asked what they intended to do about compensation, or if they intended to compensate him, and said that if they wanted to settle he would accept $1,000, plus lost wages and expenses, as a settlement. He never wrote to them. They promised to let him know soon what they would do. Accordingly appellant received a letter. asking him to come to Oconto. When he arrived, McDonald and Stibbe took him to a friend, now appellant's counsel. The lawyer seems to have been acting as friend, rather than retained by anybody at this time. He asked what appellant wanted in settlement. Appellant repeated his willingness to settle for the same amount as previously proposed. The lawyer then told him that, while he might get judgment against McDonald and Stibbe, they had no property, could go into bankruptcy, and that it would be very doubtful if he would ever recover anything. The lawyer then suggested a claim against the town under the act, and the present claim resulted.

The commission, in an opinion without findings of facts so designated, state that the negotiations with McDonald and Stibbe did not amount to "the making of a claim," within the meaning of section 2394—25, subd. 2, Stats. 1917, which would operate as a waiver of any claim against respondent. They also state, though it appears with some hesitation. that there was such evidence of camping and shooting in the neighborhood that, together with "the well-recognized practice of campers and sportsmen to engage in target shooting," and considering the location of the road, being shot accidentally became a special hazard of appellant's employment.

The trial court set aside the award on the ground that the commission acted without and in excess of its powers in finding that no claim had been made against the third persons, holding that the evidence indisputably showed the making of such a claim. He did not consider, in his memorandum opinion, the question of whether the danger of being shot was such as to become a hazard of the business, so as to make the occurrence an industrial accident.

Counsel in their briefs upon this appeal argue only upon the question on which the trial court set aside the award; they do not discuss the other point.

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John J. Blaine, Atty. Gen., W. W. Gilman, Asst. Atty. Gen., and Classon & Whitcomb, of Oconton, for appellants.

Miller & Miller, of Marinette, for respondent.

JONES. J. (after stating the facts as above). No claim has been made in the argument or brief of the respondent town that the appellant did not have a meritorious claim against the town under the Workmen's Compensation Act, although it seems to have been urged before the commission that the injury was not one incidental to the employment. Appellant clearly had a cause of action against the person who fired the shot. He may have had doubts whether he had a cause of action against both McDonald and Stibbe, and, if not, whether he could have proved who discharged the shot. Before he fully determined on the best course to pursue, he became convinced of the difficulties in the way of obtaining compensation from McDonald and Stibbe. Naturally his first thought was that these parties, or one of them, should make compensation.

Although appellant preferred obtaining compensation from McDonald and Stibbe to antagonizing the town, they never made him any definite offer and he never accepted any proposition made by them. His proposal was not accepted and was abandoned. He was willing to negotiate with them, and would have accepted $1,000 and his expenses, if they had been willing and able to make the payment. Before any conclusion was reached they took the claimant to their lawyer friend, and he became satisfied that his most certain remedy was against the town. One of the facts determining his course of action was the doubt whether a judgment against McDonald and Stibbe would be collectible. Appellant never told McDonald and Stibbe that he demanded any certain payment. Even if he hoped that they would pay him, he did not notify them that he would prosecute a claim against them if they did not pay. Although he consulted an attorney as to his rights against them, no demand was made or notice given by any attorney.

There is undoubtedly considerable force in the argument that appellant made a claim against McDonald and Stibbe. But the real question is whether it was such a claim as within the meaning of the statute forfeited or waived appellant's claim against the town. The statute existing at the time was as follows:

"Sec. 2394—25. 1. The making of a lawful claim against an employer for compensation under sections 2394—3 to 2394—31, inclusive. for the injury or death of his employee shall operate as an assignment of any cause of action in tort which the employee or his personal representative may have against any other party for such injury or death; and such employer may enforce in his own name the liability of such other party.

"2. The making of a claim by an employee against a third party for damages by reason of an accident covered by sections 2394—3 to 2394—31, inclusive, shall operate as a waiver of any claim for compensation against the employer." Stats. 1917.

[1, 2] The statute should be liberally construed. White v. Indust. Comm., 167 Wis. 483, 485, 167 N. W. 816, and cases cited. It should be so construed as to afford workmen a remedy for meritorious claims; not so construed as to deprive them of just compensation merely because they discuss and investigate their remedies, or even because they may have had some negotiations with parties other than the employer when these negotiations have led to no result and have brought no detriment to the employer. A "claim" is frequently defined judicially as "a demand of some matter of right made by one person upon another to do, or to forbear to do, some act or thing as a matter of duty." See Words and Phrases,, title "Claim." The word seems to contemplate something rather unequivocal, something in the nature of a demand, rather than a request. At least this would seem to be the proper meaning of the

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word in a statute like this, where, by a stricter construction, an employee through ignorance of the law might forfeit a just claim by having conversations and negotiations with another than his employer.

The only case cited which bears directly upon the questions involved is Harloff v. Merwin (Wis.) 177 N. W. 913, 915. In that case it was held that claimant had made his election to pursue his remedy against a third party. But the proof showed that his attorney had written several letters showing that such a claim had been made, and the employee had actually received $1,200 from the third party and given a release in full.

No claim is made that the payment of the medical and hospital expenses by McDonald and Stibbe without the knowledge of appellant bars his claim.

Judgment of the circuit court is reversed, and the cause is remanded, with instructions to affirm the award of the Industrial Commission, with costs to be paid by respondent town.

Kerwin, J., took no part.

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LOWER VEIN COAL CO. v. INDUSTRIAL BOARD OF INDIANA ET AL. (No. 186.)

(United States Supreme Court. Argued Jan. 27, 1921. Decided Feb. 28, 1921.)

41 Supreme Court Reporter, 252.

2. CONSTITUTIONAL LAW—MASTER AND SERVANT—INDIANA WORKMEN'S COMPENSATION ACT, MANDATORY AS TO COAL MINING, IS NOT UNREASONABLE AND DOES NOT DENY DUE PROCESS OR EQUAL PROTECTION.

Workmen's Compensation Act Ind. § 18, as amended in 1919 (Laws 1919, c. 57), so as to make the act mandatory as to coal-mining companies, while permissive as to all other corporations, except municipal corporations, is not unreasonable or arbitrary, and does not deny due process of law, or the equal protection of the laws in violation of Const. U. S. Amend. 14, in view of the universally recognized fact that coal mining has peculiar conditions.

(For other cases, see Constitutional Law, Dec. Dig. §§ 245, 301; Master and Servant, Dec. Dig. § 347.)

Appeal from the District Court of the United States for the District of Indiana.

Suit for an injunction by the Lower Vein Coal Company against the Industrial Board of Indiana and others. From a decree dismissing the bill, complainant appeals. Affirmed.

Messrs. William H. Thompson, of Indianapolis, Ind., and Henry W. Moore, of Terre Haute, Ind., for appellant.

Messrs. E. M. White, of Indianapolis, Ind., and John A. Riddle, of Vincennes, Ind., for appellees.

McKENNA, J., delivered the opinion of the Court.

Appellant, the Lower Vein Coal Company, is a corporation of the state of Indiana. The Industrial Board of Indiana is a board created by an act of the General Assembly of Indiana, approved March 8, 1915, known as "the Indiana Workmen's Compensation Act." Laws 1915, c. 106. The personal appellees are members of the board.

This suit was brought by the Coal Company to enjoin the Industrial Board, the Governor and Attorney General of the state, from enforcing in any manner section 18 of the Workmen's Compensation Act of the state, as amended by the General Assembly in 1919 (Laws 1919, c. 57), from asserting that plaintiff is compelled to operate under the Compensation Act, from hearing any claim for compensation asserted by any employee of the plaintiff so long as plaintiff elects not to come within the provisions of the act from making any award to any injured employee, or his or her dependents, during such time, and from doing any other act or thing prejudicial to the rights of the plaintiff, so long as it elects not to be bound by the act.

The grounds for this relief were set forth in a complaint of considerable length to which the defendants separately and severally answered. After trial of the issues thus presented the District Court entered its decree dismissing the bill for want of equity. This appeal was then prosecuted.

The Compensation Act is very long and declares its purposes to be to promote the prevention of industrial accidents; to cause provision to be made for adequate medical and surgical care for injured employees in the course of their employment; to provide methods of insuring the pay-

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ment of such compensation; to create an Industrial Board for the administration of the act and to prescribe the powers and duties of such board; to abolish the state Bureau of Inspection, and provide for the transfer to the Industrial Board certain rights, powers and duties of the Bureau of Inspection.

The original act passed in 1915 was elective and left employer and employee the option of rejecting its terms with certain exceptions. It was amended in 1917 (Laws 1917, c. 165), and railroad employees engaged in train service were exempted from its provisions.

The amendment of 1919 made the act mandatory as to all coal-mining companies of the state and its political divisions and as to municipal corporations. To all other employers the act remains permissive. They may elect to operate under its provisions. Railroad employees engaged in train service are not within them.

The sole question presented is the validity of section 18 as amended; that is, the compulsion of coal companies to the operation of the act, while to other employers it is permissive, or does not apply at all. The grounds of attack upon it are that it violates the due process clause, and the equal protection of the laws clause of the Fourteenth Amendment of the Constitution of the United States and sections 21 and 23 of the Indiana Bill of Rights. Specifically, the question is, as the Coal Company expresses it:

"Whether the Indiana General Assembly may pass a general compensation law, applicable to all employers within the state, and make it compulsory as to one hazardous employment, and elective as to all others (many equally as hazardous) except railroad employees in train service to which it does not apply at all."

And the insistence is "that such a classification rests upon no sound or just basis," and hence is inimical to the Constitution of the United States and that of Indiana.

The principle of law involved and the power of a state to distinguish and classify objects in its legislation have been too often declared, too abundantly and variously illustrated, to need repetition and we pass immediately to the contention of counsel. It is that the act is addressed to hazardous employments and where in employments that character exists, sameness exists, and a law which ignores such sameness discriminates in its operation and offends the Constitution of the United States. It may be that the Coal Company does not contend for so broad a principle but may assert protection by a comparison of its business with other businesses equally hazardous, or even more hazardous than coal mining, and that necessarily the exemption of the businesses so compared from the law taints it with illegal discrimination. To support and justify the comparison, statistics of accidents are given in the complaint, and in the number of accidental injuries coal mines are made to run fifth. Notwithstanding those other companies may go in or out of the law—coal-mining companies must stay.

The answer replies with counter assertions and statistics and a detail of the methods of coal mining and what their methods cause of accidents to the miners, and to these are added it is said, the risks that come from the generation of noxious and explosive gases. And there is evidence in the case addressed to the conflicting statistics and the conclusions to be deduced from them which occupies about ninety-three pages of the record. In this evidence occupations and businesses are compared with estimates of accidents in each and their character, severity and consequences, fatal and otherwise. There is also testimony of the wages that mine workers get and of their prosperity, and that they have a legal department and paid attorneys. And there is averment and testimony of two organizations of mine owners who retain officers and attorneys to defend suits and secure releases from personal injury claims.

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[1] The length and character of the reports and tables of statistics preclude summary. It may be conceded that different deductions may be made from them, but they and the controversies over them and what they justified or demanded of remedy were matters for the legislative judgment and that judgment is not open to judicial review. Indeed, there may be a comprehension of effects and practical influences that cannot be presented to a court and measured by it, and which it may be the duty of government to promote or resist, or deemed advisable to do so. Degrees of policies if they have bases are not for our consideration and the bases cannot be judged of by abstract speculations or the controversies of opinion. Legislation is impelled and addressed to concrete conditions deemed or demonstrated to be obstacles to something better, and the better, it may be, having attainment or prospect in different occupations (we say occupations as this case is concerned with them) dependent in the legislative consideration upon their distinctions in some instances, upon their identities in others, and as the case may be, associated or separated in regulation. And this is the rationale of the principle of classification and of the cases which are at once the results and illustrations of it.

[2] There are facts of especial pertinence that make the principle apply in the present case and justify the legislation of the state. That coal mining has peculiar conditions has been quite universally recognized and declared. It has been recognized and declared by this court and is manifested in the laws of the states where coal mining obtains. There is something in this universal sense and its impulse to special legislation —enough certainly to remove such legislation from the charge of being an unreasonable or arbitrary exercise of power.

The action of the Coal Company indicates that it considered the coal business distinctive. Other businesses though according to the Coal Company's assertion as hazardous as coal mining, accepted the law, the Coal Company and other coal companies rejected it. To this, of course, the coal companies were induced by comparison of advantages but the inducements to reject the legislation might well have been the inducement to make it compulsory. At any rate, there is, taking that and all other matters into consideration, grounds for the legislative judgment expressed in the amendment of 1919 under consideration, that is, section 18 as amended. And the fact is to be borne in mind that there are 30,000 employees in the state engaged in coal mining.

[3] The Coal Company further contends that the law includes within its terms all the company's employees whether engaged in the hazardous part of its business or not so engaged. In other words, it asserts that the conditions of those who work underground may justify the law but do not justify its application to those who work above ground. The contention has a certain speciousness but cannot be entertained. It commits the law and its application to distinctions that might be very confusing in its administration and subjects it and the controversies that may arise under it to various tests of facts and this against the same company. The contention is answered in effect by Booth v. State of Indiana, 237 U. S. 391, 35 Sup. Ct. 617, 59 L. Ed. 1011.

Appellant invokes against the law sections 21 and 23 of the Indiana Bill of Rights which respectively provide that no man's property or particular services shall be taken without just compensation, nor except in the case of the state, without compensation being first assessed and tendered, nor shall there be a grant of privileges to any citizen or class of citizens that shall not belong to all citizens.

Appellant, however, while admitting, indeed, citing cases to show that the classification of objects of legislation under the Bill of Rights of the state has the same bases of power and purposes as the classification of objects under the Fourteenth Amendment of the Constitution of the United States, yet contends that the Supreme Court of the state has

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strictly construed the Bill of Rights of the state, and has observed a precision in classification not required or practised in the application of the Fourteenth Amendment—citing for this Indianapolis T. & T. Co. v. Kinney, 171 Ind. 612, 617, 85 N. E. 954, 23 L. R. A. (N. S.) 711; Cleveland, etc., R. R. Co. v. Foland, 174 Ind. 411, 91 N. E. 594, 92 N. E. 165; Richey v. Cleveland, etc., R. R. Co., 176 Ind. 542, at page 558, 96 N. E. 694, 47 L. R. A. (N. S.) 121.

These cases were constructions of the Employers' Liability Act of the state. It was held in Indianapolis T. & T. Co. v. Kinney, supra, that that act was constitutional as to railroads because it related "to the peculiar hazards inherent in the use and operation of" them, and only applied to employees operating trains. It is the contention of the Coal Company that it is a deduction from that decision and the others cited, which may be said to be of the same effect, that there must be a difference observed between employees of coal-mining companies as they are or are not engaged in the hazardous part of the business, and as that distinction is not observed in the Compensation Act it infringes the Bill of Rights of the state because it is made compulsory "upon coal-mining companies with respect to their employees not engaged in the hazardous part of the business, and as to all other private business enterprises within the state, except railroad employees in train service, which are excluded, it is purely optional."

The argument in support of the contention is that the act requires all employees in the coal-mining business to be paid compensation under the act whether employed above ground or under ground, that is, whether hazardously employed or otherwise, whereas in the cited cases, it is insisted, the court considered such employment as a material distinction and that legislation which disregarded it would have unconstitutional discrimination.

[4] The contention only has strength by regarding Employers' Liability Acts and Workmen's Compensation Acts as practically identical in the public policy respectively involved in them and in effect upon employer and employee. This we think is without foundation. They both provided for reparation of injuries to employees but differ in manner and effect, and there is something more in a compensation law than the element of hazard, something that gives room for the power of classification which a Legislature may exercise in its judgment of what is necessary for the public welfare, to which we have adverted, and which cannot be pronounced arbitrary because it may be disputed and "opposed by argument and opinion of serious strength." German Alliance Insurance Co. v. Kansas, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189. International Harvester Co. v. Missouri, 234 U. S. 199, 34 Sup. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525.

Decree affirmed.

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JACKSON v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL. (Civ. 3756.)

(District Court of Appeal, First District, Division 2, California. Dec. 27, 1920. Hearing Denied by Supreme Court Feb. 24, 1921.)

195 Pacific Reporter, 719.

1. MASTER AND SERVANT—FINDINGS AS TO DISABILITY OF AGED COMPENSATION CLAIMANT HELD NOT CONFLICTING.

In a proceeding under the Workmen's Compensation Act to obtain compensation for injury to and loss of a toe, a finding of the Industrial Accident Commission that the applicant was 66 years of age, and by reason of his advanced age and other systemic condition previous to the injury was afflicted with hardening of the arteries which materially interfered with a sufficient blood supply to the injured member and caused gangrene to set in and greatly retarded a normal recovery, but that the disability resulting, combined with the previous physical condition, was the legitimate and proximate result of the injury, and is compensable as such, was not in conflict with a finding that the injury had resulted in a permanent disability, and that the disability was 19¾ per cent. of the total disability.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

2. MASTER AND SERVANT—DISABILITIES, NOT TRACEABLE TO INJURY, NOT COMPENSABLE.

Disabilities of a servant due to his general physical condition, and not directly traceable to the injury, are not compensable under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 372.)

Proceeding by Charles Jackson under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the Maryland Casualty Company. There was an award of compensation and an order releasing insurance carrier from further payments, and applicant brings certiorari. Writ denied.

Geo. D. Collins, Jr., of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

LANGDON, P. J. The petition for a writ of certiorari is denied. It appears that the order releasing and discharging the insurance carrier from further payments to petitioner, which is sought to be reviewed here, was made upon a finding that the injury forming the basis of this proceeding had resulted in a permanent disability, consisting of the loss of the fourth toe of the right foot at the proximal joint, with a chronic discharging sinus that the disability, in view of the age and occupation of petitioner, is 19¾ per cent. of total disability, and that the insurance carrier has paid to applicant, as indemnity under a previous temporary disability order of the commission, a sum in excess of the total sum due as compensation for a permanent disability of 19¾ per cent. of total disability.

It also appears that the petitioner himself contends here, and also maintained before the commission, that his disability was permanent. The finding on this point is therefore in conformity with his contention.

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His position, however, is that he is unable to compete in the open labor market or to earn anything at all, and therefore his disability is total under the intendment of the Compensation Act (St. 1917, p. 831).

Respondents have stated the evidence to be that petitioner is 66 years of age and is suffering from syphilis, hardening of the arteries, and heart disease, all of which necessarily enter to some extent into his inability to compete in the open labor market.

[1] Further objection of petitioner to the order sought to be reviewed is based upon the fact that a prior order of the commission, made at the time temporary disability compensation was allowed, was based upon a finding:

"That the applicant is of the age of 66 years and upwards, and, by reason of his advanced age and other systemic condition previous to said injury was afflicted with hardening of the arteries, which materially interfered with a sufficient blood supply to the injured member, and caused gangrene to set in, and greatly retarded a normal recovery from said injury, but that the disability resulting, combined with the said previous physical condition, was the legitimate and proximate result of the injury, and is compensable as such."

[2] It is contended that this finding is contradictory of and opposed to the present position of the commission that the disability resulting from the loss of the toe is 19¾ per cent. of a total disability as defined by the act, and that any further disability suffered by petitioner is due to his age and systemic condition. We do not think there is any conflict in these findings. The commission found that the condition of the toe at the time of the first order, although it was contributed to by the systemic condition of the patient, was, nevertheless, proximately caused by the injury. This condition of the toe has become permanent, and full allowance is made for the loss of the toe, which has been amputated. The commission made no deduction for the result of the systemic disturbances upon the injured member. The original injury was slight, and it is conceded that in a younger and healthier subject it would have healed readily and completely. That the entire toe was lost was a result obviously contributed to by the systemic condition of the patient, and no deduction has been made on this account by the commission, but full compensation has been allowed for the total loss of a toe, although the condition making the amputation necessary was indisputably contributed to by pre-existing systemic ailments. However, any disabilities of petitioner, due to his general physical condition, and not directly traceable to the loss of this toe, are clearly not compensable under the Compensation Act.

It is stated in the answer of the respondent that the percentage of disability was arrived at by the commission by the use of a table adopted by respondent under the provisions of section 9, subdivision 11, of the "Workmen's Compensation, Insurance, and Safety Act of 1917." Under this method of computation, it appears that a much larger percentage of disability was allowed for the loss of the toe than would have been warranted had there been no other matters taken into consideration except the amputation of the toe. It is fair to assume, therefore, that the larger percentage allowed was due to the evidence relied upon by petitioner indicating that the surgical wound due to the operation has not entirely healed, and that the muscles of the foot have become stiffened as an indirect result of the injury and amputation.

Under the statement of the evidence contained in the petition and the answer of respondents, we are of the opinion that the Industrial Accident Commission has acted within the powers conferred upon it.

The petition for a writ of certiorari is denied.

We concur: Brittain, J.; Nourse, J.

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KENNEDY v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL. (Civ. 3364; L. A. 6794.)

(District Court of Appeal, Second District, Division 2, California. Nov. 26, 1920. Rehearing Denied Dec. 24, 1920; Hearing Denied by Supreme Court Jan. 25, 1921.)

195 Pacific Reporter, 267.

1. MASTER AND SERVANT—INDUSTRIAL COMMISSION HAS CONTINUING JURISDICTION OVER COMPENSATION AWARD.

The Industrial Accident Commission has continuing jurisdiction on a showing of good cause to rescind, alter, or amend any decision or award made by it until 245 weeks from the date of injury, under Workmen's Compensation Act, § 20, subd. "a," notwithstanding section 55, subd. "b," and sections 64, 65, and 67.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

3. MASTER AND SERVANT—CONTINUING JURISDICTION OF INDUSTRIAL COMMISSION NOT LIMITED BY STATUTE CONFERRING POWER, "INCLUDING" RIGHT TO INCREASE OR DIMINISH AWARD.

The broad grant of continuing jurisdiction in the Industrial Accident Commission to rescind, amend, or alter any decision for a period of 245 weeks after the injury as conferred by the general terms of Workmen's compensation Act, § 20, subd. "d," is not to be limited by the more particular reference in that section to the Commission's right "to review, grant, regrant, diminish, decrease, or terminate" any award upon the ground that the "disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated"; the word "including" in such section not being a word of limitation, but rather a word of enlargement, and in ordinary signification implying that something else has been given beyond the general language that precedes it.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

(For other definitions, see Words and Phrases, First and Second Series, Include.)

On Hearing in Supreme Court.

4. MASTER AND SERVANT—INDUSTRIAL COMMISSION HAS JURISDICTION TO AMEND AWARD AFTER EXPIRATION OF TIME FOR REHEARING.

In a proceeding under the Workmen's Compensation Act, where the Commission, on finding of injury in the course of and arising out of employment, made an award against the insurance carrier, which claimed that its policy did not cover the injury, but made no order relieving the employer and left the case undecided as to him, and the award against the insurance carrier was annulled by a court of competent jurisdiction, the Commission had jurisdiction to amend the award and insert the name of the employer in place of that of the insurance carrier, after the expiration of the time within which application could have been made for a rehearing under section 55, subd. "b," and sections 64, 65, and 67, and that without invoking the "continuing jurisdiction" expressly granted by section 20, subd. "d," since it had jurisdiction over the parties and subject-matter until final judgment was entered.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

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In Bank.

Proceeding by J. L. Millard and Mrs. Julia E. Millard under the Workmen's Compensation Act to obtain compensation for the death of a son, Byron J. Millard, opposed by P. R. Kennedy, the employer, and the Western Indemnity Company, insurance carrier. From an award of compensation against the employer, he brings certiorari. Award affirmed in the District Court of Appeal, and hearing deniel in Supreme Court.

Swanwick & Donnelly, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

FINLAYSON, P. J. This is a petition by P. R. Kennedy for the review of an amended award made against him by the Industrial Accident Commission. Petitioner was the employer of Byron J. Millard, deceased, who was killed on October 9, 1918, while in petitioner's employ. The Commission awarded a death benefit to the applicants therefor, the parents of young Millard. The sole question presented is this: The applicants for the death benefit having failed to apply to the Commission, within the time provided by the statute, for a rehearing, did the Commission, nevertheless, have the power to amend the award after the expiration of the time within which application could have been made to it for a rehearing?

The facts necessary to an understanding of the question are these: The Western Indemnity Company, an insurance carrier, agreed to respond to any damage that might occur on account of injuries or death suffered by any employee of Kennedy in and during the course of and arising out of the operation of the trade, business, or work described in its policy of indemnity insurance. The injury that caused the death of young Millard was sustained in the course of and arose out of his employment by Kennedy, but did not occur in the course of, nor did it arise out of, the operation of the particular trade, business, or work described in the insurance policy. See Western Indemnity Co. v. Industrial Accident Commission, 30 Cal. App. Dec. 191, for a more detailed statement of the terms of the policy and of the facts respecting the cause of the injury.

Both Kennedy and the insurance carrier were made parties to the proceeding before the Industrial Accident Commission. The principal controversy there was whether the indemnity policy covered this particular injury or not. The Commission, one commissioner dissenting, determined that the injury that caused young Millard's death was covered by the insurance policy, and accordingly, on May 14, 1919, made an award against the insurance carrier, the Western Indemnity Company, awarding to the parents of young Millard a death benefit recoverable from the carrier. The Commission did not make any order relieving Kennedy from liability on the ground that it appeared from the proof that the insurance carrier, joined as a party to the proceeding, was liable for all of the death benefit, as it was authorized to do by subdivision 2 of subdivision "e" of section 30 of the Workmen's Compensation Act. Stats. 1917, p. 860. Instead, the Commission, apparently out of an excess of caution, probably anticipating that the award against the carrier might be annulled on a review thereof on certiorari left the case undecided as to Kennedy, making no award against him and no final decision discharging him from liability. This course doubtless was adopted by the Commission to the end that, if the award against the insurance carrier should be annulled by a court of competent jurisdiction, it still would be possible to enter an award against Kennedy, as the employer.

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Thereafter the insurance carrier, having applied in vain for a rehearing by the Commission, applied to the District Court of Appeal for a writ of review. The writ was granted, and the court, by decision rendered October 8, 1919—Western Indemnity Co. v. Industrial Accident Commission, supra—annulled the award against the insurance carrier on the ground that the policy did not cover the injury that resulted in the death of young Millard.

In due time the court's remittitur was sent down to the Commission, and on March 11, 1920, the Commission caused to be served on Kennedy, the petitioner here, a notice of its intention to amend its award of May 14, 1919, by substituting Kennedy in the place and stead of the Western Indemnity Company as the party liable under the award. On April 7, 1920, the Commission, over Kennedy's objection, amended the original award—the award of May 14, 1919, against the Western Indemnity Company—by making an award against Kennedy for the amount of the death benefit that it previously had adjudged to be due to the applicants on account of their son's death. In due time petitioner applied to the Commission for a rehearing. A rehearing was denied. Kennedy thereupon petitioned this court for a writ of review to annul the amended award so made against him. He is seeking for an annulment of the award against him upon the ground that the Commission had not the power thus to amend its award after the expiration of the time provided by the statute within which the applicants for the death benefit could have petitioned the Commission for a rehearing on the original award of May 14, 1919.

Sections 64 and 65 of the Workmen's Compensation Act relate to the matter of rehearings before the Commission. Section 64 provides that persons aggrieved by any award of the Commission may apply to the Commission for a rehearing in respect to matters determined by it of which they complain. That section likewise prescribes the procedure for making and serving the application for rehearing and for the determination thereof by the Commission. Section 65 states the grounds upon which applications for rehearing may be made, and provides that application for such rehearing by the Commission must be made by the aggrieved party "at any time within twenty days after the service of any final order or decision of the commission awarding or denying compensation, or arising out of or incidental thereto."

By section 6 it is provided that "within thirty days after the application for a rehearing [by the Commission] is denied, or, if the application is granted, within thirty days after the rendition of the decision on the rehearing, any party affected thereby" may apply to the Supreme Court or to a district Court of Appeal for a writ of review to determine the lawfulness of the award or final decision of the Commission.

By subdivision "b" of section 55 it is provided that all findings, decisions, and awards of the Commission shall be conclusively presumed to be lawful until and unless they are modified or set aside by the Commission, or upon a review by the courts as in the act specified, "within the time and in the manner herein specified."

As applied to a rehearing by the Commission on the application of an aggrieved party, the foregoing provisions are susceptible of but one construction. From the language of section 65 and subdivision "b" of section 55 it clearly appears that a party aggrieved by the award or final decision of the Commission, notwithstanding he may have good cause for a rehearing by that body, cannot, as strict matter of right, demand such rehearing unless, within 20 days after service of the decision awarding or denying compensation, he file with the Commission his application for a rehearing. These provisions of the act apply to rehearings that are initiated by a party to the proceeding. Under these provisions the right

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of a party thus to initiate proceedings for a rehearing is conditioned by his obligation to do so within 20 days after service of the Commission's final decision or award.

[1] But there are other provisions of the act under which, good cause appearing therefor, the Commission itself, on its own initiative, or on its attention being called to facts showing good cause, and at any time within 245 weeks from the date of the injury, may rescind, alter, or amend any decision or award made by it. The Commission is expressly given "continuing jurisdiction," during that period of time, to rescind, alter, or amend any order, decision, or award that it may have made under sections 6 to 31, inclusive, if there be good cause shown for such rescission, alteration, or amendment.

Subdivision "d" of section 20 of the act in force at the time of the injury that caused young Millard's death—the present Workmen's Compensation Act (Stats. 1917, p. 850)—reads:

"The Commission shall have continuing jurisdiction over all its orders, decisions and awards made and entered under the provisions of sections six to thirty-one, inclusive, of this act and may at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision or award made by it upon good cause appearing therefor, such power *including* the right to review, grant or regrant, diminish, increase or terminate, within the limits prescribed by this act, any compensation awarded, upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated; provided, that no award of compensation shall be rescinded, altered or amended after two hundred forty-five weeks from the date of the injury."

(The word "including" has been italicized by us to call attention to the fact that the power conferred upon the Commission by the clause in which that word occurs is included within, and therefore is but a part of, the broader power conferred by the preceding words of the section as quoted by us.)

Under the above-quoted subdivision "d" of section 20 of the act of 1917, "continuing jurisdiction," for the full period of 245 weeks after the injury, is specifically conferred upon the Commission "over all its orders, decisions and awards." By virtue of such "continuing jurisdiction" the Commission, after notice to and an opportunity to be heard by the party in intrest, is specifically empowered to "rescind, alter or amend any such order, decision or award made by it, upon good cause appearing therefor." This is a broad and general grant of "continuing jurisdiction." The act does not profess to say what shall be deemed to constitute "good cause" for the rescission, alteration, or amendment of any order, decision, or award. It does, however, declare, by positive legislative fiat that the act "shall be liberally construed * * * with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment." Section 69.

[2] Without attempting to define the "good cause," the existence of which is a prerequisite to the exercise by the Commission of its continuing jurisdiction to rescind, alter, or amend its orders, decisions, or awards—that had best be left to the gradual process of exclusion and inclusion as cases arise that involve an exercise of the power—we have no doubt that the facts in the instant case constituted "good cause" within the meaning of the statute. The findings of the Commission show that the applicants, the parents of young Millard, were entitled to payment of a death benefit and in the amount fixed by the Commission's findings. The findings, as they existed prior to the decision of the District Court of Appeal in Western Indemnity Co. v. Industrial Acc. Comm., supra, 30 Cal. App. Dec. 191, further show that Kennedy, the employer, is liable for that death benefit save only as such liability may

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be affected by the further finding that the Western Indemnity Company was the insurance carrier at the time of the injury and as such liable for the full compensation. The District Court of Appeal specifically adjudged that "the findings and award" against the Western Indemnity Company be annulled. By the court's annulment of the finding that the Western Indemnity Company was the insurace carrier and as such liable for the death benefit, the remaining findings, left unaffected by the court's decision, show on their face that Kennedy, and Kennedy alone, is liable. In other words, since the time when the decision of the District Court of Appeal became final, Kennedy's liability for the death benefit follows as a legal conclusion from the findings made and filed by the Commission. And yet, notwithstanding this fact, no decision was ever made by the Commission awarding or denying payment of compensation by Kennedy prior to the time when it amended its award on April 7, 1920, by substituting Kennedy for the Western Indemnity Company. Until then the proceeding, as to Kennedy, was left open and udetermined. Under this condition of the record, we entertain no doubt that, in the exercise of its "continuing jurisdiction," expressly granted to it by subdivision "d" of section 20 of the act, to rescind, alter, or amend any order, decision, or award made by it under the provisions of sections 6 to 31, inclusive, the Commission had the power to amend its award by substituting Kennedy for the Western Indemnity Company as the person by whom the death benefit shall be paid and against whom the award should be made. Indeed, we doubt if, under these circumstances, it is necessary to invoke the "continuing jurisdiction" expressly granted to the Commission by the Workmen's Compensation Act. Never having entered judgment for or against Kennedy prior to the entry of the amended award of April 7, 1920, the Commission, aside from the "continuing jurisdiction" vested in it by subdivision "d" of section 20, always had jurisdiction to enter a judgment or decision for or against him, and therefore had jurisdiction to make its award of April 7, 1920, awarding young Millard's parents a death benefit payable by Kennedy. It is elementary that, where a tribunal has jurisdiction over parties and subject-matter, the jurisdiction cantinues until final judgment shall have been entered.

Counsel for petitioner place their main reliance upon the decision of our Supreme Court in Georgia Casualty Co. v. Industrial Acc. Com., 177 Cal. 289. There it was held that the "continuing jurisdiction" given to the Industrial Accident Commission by the Workmen's Compensation Act of 1913 (subdivision 4, § 25, and subdivision "b," § 82) is given for the sole purpose of making such rescissions, alterations, or amendments of the original decision or award as may be required by the occurrence of any new fact or facts whereby the disability of the person in whose favor the award originally was made has been increased, diminished, or terminated. Counsel for petitioner, gratuitously assuming that the act of 1917 is susceptible of the same construction that the court in the Georgia Casualty Company Case put upon the act of 1913, argue against the Commission's jurisdiction to enter the amended award of April 7, 1920, upon the ground that the decision of the District Court of Appeal, whereby the findings and award against the insurance carrier were annulled, was not a new fact, occuring after the original award, whereby disability was either increased, diminished, or terminated.

The vice of counsel's argument lies in the assumption that the "continuing jurisdiction" conferred upon the Commission by the act of 1917 is no greater or other than that which had been conferred upon it by the act of 1913. Under the act of 1913 "continuing jurisdiction" was given to the Commission in general terms by subdivision "d" of section 25 (Stats. 1913, p.293). That subdivision read:

"The Commission shall have continuing jurisdiction over all its orders, decisions and awards made and entered under the provisions of

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sections twelve to thirty-five, inclusive, * * * and may at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision or award made by it upon good cause appearing therefor; provided, that no award of compensation shall be rescinded, altered or amended after two hundred forty-five weeks from the date of the accident."

It was held in the Georgia Casualty Company Case that the broad grant of continuing jurisdiction thus conferred in general terms by subdivision "d" of section 25 of the act of 1913 was, in effect, limited by the language of subdivision "b" of section 82 (Stats. 1913, p. 317). That subdivision read:

"Nothing contained is this section shall, however, be construed to limit the right of the Commission, at any time within two hundred forty-five weeks from the date of its award, and from time to time, after due notice and upon the application of any party interested, to review, diminish or increase, within the limits provided by this act, any compensation awarded upon the grounds that the disability of the person in whose favor such award was made has either increased or diminished or terminated."

In construing the several provisions of the act of 1913, and endeavoring to harmonize them, the Supreme Court held that these two sections —sections 25 and 82, disconnected in their respective positions in the act, but connected in their mutual reference to the powers of the Commission over its orders, decisions, and awards—should be read together, and should be so construed as to present one harmonious system for the re-examination by the Commission of the matters decided by it. The court said:

"When these several sections are so read and construed together, it seems quite obvious that the provisions of subdivision 'b' of section 82, which permit the Commission within the period of 245 weeks after its award to rescind, diminish, or increase the same 'upon ground that the disability of the person in whose favor such award was made has either increased or diminished or terminated,' contemplate a change in conditions arising after the making of the original award, *and by which the disability of the person n whose fovor such award was made has been either increased, diminished or terminated,* and that under this subdivision of section 82 of the act the power of the Commission thus extended over the period of 245 weeks after the date of its original award is limited in its exercise to the consideration of such facts only as have arisen since the making of such award, and that it is only upon the proof of such facts that the Commission has jurisdiction to review, diminish or increase such award." (Italics ours.)

It is obvious that the court's reference to new facts that "have arisen since the making of such award" means such new facts as affect the disability of the person in whose favor the award was originally made, by increasing, diminishing, or terminating such disability.

[3] No such narrow construction can be put upon the language of subdivision "d" of section 20 of the present act, whereby "continuing jurisdiction" is conferred upon the Commission. The sections of the act of 1913 that related to the Commission's continuing jurisdiction—section 25, subd. "d," and section 82, subd. "b"—could be harmonized only by construing the general terms of section 25 as limited by the more restrictive language of section 82. But the broad grant of continuing jurisdiction as conferred by the general terms of subdivision "d" of section 20 of the present act is not to be thus limited by the more particular reference in that section to the Commission's right "to review, grant or regrant, diminish, increase or terminate" any award upon the ground "that the disability of the person in whose favor such award was made

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has either recurred, increased, diminished or terminated." True, subdivision "d" of section 20 of the present act is, to a large extent, a re-embodiment, mutatis mutandis, of subdivision "d" of section 25 and subdivision "b" of section 82 of the act of 1913; the provisions of these two sections of the act of 1913 being embodied, with few, but important, changes in subdivision "d" of section 20 of the act of 1917. But, though subdivision "d" of section 20 of the act of 1917 is largely a re-embodiment of subdivision "d" of section 25 and subdivision "b" of section 82 of the act of 1913, still subdivision "d" of section 20 of the present act is vastly different from a mere re-enactment of the corresponding provisions of the act of 1913. The present act, in subdivision "d" of section 20, declares, in general terms, that at any time within 245 weeks from the date of the injury the Commission "shall have continuing jurisdiction over its orders, decisions and awards * * * and may at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision, or award made by it upon good cause appearing therefor." This general grant, in itself unlimited save as to the time within which the power may be exercised, is followed by a more particular provision, namely, a particular reference to the power of the Commission to review, grant or regrant, diminish, increase, or terminate any award "upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished or terminated." But the language of this more specific or particular reference to the exercise of the Commission's "continuing jurisdiction," so far from limiting the preceding general grant of power, implies the very opposite. The use of the word "including" in the phrase "such power *including* the right to review," etc., indicates that the power that the Commission may exercise under its grant of continuing jurisdiction is more than the mere power to "review, grant or regrant, diminish, increase or terminate" an award on the ground that the disability has "recurred, increased, diminished or terminated." "Including" is not a word of limitation. Rather it is a word of enlargement, and in ordinary signification implies that something else has been given beyond the general language that precedes it. Fraser v. Bentel, 161 Cal. 394; In re Goetz, 75 N. Y. S. 750. As here employed, the word "including" is used to express the idea that the specific power to review, grant or regrant, diminish, increase, or terminate an award upon the ground that the disability has recurred, increased, diminished, or terminated—a particular power specifically referred to in the section of the present act—is but a part of the larger and more comprehensive power conferred by the more general language of the immediately preceding clause of the section. One of the definitions of "include," as given by Webster, is:

"To comprehend or comprise, as a genus, the species, the whole a part, an argument or reason the inference; to contain; to embrace."

For these reasons we conclude that the particular power conferred by that clause of subdivision "d" of section 20 which begins with the words "such power *including* the right to review" is but a part of, and not a limitation upon, the larger and more general power granted by the clause which confers upon the Commission "continuing jurisdiction" or power to rescind, alter or amend any * * * order, decision or award made by it upon good cause appearing therefor."

As we have seen, the general grant of power conferred upon the Commission by the more general language of subdivision "d" of section 20 of the present act is broad enough to include the amendment of the award that was made by the Industrial Accident Commission in the present instance. We conclude, therefore, that the award against petitioner should be, and it is, affirmed.

We concur: Thomas, J.; Weller, J.

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Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [4] The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 2, is denied.

In denying the application we desire to say that we are not to be understod as approving all that is said in the opinion as to the proper construction of H of subdivision "d" of section 20 of the Workmen's Compensation Act (Stats. 1917, p. 850) with relation to the powers of the Industrial Accident Commission in view of the "continuing jurisdiction over all its orders, decisions and awards" thereby given. Some of the language in the opinion with relation to the power of the Commission over its awards under this provision is rather broad, and we prefer to reserve any intimation of our opinion as to its correctness, deeming it in no way essential to the judgment of the District Court of Appeal. The conclusion of the District Court of Appeal finds full support in the facts of this case as stated in the opinion, without any necessity of invoking this "continuing jurisdiction" provision, as is fully shown and stated in the opinion.

All concur.

BILLICK v. INDUSTRIAL COMMISSION OF COLORADO ET AL. (No. 9727.)

(Supreme Court of Colorado. Jan. 10, 1921.)

195 Pacific Reporter, 114.

MASTER AND SERVANT—FINDINGS HELD TOO INDEFINITE TO SUSTAIN DENIAL OF COMPENSATION.

In a proceeding under the Workmen's Compensation Act in which the evidence is not wholly undisputed, a finding that the claimant has not established his claim by a preponderance of evidence and has not shown that he has sustained any accident arising out of and in the course of his employment, or that his condition is the result of any accident in the course of his employment, is insufficient to support the decision denying compensation, and the case must be remanded for more specific findings of fact.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Department 2.

Error to District Court, Pueblo County James A. Park, Judge.

Proceeding by John Billick under the Workmen's Compensation Act (Laws 1919, p. 700) to obtain compensation for personal injuries opposed by the Stearns-Roger Manufacturing Company, the employer, and the London Guarantee & Accident Company, Limited. There was a decision of the Industrial Commission denying compensation, which was sustained by the district court, and the claimant brings error. Remanded, with directions.

M. J. Galligan, of Pueblo, for plaintiff in error.

Victor E. Keyes, Atty. Gen., and John S. Fine, Asst. Atty. Gen., for the Industrial Commission.

William E. Hutton and Bruce McCay, both of Denver, and Charles M. Rose, of Pueblo, for defendants in error.

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DENISON, J. The finding of the commission is as follows:

"That the burden of proof is upon the claimant; that the claimant has not established his said claim by a preponderance of the evidence submitted herein, and that he has not shown that he sustained any accident arising out of and in the course of his employment while performing services for the above-named employer, or that the claimant's condition was or is the result of any accident sustained while in the course of his employment while working for the above-named employer; and that therefore the claim of the said John Billick should be denied."

This is substantially the same as the finding of the commission in the case of Prouse v. Industrial Commission, 194 Pac. 625, decided at the present term. In that case we said these findings were insufficient, but, because the material facts in that case were undisputed, we considered the evidence as if it were the findings of fact.

In the present case, although the evidence is greatly in favor of the finding of the commission, yet it is not wholly undisputed, and the law forbids us to consider it.

We therefore remand the matter to the district court with directions to require the commission to make more specific findings of fact; among other things, whether the claimant had any disease, and, if so, what it was; whether any unexpected occurrence of any kind took place, and, if so, whether it was the cause, or a contributing cause, of the paralysis which seized the claimant, and what was the cause thereof.

Scott and Burke, JJ., concur.

INDUSTRIAL COMMISSION OF COLORADO ET AL. v. COLORADO FUEL & IRON CO. (No. 9960.)

(Supreme Court of Colorado. Jan. 10, 1921.)

195 Pacific Reporter, 114.

MASTER AND SERVANT—LIMITATION OF COMPENSATION TO NONRESIDENT DEPENDENT SHARING IN LAPSED AWARDS DEFINED.

Under Laws 1917, pp. 556, 557, § 2, subsecs. 5, 7, distributing lapsed awards, and subsection 10, limiting awards to nonresidents to one-third of the amount allowed resident dependents, but not to exceed $1,000, where an award of $2,500 for an employee's death was apportioned so that a dependent son, a resident, was awarded one-third, and the widow and daughter, nonresident dependents, were awarded jointly one-third of the remainder, and the shares of the son and widow lapsed by his death and her remarriage, the daughter was entitled to an award of $1,000, less the sum awarded in the first instance, as provided in the statute, which applies to subsequent as well as original awards, and she was not limited to one-third of the unpaid sum.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Error to District Court City and County of Denver; C. C. Butler, Judge.

Proceeding by Maria Hernandez, now Maria Lopez, for herself and daughter, Josephino Hernandez, under the Workmen's Compensation Act for compensation for the death of her husband, Silvano Hernandez, opposed by the Colorado Fuel & Iron Company, employer. An award

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was made on the basis of $2,500, apportioned between a minor son and the widow and daughter, and the son subsequently died, the widow remarried, and on appeal to the district court the total amount of the award was reduced to $1,000, payable to the minor daughter, and the Commission and applicants bring error, and the employer brings cross-error. Judgment affirmed.

Victor E. Keyes, Atty. Gen., and John S Fine, Asst. Atty. Gen., for plaintiff in error.

Fred Farrar and Wendell Stephens, both of Denver, for defendant in error.

SCOTT, J. In this case the Industrial Commission found that Silvano Hernandez, an employee of the Colorado Fuel & Iron Company, was killed by an accident arising out of and in the course of his employment, on the 2d day of November, 1918; that at the time of his death he left his widow, Maria Hernandez, a daughter, Josephino Hernandez, and a son, Manuel Hernandez, both of which children were minors; that the widow and daughter, at the time of the death of the employee, resident in the republic of Mexico, and the son resided in the city of Pueblo, Colo. The commission further found that the said widow and minor children were wholly dependent upon the deceased for support.

An award was made upon the basis of $2,500. The minor son, who resided in Colorado, was awarded one-third of this sum, or $833.33. The widow and daughter were awarded jointly one-third of the remainder, or one-third of $1,666.67, to wit, $555.56, under the limitation of the statute in case of foreign dependents.

The minor son died on January 8, 1919, with the sum of $807.88 of the award to him remaining unpaid. The widow remarried on the 2d day of May, 1919, and the unpaid portion of the award to her lapsed under the statute.

The commission then awarded to Josephino, the infant daughter, residing in Mexico, the total of the lapsed and unpaid portions of the awards theretofore made to the widow and son, in the total sum of $1,363.44, less certain expenses provided by the statute.

Appeal was had from this award to the district court, where judgment was rendered reducing the total amount of this award to the dependent Josephino to the sum of $1,000, less the sum awarded in the first instance, as provided by the statute. Error and cross-error are assigned.

The subsections of the act of 1917 (Laws 1917, c. 155) applicable are as follows:

"V. In case of remarriage of a spouse without children, he or she shall receive a lump sum settlement equal to one-half of the amount of compensation remaining unpaid. This amount shall be paid to such spouse within sixty days after written notice to the Commission of such remarriage. In case of remarriage of a spouse who has dependent children, the unpaid balance of compensation, which would otherwise become due to such spouse, shall be paid to such children. * * *

"VII. (1) Questions as to who constitute dependents, and the extent of their dependency, shall be determined as of the day of the accident to the injured workman, and their right to death benefits shall become fixed as of said time irrespective of any subsequent change in conditions, and the death benefits shall be directly payable to the dependent or dependents entitled thereto, or to their legal representatives.

"(2) When a right to death benefits shall have become fixed, it shall cease upon the happening of any one of the following contingencies:

"(a) Upon the marriage of the spouse, with the exception as to lump sum settlement, as hereinbefore provided.

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"(b) When a child reaches the age of eighteen years, unless such child at such time is physically or mentally incapacitated from earning.

"(c) Upon the death of any dependent.

"Provided, however, that in any case where the share of any dependent shall lapse, it shall survive to the remaining dependents. * * *

"X. Death benefits under this act to dependents who are nonresidents of the United States shall be one-third of the amount which a dependent who is a resident of the United States might receive: Provided, that in no event shall death benefits to dependents who are nonresidents of the United States exceed the aggregate sum of one thousand dollars."

It is clear that under subsection 7 of the act, upon the death of the son, the unpaid amount of the award to him should be paid pro rata to the widow and daughter, subject to the limitation provided by section 10. And under subsection 5 upon the marriage of the widow, being at a later date, the unpaid portion of the award to her was required to be paid to the surviving daughter, subject to the same limitations.

Subsection 10 limits the sum to be paid to a nonresident of the United States to one-third of the amount to be paid to a resident dependent, and provides that "in no event shall death benefits to dependents who are nonresidents of the United States exceed the aggregate sum of one thousand dollars."

It is plain that by this language it was intended that not to exceed $1,000 was to be paid to nonresident dependents in any case, regardless as to the number of them or as to the times of payment, or whether under the original or subsequent awards.

It is contended by the commission that this limitation applies only to the original award. This construction cannot be sustained.

It is contended by the defendant company that the amount must be limited to one-third of the unpaid sum; that is to say, one-third of the sum of $807.89 still due under the award to the son, or $269.30. This is equally erroneous.

The district court held that in this case the $1,000 limitation only applied, and that the daughter, Josephino, residing in Mexico, was entitled to receive from the unpaid awards the sum of $1,000 less the sum of $555.55, being the amount theretofore awarded to the widow and daughter.

We think this is the only reasonable construction to be given to the statute considered in its entirety, and the judgment is accordingly affirmed.

Denison and Burke, JJ., concur.

KOKOTOVICH v. INDUSTRIAL COMMISSION OF COLORADO ET AL. (No. 9963.)

(Supreme Court of Colorado. Feb. 7, 1921.)

195 Pacific Reporter, 646.

1. MASTER AND SERVANT — COMMISSION'S ORDER CONFIRMED BY DISTRICT COURT NOT DISTURBED UNLESS WITHOUT JURISDICTION.

Where an order of the Industrial Commission has been confirmed by the district court, and there is no contention that it was procured by

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fraud, the commission's findings of facts supporting the order can only be disturbed, if at all, on the ground of gross abuse of discretion exceeding the commission's powers. Laws 1919, c. 210, § 103.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

2. MASTER AND SERVANT—REFUSAL OF LUMP SUM AWARD HELD NOT AN ABUSE OF COMMISSION'S DISCRETION.

Where an injured servant had a wife and eight minor children wholly dependent upon him, with no property or income, and was unable to perform manual labor, and desired a lump sum to purchase a farm, but had been earning more than $350 a month prior to injury, and since had drawn over $60 a month, and was, 15 months after the accident, penniless and in debt, *held* that the Industrial Commission's refusal to award a lump sum was not an abuse of discretion.

(For other cases, see Master and Servant, Dec. Dig. § 385[20].)

3. MASTER AND SERVANT—SUPREME COURT MAY CONSIDER ONLY WHETHER THERE IS EVIDENCE TO SUPPORT FINDINGS OF INDUSTRIAL COMMISSION.

In reviewing an award of the Industrial Commission, confirmed by the district court, this court may consider only the legal question whether there is evidence to support the findings.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

Department 3.

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Proceeding by Mike Kokotovich for compensation under the Workmen's Compensation Act, opposed by the Rocky Mountain Fuel Company, employer, and the Employers' Mutual Insurance Company, insurer. Award in payments was allowed and applicant's petition for lump sum settlement was denied. The district court affirmed the findings and order of the Commission, and the applicant brings error. Affirmed.

B. F. Reed and Robert W. Steele, Jr., both of Denver, for plaintiff in error.

Victor E. Keyes, Atty. Gen., and John S. Fine, Deputy Atty. Gen., for defendant in error Industrial Commission.

Frank C. West, of Denver, for defendants in error Rocky Mountain Fuel Co. and Employers' Mut. Ins. Co.

BURKE, J. The Industrial Commission of Colorado, under the provisions of the Workmen's Compensation Act, found plaintiff in error totally and permanently disabled and allowed him the maximum, $8 per week for life, therefor. He petitioned for a lump sum settlement in lieu of this allowance. A hearing was had on that petition, testimony taken, and the Commission found that it was not for his best interests that his petition be granted and ordered accordingly. Such further proceedings were had that the cause was regularly reviewed by the district court, which affirmed the findings and order of the Commission. To review that judgment the cause is now before us on error.

The act in question authorizes the Commission to order the payment of an award in installments or in a lump sum "as it may determine to be for the best interests of the parties concerned." The method of payment thus rests within the discretion of the Commission. The courts are authorized to set aside an order of the Commission only on the ground that it was procured by fraud, or is unsupported by the Commission's finding of fact, or beyond its power. Section 103, c. 210 Laws 1919.

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[1, 2] There is no contention that the order here complained of was procured by fraud, and it was the proper order to enter on the fact as found. It can only be disturbed, if at all, on the ground that it was a gross abuse of discretion; hence in excess of the power of the Commission. Plaintiff in error contends that the action of the Commission in denying his petition for a lump sum settlement was "arbitrary, unreasonable, unjust, and contrary to law and constitutes a gross abuse of discretion." To establish this contention he calls attention to the following facts disclosed by the record: That Kokotovich had a wife and eight minor children all living and wholly dependent upon him for support; that he had no property and no income; that he was unable to perform manual labor of any kind; that he had been reared on a farm and wished to purchase a small farm where he could maintain home for himself and family and support and educate his children; that he was 33 years old and his expectancy was 33.92 years.

Assuming, but not deciding that these things may be considered as tending to establish the alleged abuse of discretion on the part of the Commission, the record discloses the further facts that Kokotovich, having been earning from $350 to $450 per month, and having since his injury drawn $34.72 a month compensation, plus $30 a month from some fraternal society to which he belonged, was, within 15 months of the date of the accident, penniless and $1,200 in debt. Furthermore, that neither plaintiff nor his wife ever conducted a business of any kind of their own.

No fixed rule can be laid down for determining whether weekly compensation or a lump sum should be allowed a claimant under our Workmen's Compensation Act. In most cases the controlling factor must be the character, capacity, and business ability of the claimant.

[3] In view of the foregoing facts this court cannot say that the Commission abused its discretion.

"This court may consider only the legal question of whether there is evidence to support the findings." Passini v. Industrial Commission, 64 Colo. 349, 171 Pac. 369.

Finding no error in the record, the judgment is affirmed.

Scott, C. J., and Bailey, J., concur.

WEAVER v. INDUSTRIAL COMMISSION OF COLORADO ET AL. (No. 9926.)

(Supreme Court of Colorado. Jan. 10, 1921.)

194 Pacific Reporter, 941.

MASTER AND SERVANT—INDUSTRIAL COMMISSION'S FINDINGS IN COMPENSATION CASE HELD MERE CONCLUSIONS OF LAW AFFORDING NO BASIS FOR JUDGMENT.

Findings by the Industrial Commission reciting that deceased employee was burned in an explosion while in the course of his employment, that the proximate cause of his death, about one year and four months after the accident, was appendicitis due to abscesses, that death was not caused by the accident, and that therefore the claim should be denied, state mere conclusions of law affording no basis for a judgment or review, and necessitate a reversal and remand of the case to the commis-

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sion to perform its statutory duty to make specific findings of fact as to the cause of death, as well as specific findings of fact bearing on the contentions of the parties.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Error to District Court, City and County of Denver; Chas. C. Butler, Judge.

Proceedings by Louise M. Weaver, on behalf of herself and minor children, for an award for the death of applicant's husband, A. C. Weaver, opposed by the Mountain Motor Fuel Company, employer, and the London Guarantee & Accident Company, Limited, insurer. Award denied by the Industrial Commission, whose decision was affirmed by the district court on appeal, and applicant brings error. Reversed, with directions to remand to the Industrial Commission with instruction for further investigation.

Quaintance, King & Quaintance, of Denver, for plaintiff in error.

Victor E. Keyes, Atty. Gen., and John S. Fine, of Denver, for Industrial Commission.

William E. Hutton and Bruce B. McCay, both of Denver, for Mountain Motor Fuel Co. and London Guarantee & Accident Co.

SCOTT, J. This case, like a great majority of those having their origin with the State Industrial Commission, contains no intelligent or sufficient statement or finding of fact by that body as is required by law.

The purported findings are confined entirely to the following:

"The Industrial Commission, on the 12th day of October, A. D. 1917, after having read and considered all of the evidence finds:

"That the said A. C. Weaver on or about the 24th day of November, A. D. 1915, while performing duties arising out of and in the course of his employment as an employee of the said Mountain Motor Fuel Company by being burned on different parts of the body through an explosion.

"The commission further finds from the evidence that the said A. C. Weaver died on March 23, 1917, and that the proximate cause of the death of the said A. C. Weaver was due to abscesses or ruptured appendix and the ensuing appendicitis which was caused thereby, and that the death of the said A. C. Weaver was not caused by or due to the accident which the said A. C. Weaver suffered on the 24th day of November, A. D. 1915, and that therefore the claim of said claimants, Louise Weaver, widow of the decedent, and Lena Louise Weaver, minor child of decedent, should be denied."

In this statement there does not appear to be the finding of a single fact which in any sense justifies the conclusion of the commission, or which affords a basis for review by this court.

Just how the trial court could intelligently render a judgment for or against the contentions of either party from a consideration of this purported finding is not clear.

The court sustained the judgment of the commission, but certainly not from any statement of the facts detailed in the findings of the commission, for this contains nothing but bare conclusions of law, certainly not justified by any fact stated therein.

The statute in this particular is not to be treated as without a purpose, and inasmuch as it prohibits the court from disturbing the findings of fact by the commission upon which it bases its judgment and award, it is imperative that the court have before it a sufficiently complete statement of the facts by the commission as will enable it to render an independent conclusion as to the law to be applied.

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It was not the purpose of the statute to compel the court to dig through the record to ascertain all of the facts appearing, else it would not have provided that the findings of fact by the commission must be controlling on review.

A statement of the facts and circumstances of the entire case as found by the commission is imperative, or an intelligent, efficient, or just review by the court is impossible.

From the record alone, but not from any findings of fact by the commission, we gather that A. C. Weaver, while in the employ of the Mountain Motor Fuel Company, was injured in an accident growing out of an explosion and fire on the 24th day of November, 1915; that his injuries were extremely serious; his hair was burned from his head; his clothing burned from his body; his face permanently disfigured and his body permanently impaired. While it appears that at a later time he performed some sort of service for his company, it is quite clear that he was a sufferer by reason of his injuries in the accident until the time of his death.

The record indicates that Weaver had been awarded compensation, which he received for the period from the time of his injury until the time of his death, but this is not clear from the record and is not referred to in the findings of the commission.

It appears from the record alone that he was operated upon for what was diagnosed as appendicitis and ulcers formed in the stomach and intestines and that he died a few days after such operation, on the 23d day of March, 1917, or about one year and four months after the accident. He appears to have suffered greatly after the accident from nausea and from pains in the region of his stomach and bowels. This seems to have continued generally from the time of the accident until the time of the operation.

The surgeons suggested a deplorable internal condition appearing at the time of the operation. The testimony of the physicians indicates that the burns suffered were not the probable cause of appendicitis, yet it is not at all clear from the testimony that appendictis was the direct cause of death or that this may not have been more directly attributable to other infections indicated by the ulcers and decaying condition found in the stomach and bowels.

The claim of the dependents is that there was such causal connection between the accident and the condition resulting directly in death as to justify recovery under the statute. The testimony of the physicians was not directed to this vital question sufficiently for the court upon its own initiative to determine the question, and the commission made no finding upon this point.

It is the plain duty of the commission to make specific findings, reciting all facts important in the history of the case, as well as specific findings of fact bearing upon the contentions of the parties from the testimony adduced. Mere conclusions of law will not suffice.

The judgment of the district court is reversed, with directions to remand the case to the Industrial Commission with instruction to investigate further as to the direct cause of the death of Weaver, and as to whether or not there was a reasonable causal connection between the accident and such cause of death, or whether or not such accident hastened death from any cause then existing. Further, that the commission be required to specifically find its conclusion as to all the facts appearing, and its conclusions of law drawn from such facts.

Judgment reversed.

Denison and Burke, JJ., concur.

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ATWOOD v. CONNECTICUT LIGHT & POWER CO.

(Supreme Court of Errors of Connecticut. Jan. 26, 1921.)

112 Atlantic Reporter, 269.

1. MASTER AND SERVANT—MOTIONS TO CORRECT RECORD SHOULD BE PRESENTED TO COMPENSATION COMMISSIONER.

Motions to correct finding of compensation commissioner, and to have evidence taken before him certified by him and made a part of the record, should be presented to him, and not to the superior court, to which appeal is taken from the award, and in the event of the denial of such motions, error based thereon should be incorporated in the reasons of appeal filed in the superior court.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

2. MASTER AND SERVANT—MOTION TO CORRECT RECORD IN COMPENSATION CASE SHOULD BE MADE WITHIN REASONABLE TIME.

On appeal from the award of the Compensation Commissioner, the appellant should make his application to correct the finding of the commissioner within a reasonable time after the filing of his appeal, and, unless the time is otherwise fixed by rule or statute or extended for cause by the commissioner, such reasonable time will be within two weeks after the filing of the appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[4¼].)

3. MASTER AND SERVANT—EVIDENCE MATERIAL TO CORRECTIONS OF RECORD ON APPEAL SHOULD BE FILED WITH COMPENSATION COMMISSIONER.

On appeal from award of Compensation Commissioner, the appellant, on application to commissioner for correction of finding must file with the motion or at the earliest time he can procure the transcript such portions of the evidence as are relevant and material to the several corrections asked for.

(For other cases, see Master and Servant, Dec. Dig. § 417[4¼].)

4. MASTER AND SERVANT—ADDITIONAL EVIDENCE RELEVANT TO CORRECTIONS TO COMPENSATION COMMISSIONER'S RECORD SHOULD BE FILED IN TIME.

On motion to correct finding of Compensation Commissioner, the appellee should within one week after appellant has filed his transcript, or at the earliest time he can procure the transcript, file with the commissioner such additional evidence as he claims to be relevant and material to the corrections asked for.

(For other cases, see Master and Servant, Dec. Dig. § 417[4¼].)

5. MASTER AND SERVANT—COMPENSATION COMMISSIONER SHOULD FILE MOTION TO CORRECT RECORD WITH DECISION AND CERTIFY EVIDENCE.

On appeal from finding and award of Compensation Commissioner, the commissioner should file with the superior court, within a reasonable time, appellant's motions to correct the finding and to have evidence certified, together with his decision thereon, and if such motions be denied in whole or part, and such denial be made a ground of appeal, he should within a reasonable time thereafter file with the superior court the transcript of evidence filed with him by appellant and appellee together with such additional evidence deemed by him relevant and material.

(For other cases, see Master and Servant, Dec. Dig. § 417[4¼].)

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6. MASTER AND SERVANT — REVIEWING COURT CANNOT EXAMINE EVIDENCE IN COMPENSATION CASE EXCEPT TO REVIEW REFUSAL TO CORRECT RECORD.

On appeal from award of Compensation Commissioner, the superior court cannot examine the evidence except for the limited purpose of determining whether commissioner erred in refusing to correct his finding, and for such limited purpose it can examine only such evidence as was certified to it by the commissioner.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

7. MASTER AND SERVANT—COMPENSATION COMMISSION'S FINDING OF DEPENDENCY NOT REVIEWABLE.

On appeal from award of Compensation Commissioner, the court cannot review commissioner's finding of fact as to dependency unless the commissioner applied an illegal standard or found a fact without evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

8. MASTER AND SERVANT—"DEPENDENT" WITHIN WORKMEN'S COMPENSATION ACT DEFINED.

The test as to dependence within Workmen's Compensation Act is whether the employee's contributions were relied upon by the dependent for his or her means of living, the class and position in life of the dependent being considered; and the fact that earnings were turned into a family fund and used as one of the sources of support of the family of the employee does not prove that they were relied upon for living expenses.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent.)

9. MASTER AND SERVANT — FATHER APPLYING SON'S EARNINGS FOR PAYMENT OF HOUSE HELD NOT A "DEPENDENT" WITHIN WORKMEN'S COMPENSATION ACT.

One steadily employed earning $2,000 a year, who did not require his son's earnings for his own or his family's living expenses, but who applied such earnings toward the payment of the purchase price of a house, *held* not a dependent of the son within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Appeal from Superior Court, New Haven County; James H. Webb, Judge.

Proceedings under Workmen's Compensation Act by John Nathan Atwood for compensation for death of J. Vincent Atwood, opposed by the Connecticut Light & Power Company, employer. Award for claimant by the Compensation Commissioner, and from judgment confirming the award and dismissing the appeal therefrom, the employer appeals. Judgment set aside, and cause remanded, with directions.

Appeal by defendant from a finding and award of the Compensation Commissioner for the third district in favor of plaintiff claimant, taken to and tried by the superior court in New Haven county. The court confirmed the award and dismissed the appeal. and from this judgment the defendant appealed. Error; judgment to be entered overruling the award of the commissioner.

On November 19, 1919, J. Vincent Atwood was, and for 26 full calendar weeks prior thereto had been, in the employ of the defendant, and on said day received an injury arising out of and in the course of the employment from which he died.

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The decedent was the son of the plaintiff claimant, 18 years of age, and unmarried, and left surviving him his father and 17 years old sister, his mother having long since deceased. He had been working for about 3 years and had always turned his wages over to his father. For some months he had turned over his pay envelope to his father who took therefrom $20 and handed him the balance for spending money and the purchase of clothing. In case the pay envelope did not contain $20 the father gave his son a few dollars for his own uses. The average amount of the decedent's earnings used by the plaintiff was $20 per week.

The plaintiff at the time of the injury to decedent was 42 years of age, and a railroad engineer earning about $2,000 a year. His family consisted of his wife (a second wife), the decedent, a daughter, the sister of said decedent, and five children by the second wife between the ages of 4 and 12, all living at home and nonwage-earning. The plaintiff had no property, with the exception of a house, in a portion of which he lived with his family and upon which he had paid $900. Neither his wife nor any other member of his family had property.

From July 14, 1919, the plaintiff used practically all of the decedent's $20 a week for the purpose of providing funds with which to make a payment upon a part of the purchase price of said house, which was purchased on July 14, 1919. The maintenance received by the decedent from his father in providing for him a home was worth $10 per week.

The court found that the amounts so paid to the plaintiff by decedent were relied upon by the claimant for his support, and were used by him for support proper to his condition in life, and that the claimant was a partial dependent upon said decedent. The defendant claimed that these amounts were used for investment, and not for living expenses, and that the earnings of claimant were sufficient to maintain life in a manner suited to his condition in life, with the result that the amounts so contributed by the decedent did not create a condition of partial dependency. The commissioner overruled these claims and awarded to the claimant on account of the death of his son $12.03 per week for the period of 312 weeks.

William E. Thoms. of Waterbury, for appellant.
Clayton L. Klein, of Waterbury, for appellee.

WHEELER, C. J. (after stating the facts as above). Six of the nine assignments of error are the court's denial of the several paragraphs of the defendant's motion to correct the finding and of its motion that the evidence taken before the commissioner be certified by him and made a part of the record.

[1] These motions should have been presented to the commissioner for his action, and in the event of their denial error based thereon incorporated in the reasons of appeal filed in the superior court.

The practice in compensation cases is comparatively new, and for this reason, if the corrections asked for would have affected the decision upon the appeal to this court, we should have been disposed to have, in this instance, considered them on their merits. In order to have uniformity in our practice as to this class of motions, we purpose stating with some fullness the proper practice upon a motion to correct before the commissioner and upon appeal from his decision in the superior court, and thence on appeal to this court.

In Swanson v. Latham, 92 Conn. 87, 90, 101 Atl. 492, 494, we said:

"The right of the trial court to correct the finding of the commissioner is similar to that exercised by us upon a proper appeal over the finding of a trial court."

We foreshadowed our purpose to make the practice conform in substance to that established on appeals from the superior court to this court.

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[2] An appellant from a finding and award of a Compensation Commissioner should make his application to correct the finding to the commissioner within a reasonable time after the filing of his appeal, and unless this time be otherwise fixed by rule or statute, or extended for cause by the commissioner, such reasonable time will be within two weeks after the filing of the appeal.

[3] The appellant must file with the commissioner with his motion, or at the earliest time he can procure the transcript, such portions of the evidence as are relevant and material to the several corrections asked for.

[4] If the appellee claims that additional evidence is relevant and material to the corrections asked for, he should within one week after appellant has filed his transcript, or at the earliest time he can procure the transcript, file with the commissioner such additional evidence.

[5] The commissioner should file with the superior court within a reasonable time such motions together with his decision thereon; if said motions be denied in whole or part, and such denial be made ground of appeal, he should within a reasonable time thereafter file with the superior court the transcript of evidence filed with him by appellant and appellee, together with such additional evidence as may have been taken before him in the form of testimony, or taken by him in other ways and deemed by him relevant and material to these corrections.

[6] The appeal should assign as error the finding of or refusal to find facts as contained in the motion to correct by the commissioner. The superior court determines the errors so assigned upon the evidence certified to it by the commissioner. It cannot consider other evidence in passing upon such errors. It cannot try ultimate issues of fact by independent examination of the evidence. Except for the limited purpose of correcting a finding, it cannot examine the evidence, and for this limited purpose it examines such evidence as the commissioner has certified to it. But, when it appears necessary to protect substantial rights of a party, not represented by counsel, the superior court may order a transcript of the evidence. Rainey v. Tunnel Coal Co., 93 Conn. 92, 105 Atl. 333, 5, A. L. R. 1081.

Upon refusal of the court to correct the finding as asked for, the appellant may incorporate in his assignment of errors to this court such refusal, specifying in separate assignments the several refusals to correct. We determine these assignments upon the evidence certified to the superior court and made a part of the record on appeal to this court. In case appellee desires the finding of the commissioner or of the superior court corrected, he shall proceed under a like practice.

The additional questions involved in the remaining assignments of error are whether the claimant was a dependent of the decedent, and, if so, whether the amount of the weekly award made and the duration fixed for it were justified by the Compensation Act. Since we must answer the first question in the negative, there is no occasion to determine the validity and duration of the award.

[7] "The question of dependency is by the act made one of fact. And unless the commissioner has applied an illegal standard or found a fact without evidence we cannot review his finding." McDonald v. Great Atlantic & Pacific Tea Co., 95 Conn. 160, 165, 111 Atl. 68.

[8] "The test is whether the contributions were relied upon by the dependent for his or her means of living, judging this by the class and position in life of the dependent." Powers v. Hotel Bond Co., 89 Conn. 143, 152, 93 Atl. 245, 249.

The contributions relied upon must necessarily be, as we pointed out in Blanton v. Wheeler & Howes Co., 91 Conn. 226, 230, 99 Atl. 494, Ann.

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Cas. 1918B, 747, such as were relied upon for the living expenses. And these living expenses were to be measured by those which were necessary and proper for the class and station in life of the claimant .

We further pointed out that proof that contributions were used for the living expenses would not create a condition of dependency unless the fact further appeared that these contributions were required for the living expenses and had been relied upon by the dependent for his living expenses, reckoning these by those which were reasonably necessary and proper for one in his class and station in life.

"The Compensation Act," we said, on page 231 (99 Atl. 496), "does not contemplate support for any save the dependent, and one cannot be said to be a dependent who has sufficient means at hand for supplying present necessities, judging these according to the class and position in life of the alleged dependent."

The fact that the earnings were turned into a family fund and used as one of the sources of support of the family of the deceased does not prove that they were relied upon by the claimant for his living expenses. McDonald v. Great Atlantic & Pacific Tea Co., 95 Conn. 160, 111 Atl. 65, 68.

Again, in treating of this subject, we said:

"That no one, not belonging to the enumerated classes of persons conclusively presumed to be dependent, is entitled to be regarded as a dependent or partial dependent, whose financial resources at his command or within his power to command by the exercise of such efforts on his part as he reasonably ought to exert in view of the existing conditions, are sufficient to sustain himself and family in a manner befitting his class and position in life without being supplemented by the outside assistance which has been received for some measure of it." Gherardi v. Connecticut Co., 92 Conn. 454, 458, 103 Atl. 668.

[9] The facts of record show that the plaintiff claimant received of the earnings of the decedent in the period from July 14, 1919, to November 19, 1919, upward of $350, and had applied none of it to the living expenses of himself or family. All of this sum had been used for the purpose of making a payment on account of the purchase price of the house which he had purchased on July 14, 1919, and toward this purchase price the plaintiff claimant had paid $900 up to the time of the injury to decedent. The claimant had not in fact relied on these earnings for the living expenses of himself and family. And the reason is apparent. The claimant was in good health, with steady employment, and earning upward of $2,000 a year as a locomotive engineer. He did not require these earnings of his son for his own or his family living expenses, and had applied these entire earnings toward this purchase price.

The finding is not susceptible of other interpretation than that the claimant did have sufficient means at hand for supplying the present necessities of himself and family, judging these according to his class and position in life. Blanton v. Wheeler & Howes Co., 91 Conn. 226, 230, 99 Atl. 494, Ann. Cas. 1918B, 747.

The commisioner holds that upon the facts found these earnings were used for the support of the plaintiff and his family and relied upon for their support, measuring that according to his station in life.

The subordinate facts combat both propositions. The commissioner argued "that reasonable and modest savings constitute an item of living expenses," and that the earnings of the decedent applied to the purchase price of this house were no more than a reasonable and modest saving for this family."

The case is not that to which the commisisoner likens it. If the earnings had, in fact, been used in the family support, and at the same time

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the plaintiff father had made a weekly or monthly saving of an amount relatively small compared to his income. or carried a life insurance for a moderate amount, or made payments of a moderate amount toward the purchase of a home, we should not be disposed to hold that the money saved, or that paid for life insurance, or toward the purchase price for a home, necessarily came in fact from the earnings of the decedent, and hence the claimant could not be a partial dependent of decedent.

The family protection involved in such saving or such expenditure, if reasonable, according to the station in life of the claimant, will be held to be legitimate family expenditures. They are not the savings for investment, but rather the provision of thrift for the family protection against the contingencies of death, ill health, lessening earning power, or lessening work to be had. But when the savings go beyond these reasonable bounds, and, as in this case, are at the rate of about one-half the total earnings of the claimant, they must be held to be payments made toward an investment, and not to the payment of living expenses.

Our Compensation Act (Pub. Acts 1913C, 138) was never intended to make one a dependent of a decedent whose earnings had in the lifetime of the decedent been handed to the claimant and used by him, not for living expenses but to make a substantial investment. Between the modest savings of thrift. or family self-sacrifice, for family protection and a savings for investment, the line, although incapable of definition, ought not to be difficult in a given case to find. Mulraney v. Brooklyn R. T. Co., 190 App. Div. 774, 180 N. Y. Supp. 654.

The subordinate facts of the finding are inconsistent with its conclusion that these earnings were relied upon by the claimant for the support of himself and family and were proper expenditures for such purpose, and do not support the finding of dependency. McDonald v. Great Atlantic & Pacific Tea Co., 95 Conn. 160, 111 Atl. 68.

There is error, the judgment is set aside, and the cause remanded, with direction to the superior court to render judgment sustaining the appeal from the commissioner and vacating his award and directing him to deny the claim.

The other Judges concurred.

WRENN v. CONNECTICUT BRASS CO. ET AL.

(Supreme Court of Errors of Connecticut. Feb. 21, 1921.)

112 Atlantic Reporter, 638.

MASTER AND SERVANT — COMPENSATION ACT PROVIDES COMPENSATION FOR PERIOD BETWEEN INJURY TO LIMB AND COMPLETE LOSS OF USE.

The Workmen's Compensation Act (Gen. St. 1918, § 5352) provides compensation for the period of incapacity between the date of injury and the date of determination of complete loss of use of the injured arm or limb, as well as for the complete and permanent loss of the use of the arm or limb, loss of the arm or limb through amputation, occurring when the amputation takes place, and the complete and permanent loss occurring when no reasonable prognosis for complete or partial cure can reasonably be made, and until such time the specific compensation for the loss or for the complete and permanent loss of use cannot be made.

(For other cases, see Master and Servant, Dec. Dig. § 387.)

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Appeal from Superior Court, New Haven County; James H. Webb, Judge.

Proceedings for compensation under the Workmen's Compensation Act by Maurice Wrenn, the employee, opposed by the Connecticut Brass Company, the employer, and others. From an award of the Compensation Commissioner in favor of the employee, defendants appealed to the superior court, which dismissed appeal and affirmed award, and defendants appeal. No error.

De Lancey S. Pelgrift, of Hartford, for appellants.

Francis P. Guilfoile and William K. Lawlor, both of Waterbury, for appellee.

WHEELER, C. J. The plaintiff on March 6, 1915, sustained a severe fracture of his left forearm which left his arm in a "twisted and unnatural position." We ascertain from the finding that a competent surgeon was of the opinion that the operation of effecting a bone graft would make a useful arm of the injured member. Operations of this character are often successful. The operation was made, and by the latter part of April, 1916, the forearm had become straight, and the surgeons believed that good functional results would follow, and a useful arm follow the operation. Instead, a suppurative process persisted, and on June 26, 1916, it was necessary to further operate in order to prevent a more serious condition, and this wound finally healed August 21, 1916.

The arm has never been a useful arm since the original injury, and at no time has it been useful for industrial purposes.

The finding of the Commissioner is not as definite as it should have been, but, reading the finding as a whole and in the light the parties construe it, we think it must be understood as finding that the expectation of effecting a cure and making the arm useful was definitely abandoned on June 26, 1916. We also think the finding must be read as stating that the arm was not a complete and permanent loss until on and after June 26, 1916. Until that time high professional opinion expected that the arm would as a result of the operation be rendered useful, but, due to the development of untoward conditions, the operation proved unsuccessful in its results.

All reasonable efforts should be used to save an injured arm or limb, and thus prevent the necessity for its amputation, or its complete loss of usefulness. Until the time for such effort has passed professional skill should be directed to the attempt to effect a cure. When competent professional opinion upon fair examination reaches the conclusion, or should reach the conclusion, that it is not reasonable to expect to cure or improve the injured arm, it can then be said for the first time that the loss of this member has occurred. Then, unless something further must be done to improve or heal the member, there exists the condition described in the statute (Gen. St. 1918, § 5352), "the complete and permanent loss of the use of one arm," and the specific compensation provided by statute is then due. But this does not compensate the injured employee for the period between the date of injury and the date of determination of the complete loss of use. The incapacity during this period may have been total or partial, and our act provides compensation for this period of incapacity as well as for the complete and permanent loss of the use of the arm.

We reached the conclusion in Franko v. Schollhorn Co., 93 Conn. 13, 104 Atl. 485, that an employee suffering an injury to a finger which prevented him from working at all for a time was entitled to receive compensation for the period of total incapacity, and, when the finger was subsequently amputated as a result of the accident, he was also entitled to the specific compensation provided for the loss of that member.

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This case compels a reconsideration of that case, and its restudy has satisfied us with the justness of its result and the soundness of its logic and its reasoning. On page 19 of 93 Conn., on page 487 of 104 Atl., we said:

"The handicap determines the loss. But when the loss of the member is preceded by a long incapacity while efforts are made to heal and cure the injury, the injured employee has suffered far more than from the mere loss of the member. Compensation for the loss of the member will not compensate him for the period of incapacity preceding the loss of the member. The just rule of compensation will give compensation for the period of total incapacity as well as for the loss of the member."

We fully agree with the application of the principle as decided in that case as made by the Commissioner and the trial court to this case. "There is no difference in principle between the Franko Case and this case."

The loss of the arm through amputation occurs when the amputation takes place. The complete and permanent loss of the use of the arm occurs when no reasonable prognosis for complete or partial cure and no improvement in the physical condition or appearance of the arm can be reasonably made. Until such time the specific compensation for the loss or for the complete and permanent loss of the use of the arm cannot be made.

In this case the treatment of the arm was continued up to August 1, 1916, and, as we understand the finding, ceased and the wound in the arm finally healed at this time. Not until then did the period of incapacity for which the injured employee was entitled to compensation cease and the condition of a complete and permanent loss of the arm exist.

We are not impressed with the argument of the defendants that this interpretation of the act will lead employers and the insurers of employers to cause the amputation of the injured member instead of seeking to effect in all cases a cure before resorting to amputation. Our faith in the humanity and integrity of employers and insurers and in the good faith and professional honor of surgeons forbids our adoption of so repulsive a conclusion.

There is no error.

The other Judges concurred.

BALLOU v. INDUSTRIAL COMMISSION ET AL. (No. 13693.)

(Supreme Court of Illinois. Feb. 15, 1921.)

129 Northeastern Reporter, 755.

1. MASTER AND SERVANT—"LOSS OF USE OF HANDS" NOT NECESSARILY "LOSS OF HANDS" WITHIN COMPENSATION ACT.

The expression "loss" and "loss of use" should be given their ordinary meaning in construing the Workmen's Compensation Act, and the loss of the use of both hands is not necessarily the loss of both hands within section 8, par. (e).

(For other cases, see Master and Servant, Dec. Dig. § 385[12].)

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2. MASTER AND SERVANT—"USE OF HANDS LOST" WITHIN COMPENSATION ACT WHEN NORMAL USE ENTIRELY TAKEN AWAY.

When the normal use of the hands is entirely taken away, there is a "loss of their use within the Workmen's Compensation Act without actual severance of the hands.

(For other cases, see Master and Servant, Dec. Dig. § 385[12].)

3. MASTER AND SERVANT—INJURIES TO HANDS HELD NOT 'LOSS OF BOTH HANDS" WITHIN COMPENSATION ACT.

Injuries to an employee's hands, whereby the joints of the wrist and fingers were stiffened so that he could not grasp small objects and one of the hands could not be raised at the wrist, *held* not a loss of both hands within Workmen's Compensation Act, § 8, par. (e).

(For other cases, see Master and Servant, Dec. Dig. § 385[12].)

4. MASTER AND SERVANT — EVIDENCE INSUFFICIENT TO SHOW TOTAL PERMANENT DISABILITY WITHIN COMPENSATION ACT.

Evidence *held* insufficient to show that an employee sustaining injuries causing a stiffening of the joints of the wrist and fingers was totally and permanently disabled within Workmen's Compensation Act, § 8, par. (f), providing certain compensation for complete disability including a life pension.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

Error to Circuit Court, Kendall County; Adam Cliffe, Judge.

Proceedings under the Workmen's Compensation Act by Frank Luther for compensation for injuries, opposed by Bert Ballou and others. Compensation was awarded and the awarl confirmed by the circuit court. and defendants bring error. Reversed and remanded with directions.

John M. Raymond and John K. Newhall, both of Aurora, for plaintiffs in error.

Alschuler, Putnam & Flannigen, of Aurora, for defendant in error.

STONE, J. Defendant in error, Frank Luther, on March 30, 1917, while employed about machinery used in connection with the sand pit of the plaintiffs in error, was seriously injured. While oiling some of the machinery used in connection with plaintiffs in error's business his jacket was caught by a revolving shaft and his arms drawn into the machine. The evidence discloses that he lost the index finger and the distal phalange of the thumb of the right hand; that the joints of the remaining fingers were anchylosed or stiffened; that while he could grasp objects of the size of two fingers of a man's hand yet his hand could not be closed entirely; that there was likewise a stiffening or a loss of motion of the wrist joint; that the left arm was fractured in the upper third of the humerus; that the wrist was anchylosed, and in addition there was a severance of the nerve controlling the muscles used in lifting the hand, so that he had what is known as "drop wrist." meaning that the hand could not be raised at the wrist; that though the members of the left hand were not lost, all are stiff in the joints and limited in their use. The medical testimony of both parties to this cause of action tends to show that the defendant in error suffered a loss of at least 75 per cent. of the use of the right hand and $66^2/_3$ per cent. of the left hand. the evidence of defendant in error tending to show that the right hand is practically useless so far as labor is concerned. The Industrial Commission, on review, found that the applicant, as a result of the accident, had suf-

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fered the permanent and complete loss of both hands, and entered an award in the sum of $7.50 per week for 416 weeks and a pension for the remainder of applicant's life in the sum of $20.80 per month, "for the reason that the injury sustained caused the permanent and complete loss of use of both hands, and for the further reason that the injuries sustained have caused complete disability, which renders the petitioner wholly and permanently incapable of work." This award having been confirmed by the circuit court, the case comes here on writ of error.

Plaintiffs in error contend that the finding of the Industrial Commission is insufficient, in that it does not find that the applicant suffered a loss of both hands, as provided by the last clause of paragraph (e) of section 8 of the Workmen's Compensation Act of 1915 (Laws 1915, p. 400). that a finding that the applicant suffered the permanent and complete loss of use of both hands is not a finding which complies with this provision of the statute. It is further contended that there is no competent evidence in the record tending to establish that the accident in question caused the loss of both hands within the meaning of paragraph (e) so as to constitute total and permanent disability for the purpose of fixing compensation under paragraph (f) of section 8, and that the competent evidence shows that the defendant in error was not wholly and permanently incapable of working, as required by paragraph (f).

Paragraph (e) of section 8 of the Compensation Act of 1915 provides as follows:

"For the loss of a hand, or the permanent and complete loss of its use, fifty per centum of the average weekly wage during 150 weeks. * * * The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall constitute total and permanent disability, to be compensated according to the compensation fixed by paragraph (f) of this section: Provided, that these specific cases of total and permanent disability shall not be construed as excluding other cases."

Paragraph (f) provides.

"In the case of complete disability, which renders the employee wholly and permanently incapable of work," certain payments of compensation shall be made, including pension for the life of the applicant.

[1-3] Plaintiffs in error contend that under the act of 1915, in order to bring the applicant under the provisions of the statute regarding complete disability rendering the employee wholly and permanently incapable of work, the injury to the hands must be the loss of both hands and not the loss of the use of both hands. While in case of loss of both hands the use of them would, of course, be likewise lost, yet it does not follow that the loss of use of both hands is the same as the loss of both hands. The expression "loss" and "loss of the use," as used in the law, should be given their ordinary meaning. Incapacity to use a member need not, however, be tantamount to actual severance of that member. It is enough if its normal use is entirely taken away. Mark Manf. Co. v. Industrial Com., 286 Ill. 620, 122 N. E. 84. But it is evident under this act as it existed at the time of the injury, that if there exists in this case a complete disability which renders the defendant in error wholly and permanently incapable of work it must arise from other sources than those specified in paragraph (e).

[4] Defendant in error argues that as under the provisions of paragraph (e) the specific cases mentioned in said paragraph are not to be construed as excluding other cases, he is entitled to the award under paragraph (f), for the reason that the evidence shows that he is, in fact, totally and permanently disabled. It will be clearly seen that situations other than those referred to in said paragraph may arise which might result in total permanent disability. In Illinois Midland Coal Co v. Industrial Board. 277 Ill. 333, 115 N. E. 527, a fracture of the skull

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resulted in total permanent disability. So in Frey v. Kerens-Donnewald Coal Co., 271 Ill. 121 110 N. E. 824, where paralysis resulted from a blow on the head, rendering the applicant permanently incapable of work. So the question arises whether or not there is any competent evidence in the record tending to show that the condition of the defendant in error, although not enumerated in paragraph (e) of section 8, is nevertheless such as renders him wholly incapable of work. We do not think so. The defendant in error's evidence shows that he did janitor work, in which he used a broom and wheelbarrow; that for two months he earned $50 per month as watchman, and that he worked at clam-fishing, poling the boat up and down the river by means of a push-pole, which he used with his hands. While the evidence also discloses that he could not do this work as well nor as long as he could have done before the injury, yet that evidence does negative the idea that he is totally incapable of performing work. The injury to the defendant in error was serious, and he should receive the full amount of compensation to which he is entitled under the law; but this court does not make the laws, but must construe them as it finds them. We are of the opinion that there was no competent evidence in the record tending to show that for any cause defendant in error is totally permanently disabled, rendering him wholly and permanently incapable of work.

The judgment of the circuit court must therefore be reversed and the cause remanded to that court, with directions to remand the same to the Industrial Commission for further proceedings not inconsistent with this opinion.

Reversed and remanded, with directions.

DECATUR CONSTRUCTION CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13699.)

(Supreme Court of Illinois. Feb. 15, 1921.)

129 Northeastern Reporter, 738.

1. MASTER AND SERVANT—OBJECTION THAT CERTIORARI TO REVIEW AWARD WAS NOT SUED OUT IN TIME MUST BE RAISED IN CIRCUIT COURT.

The objection that a writ of certiorari to review an award of the Industrial Commission was sued out more than 20 days after the decision cannot be entertained in the Supreme Court, where the objecting party appeared in the circuit court, moved to quash the writ on other grounds, and joined issue on the merits, without making such objection.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

2. MASTER AND SERVANT — CERTIORARI TO REVIEW AWARD MAY BE SUED OUT WITHIN 20 DAYS AFTER NOTICE OF DECISION.

Under the statute, a writ of certiorari to review an award by the Industrial Commission may be sued out within 20 days of the receipt of notice of the decision, and need not be sued out within 20 days from the making or filing of the decision.

(For other cases, see Master and Servant, Dec. Dig. § 417[4½].)

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3. MASTER AND SERVANT—FINDING BY INDUSTRIAL COMMISSION MUST BE BASED ON SUBSTANTIAL EVIDENCE.

A finding of the Industrial Commission in a proceeding under the Workmen's Compensation Act cannot be based on mere conjecture, but must have some substantial foundation in the evidence.

(For other cases, see Master ad Servant, Dec. Dig. § 405[1].)

4. MASTER AND SERVANT—EVIDENCE WHICH, IF NOT DISPUTED, WOULD JUSTIFY AWARD, DOES NOT JUSTIFY FINDING.

The Industrial Commission is not justified in finding for a party because there is some evidence which, if standing undisputed, would justify the award.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

6. MASTER AND SERVANT — EVIDENCE INSUFFICIENT TO SUPPORT COMPENSATION AWARD FOR PERCENTAGE OF LOSS OF USE OF LEGS.

In a proceeding under the Workmen's Compensation Act, evidence *held* insufficient to support the finding of the Industrial Commission that the petitioner had lost 35 per cent. of the use of one leg and 10 per cent. of the use of the other.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

Error to Circuit Court, Macon County; William K. Whitfield, Judge.

Proceedings under the Workmen's Compensation Act by William E. Wilhite for compensation for injuries, opposed by the Decatur Construction Company, employer. Compensation was awarded, and the award confirmed by the circuit court, and the employer brings error. Reversed and remanded, with directions.

Gallagher, Kohlsaat & Rinaker, of Chicago, for plaintiff in error.
Henson & Helmick, of Decatur, for defendant in error.

CARTWRIGHT, C. J. On January 16, 1919, William E. Wilhite, was employed as foreman by the Decatur Construction Company in the construction of a runway at a grain elevator at Prairie Hall, in Macon county. About 50 or 60 feet from the elevator there was a small office building, used by the construction company for the storage of tools, and for the men to change their clothes and eat their noonday meals. In the morning of that day Wilhite and his helper went to the office to get their tools and put on their overalls, preparatory to going to work. The helper secured his tools and left the office, but Wilhite remained to start a fire in the stove, so that the men would have a warm place to eat their dinner. He started the fire with the aid of a can of gasoline, which exploded and set fire to his clothing, so that he was burned about the hands and legs. He was taken to a hospital at Decatur, where he remained for 9 weeks and 3 days, and he made application to the Industrial Commission for compensation for his injuries.

There was a hearing before an arbitrator, where the contest related to the extent of the injuries and the amount of compensation to which Wilhite was entitled. The arbitrator awarded $5.14 for 1 week and $12 per week for 9 weeks for temporary total incapacity, and the further sum of $12 per week for 131 weeks and $3 for 1 week for the reason that the injuries sustained caused a permanent loss of 50 per cent. of the use of the left leg and a like permanent loss of 50 per cent. of the use of the right leg. A petition for a review of the award was filed, and a hearing was had before the Industrial Commission, where it was stipu-

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lated that, since the transcript of the testimony taken before the arbitrator could not be obtained, the application should be tried de novo upon evidence produced before the commission. On the hearing an award was made of $12 a week for a period of 46²/₇ weeks for temporary total disablity, $12 per week for 61¼ weeks on account of 35 per cent. of permanent loss of the use of the left leg, and $12 per week for a period of 17½ weeks for 10 per cent. loss of the use of the right leg. A writ of certiorari was sued out of the circuit court of Macon county, and the court quashed the writ and confirmed the decision of the Industrial Commission. This court awarded a writ of error for a review of the record.

[1, 2] William E. Wilhite objected in this court to the jurisdiction of the circuit court, on the ground that the decision of the Industrial Commission was made and filed on January 15, 1920, and the writ of certiorari was sued out of the circuit court on February 9, 1920, more than 20 days after the decision of the Industrial Commission. The objection, if well grounded, could not be entertained, because it was not made in the circuit court; but Wilhite appeared there, and moved to quash the writ of certiorari on other grounds, and joined issue on the merits. The objection, however, was evidently based on a misapprehension of the statute, which provides that a suit by writ of certiorari shall be commenced within 20 days of the receipt of notice of the decision of the commission, and not from the time when it was made or filed.

On the hearing before the commission Wilhite testified that his left leg hurt him; that he could straighten it out pretty good by taking time, and when he was exercising it he could straighten it out; that if he stood in one position any length of time he felt pain when he moved the leg; that it felt as if the leaders under the left knee would break; that his right leg troubled him to some extent, and the leaders also; that it was stiff above his shoe top, where the burn was, and his knee was also stiff. He was asked what per cent. he had lost the use of his left leg, and an objection to the question was overruled, and he answered, "I claim 50 per cent. loss of my left leg, and I think I fully lost that much of it." A similar question was asked as to the use of the right leg, and the answer under objection was, "Twenty-five per cent."

The doctor who attended Wilhite at the hospital and had entire charge of his case testified that he had burns on both legs, and his hands were burned; that the burns on the hands were first degree burns, and those on the leg were right close to second degree; that the muscles of the legs were not affected by the burns, which were not deep enough to have them affected; that there was some slight degree of permanent disability from the scar formation, but it was negligible; that the injury to the right leg was practically negligible, except for discomfort, and there was no permanent disability so far as the action of that leg was concerned; that on the left leg there was a slight contraction of the knee action—very slight—and the disability would be between 5 and 15 per cent. on account of the scar tissue; that none of the tendons above the knee were destroyed or hurt by the burns on the left leg. The award of the arbitrator was in excess of any testimony at the hearing before the commission, and the commission did not accept the opinion either of Wilhite or the doctor, but made an award between the two.

[3-6] The remedial nature of the Workmen's Compensation Act (Hurd's Rev. St. 1919, c. 48, §§ 126–152i) and its beneficent purpose should be given due weight in its construction, but its purpose can only be realized by even-handed justice to both employer and employed, so that one shall receive that to which he is entitled, and the other shall pay no more. The question here is only as to the amount of compensation to which Wilhite is entitled, and the court must determine whether there is sufficient competent evidence in the record to sustain the award. A finding of the commission cannot be based on mere conjecture, but must have some substan-

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tial foundation in the evidence, and the commission is not justified in finding for one party because there is some evidence which, standing undisputed, would justify the award. Hafer Washed Coal Co. v. Industrial Com., 293 Ill. 425, 127 N. E. 752.

In that case, as in this, the claimant was permitted to express an opinion as to the per cent. of loss he suffered on account of his injuries and it was held error to permit him to express such an opinion. It was for the commission to determine the per cent. of loss as an ultimate fact and to hear all the evidence which would aid it in the conclusion, and, eliminating the opinion of Wilhite as incompetent, it is quite evident that the finding as to the percentage of loss in the use of the legs, and that such loss would be permanent, was not sustained by competent evidence. Undoubtedly, the commission, by seeing the legs of Wilhite, could discern a narrow strip of scar on the right leg and a scar practically covering the inside of the left leg, but certainly could not determine from appearances that there was a degree of permanent disability for which the award was made. To the end that justice may be done, there should be a further opportunity for a hearing on the question of the extent of loss of the use of Wilhite's legs, if he should desire such a hearing.

The judgment of the circuit court is reversed, and the cause is remanded to that court, with leave to the defendant in error, Wilhite, to have the case again referred to the Industrial Commission, if he shall be so advised, or otherwise to enter judgment reversing the decision of the Industrial Commission.

Reversed and remanded, with directions.

FRANKLIN COAL & COKE CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13716.)

(Supreme Court of Illinois. Feb. 15, 1921.)

129 Northeastern Reporter, 811.

1. MASTER AND SERVANT — CONTROL OF WORK IS CHIEF TEST OF RELATION OF INDEPENDENT CONTRACTOR.

In determining whether a workman is an employee or an independent contractor, the right to control the manner of doing the work, and not the actual exercise of such right, is the principal consideration.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

2. MASTER AND SERVANT — "INDEPENDENT CONTRACTOR" DEFINED.

An "independent contractor" is one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.)

3. MASTER AND SERVANT—PAYMENT FOR WORK BY PIECE OR OTHERWISE NOT CONTROLLING ON QUESTION WHETHER ONE IS INDEPENDENT CONTRACTOR.

Where a workman is subject to the employer's control, the fact that he is to be paid by the piece or the job or by the day or hour is not necessarily controlling on the question whether he is a contractor.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

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4. MASTER AND SERVANT — WHETHER WORKMAN WAS EMPLOYEE OR INDEPENDENT CONTRACTOR HELD A QUESTION OF FACT.

Where the building of mine cars for use in an employer's mines was done on the employer's premises in a shop provided for that purpose with materials furnished by it and with its tools by carpenters who were its regular employees and were subject to be called from the work and actually were called from the work at different times to do other work for the employer, and the employer told them the sizes and dimensions of the cars, and the work did not require much supervision, it was a question of fact, in a proceeding under the Workmen's Compensation Act, whether they were employees or independent contractors, though they were paid by the car.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

5. MASTER AND SERVANT—DECISION OF INDUSTRIAL COMMISSION THAT INJURED PERSON WAS EMPLOYEE IS CONCLUSIVE WHEN SUPPORTED BY EVIDENCE.

Where there was a conflict in the evidence but there was evidence tending to show that an injured person was an employee and not an independent contractor, such as reasoably justified the conclusion that he was employee, the decision of the Industrial Commission to that effect was conclusive.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Error to Circuit Court, Franklin County; Charles H. Miller, Judge.

Proceeding under the Workmen's Compensation Act (Hurd's Rev. St. 1919, c. 48, §§ 126–152i) by Henry F. Weaver for compensation for injuries, opposed by the Franklin Coal & Coke Company, employer. Compensation was awarded, but the award was set aside by the circuit court, and the claimant brings error. Reversed, and award confirmed.

George R. Stone, of Marion. and R. E. Hickman, of Benton, for plaintiff in error.

W. H. Hart and W. W. Hart, both of Benton, for defendant in error.

DUNN, J. Henry F. Weaver was injured on October 28, 1918, while using a joiner or planer in the construction of mine or pit cars, so that he lost the use of some of the fingers of his left hand, and upon his application an award of compensation was made to him by the Industrial Commission against the Franklin Coal & Coke Company. Upon a writ of certiorari the circuit court of Franklin county set aside the award and the claimant has sued out a writ of error to reverse this judgment.

The only controversy is whether the plaintiff in error at the time of his injury was working for the defendant in error as an employee, or was an independent contractor or was working for an independent contractor.

The defendant in error was operating coal mines at Royalton, in Franklin county, and the plaintiff in error had been in its employ as a carpenter most of the time for three or four years before he was injured, being carried on the payroll and drawing his pay, as did other employees, twice a month. at the rate of 75 cents an hour for the time he worked. Before the accident the defendant in error had difficulty in getting mine cars for use in its mines, which it had been accustomed to purchase, and it therefore arranged to get the material and have the cars constructed. The cars were built by the plaintiff in error and George Taylor, another carpenter employed by the defendant in error, in the shop provided by

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defendant in error upon its premises about 700 or 800 feet from one of its shafts. The defendant in error furnished all materials and practically all the tools used in the construction of the cars and directed the sizes and dimensions of the cars to be built. The plaintiff in error and Taylor were paid $17.50 for the work on each car. While they were at work on the cars they were also subject to the orders of defendant in error for other work about the mine as carpenters, and actually did other carpenter work for the defendant in error, for which they were paid at the rate of 75 cents an hour on the pay roll of the company.

Concerning the contract for the work on these cars the plaintiff in error testified:

"Mr. Mitchell asked me one morning when I walked into the office how it would suit me to go to Coffeen, Ill., to build 50 mine cars, and I asked him what he wanted to give me for building these cars, and he told me Mr. Taylor was going to build 75 cars at $18 a car, and he would let me know the next Monday about going to Coffeen. I went to see him the next Monday and he said he was not allowed to build the cars up there on account of the local, and had me go down and see if he could arrange an old lumber yard place downtown to build them at Royalton and make a shop out of it. I went and looked it over and told him that we couldn't arrange to build the cars down there, so he said he would build these cars over there at the mine; that he would go to work and put that shop up and for me to see Mr. Taylor, and if it was agreeable with Mr. Taylor we would build all the cars there at this one shop and he would ship the cars to Coffeen. I saw Mr. Taylor and he said it was all right with him; he would be glad for me to help him and he would help me build the cars, and so we just started in the work in that way. We had built 37 cars when I got hurt. The contract with the respondent company was first took by Mr. Taylor, and then Mr. Mitchell later on wanted me to make these 50 for him. The ones that he wanted at Coffeen were never made. I never made that contract with Mr. Mitchell. If any contract was made at all it was Mr. Taylor that made the contract. I made no contract with Mr. Mitchell at all. He only talked about it but it was never finished."

Taylor testified:

"The pit cars were built for the Franklin Coal & Coke Company by the order and direction of J. L. Mitchell. He asked me some time before to take a contract to build these cars. I told him one morning I was ready to build them if we could agree on prices, and we agreed on $18 a car, and I saw Mr. Weaver and he offered to go in fifty-fifty with me and we would build the cars. The contract was made with Mr. Mitche'l and me but not in the presence of Mr. Weaver. He hadn't anything to do with it. I made the contract myself, and Mr. Weaver was helping in that work when he was injured. I don't know that it was with the knowledge and consent of Mr. Mitchell that Mr. Weaver and I assumed the contract that I had with Mitchell. I feel myself that before I did anything under the contract that I took Mr. Weaver for my partner. We did the work with Mr. Mitchell's consent. We built 37 cars. We were paid $17.50 for each car. The regular business of the Franklin Coal & Coke Company was the mining and marketing of coal. I think the intention of the company was to build its own cars from that time on. Mr. Mitchell told me when we built these 75 he would have another 75, and he didn't say they were for Coffeen. He said the cars were for the north and south mines. The 37 cars were all built. They are ordinary mine cars. I was on the pay roll in addition to pay for the cars, at the same time. I worked on some houses that were built near the schoolhouse. I helped on four other new houses that were used for school purposes, and then we loaded some cars used out at Coffeen, and other work. Mr. Weaver was paid the same as I was. We was paid for what

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we done—just like the miners would be for continuous work. The car work was a different proposition from this other work. We would build cars one day and work at something else one day. We was paid for the work when we got done, and then we would work at something else for half a day and be on the payroll for the other work."

J. L. Mitchell, the president of the company, testified:

'I gave him (Weaver) and George Taylor a contract to build mine cars. The arrangements were all oral and made before the alleged injury—two or three months, I think. As I remember it, it was to be $17 a car, but when Mr. Taylor and I closed up I think he wanted $18 and we compromised at $17.50. We furnished everything—furnished the material. They built the cars at that price. By 'they' I mean George Taylor and Henry Weaver. The aggregate of the contract was between $500 and $600. I think it was $595, which was 34 mine cars at $17.50. There has been $595 paid. I could not say how the payments were made. Our people needed cars and repair cars. We mine coal with organized labor, and this was not organized labor. These payments were made as the contractors wanted them. These payments did not go on the pay roll at all. It was just run through our expense accounts."

[1, 2] In the case of Bristol & Gale Co. v. Industrial Com., 292 Ill. 16, 126 N. E. 599, it is said that it is impossible to lay down a rule by which the status of men working and contracting together can be definitely defined in all cases as employees or independent contractors; that each case must depend on its own facts, and ordinarily no one feature of the relation is determinative but all must be considered together. In that case is a very full discussion of the circumstances under which persons engaged in doing work may be regarded as employees or as independent contractors and many cases are considered in which their relation has been adjudicated. It is held that the principal consideration in determining whether a worker is an employee or an independent contractor is the right to control the manner of doing the work. It is not the actual exercise of the right by interfering with the work but the right to control which constitutes the test. Many definitions of an independent contractor have been made, but they are not essentially different, and the definition given in Jaggard on Torts, § 73, may be regarded as a correct statement of the law:

"An independent contractor is one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result."

[3-5] The fact that payment is to be made by the piece or the job or the day or hour is not necessarily controlling, where the workman is subject to the control of the employer as an employee and not a contractor. Here the work was done on the employer's premises, in a shop provided for the purpose, with materials furnished by the employer and with its tools. The workmen were regular employees of the defendant in error. They were subject to be called from this work, and actually were called from the work at various times by the employer to do other work which it desired done. The company told them what the sizes and dimensions of the cars were to be, the height and width, and the height of the wheels, and the workmen made them accordingly. The work was not of a character requiring a great deal of supervision. The men doing the work had all the skill that was necessary to make the cars, and they were given the dimensions and kind of cars that were to be constructed. Little or no direction or oversight was necessary. When they once had their instructions they could proceed with their work without the necessity of any interference by the employer. Whether the plaintiff in error and his associate, Taylor, were employees of the defendant in error or independent contractors, was a question of fact to be determined from the evidence. If there was a conflict of the evidence in this case, it is

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manifest that there was evidence tending to show that they were employees and not independent contractors, such as would reasonably justify the conclusion that they were employees. Under such circumstances the decision of the Industrial Commission that the plaintiff in error was an employee of the defendant in error is conclusive. Cinofsky v. Industrial Com., 290 Ill. 521, 125 N. E. 286.

The circuit court erred in setting aside the award, and its judgment will be reversed and the award of the Industrial Commission confirmed.

Judgment reversed; award confirmed.

HAFER WASHED COAL CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13480.)

(Supreme Court of Illinois. Dec. 21, 1920. Rehearing Denied Feb. 3, 1921.)

129 Northeastern Reporter, 521.

1. MASTER AND SERVANT — INJURY TO MINE CAGER DRIVING MULE HELD ONE "ARISING OUT OF EMPLOYMENT," WITHIN COMPENSATION ACT.

Injury to one employed in mine as a cager, with duty to act as timberman when so directed, arose out of the employment. within Compensation Act, where he and a mule driver were directed by the assistant mine manager to go and get some timbers, and after they were loaded, he, at request of the other, drove the mule, when he was injured by low-hanging coal.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT—AWARD FOR PARTIAL PERMANENT LOSS OF USE OF ARM AUTHORIZED BY COMPENSATION ACT.

An award to injured employee, in addition to one for $5^{3}/_{7}$ weeks of total incapacity, of the same amount per week for $62^{2}/_{3}$ weeks for $33^{1}/_{3}$ per cent. permanent loss of the use of the left arm, if justified by the facts, is authorized by Workmen's Compensation Act, § 8, par. (e), cl. 13.

(For other cases, see Master and Servant, Dec. Dig. § 385[10].)

3. MASTER AND SERVANT—AWARD UNDER COMPENSATION ACT NOT REVERSED FOR EMPLOYEE'S OPINION OF EXTENT OF INJURY.

Judgment confirming award under Workmen's Compensation Act will not be reversed, because the employee was allowed to testify before the arbitrator that he believed the loss of the use of his arm to be one-third, his other testimony tending to show loss to that extent, and his injury having been exhibited to and examined by the arbitrator and the commission.

(For other cases, see Master and Servant, Dec. Dig. § 418[5].)

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Error to Circuit Court, Williamson County; D. T. Hartwell, Judge.

Proceeding under the Workmen's Compensation Act by Fred Damron, employee, against the Hafer Washed Coal Company, employer. To review a judgment affirming an award of the Industrial Commission, the employer brings error. Affirmed.

Denison & Spiller, of Marion (R. H. Davis, of St. Louis, Mo., of counsel), for plaintiff in error.

George R. Stone, of Marion, for defendant in error.

FARMER, J. This case comes to this court on a writ of error allowed to review the judgment of the circuit court approving and confirming an award made Fred Damron under the Workmen's Compensation Act (Hurd's Rev. St. 1919, c. 48, §§ 126–152i). Damron was an employee of plaintiff in error, and on November 29, 1918, while driving a pit car hauling timbers in plaintiff in error's mine, he was caught between the car and low-hanging coal and his left collar bone broken and shoulder bruised. It is admitted the parties were under the Compensation Act and that Damron's wages as timberman and cager were $5 per day and that of a trapper $4.75. A hearing was had before an arbitrator March 19, 1919, and Damron was awarded $13 per week for $5^2/_7$ weeks, covering the period of total incapacity, which was paid. He was awarded the further sum of $13 per week for $66^2/_3$ weeks under paragraph (e) of section 8 for $33^1/_3$ per cent. permanent loss of the use of the left arm.

Three points are relied upon by plaintiff in error for a reversal of the award: (1) Because defendant in error, Damron, was permitted, over objection, to testify that the injury had caused the loss of one-third the use of his left arm; (2) the award is not authorized by the statute under which it was made; (3) the injury did not arise out of and in the course of the employment.

[1] Treating the questions in the reverse order they are presented in the brief, we do not think the claim that the injury did not arise out of and in the course of the employment is well founded. There is no conflict in the testimony on this question. Damron's employment was that of cager, and his duties also were to act as timberman when so directed. On the day of the injury he, another employee named Harris, and a man named Arnold, who was driver of a mule in hauling pit cars, were directed by the assistant mine manager to go to the "branch" and get some timbers or props and take them 150 or 200 feet to the place where it was desired to use them. They proceeded to the place where the timbers were, loaded them on the car, and started to haul them to the place directed. The driver, Arnold, was on the rear of the car, and Damron on the front.. Arnold asked Damron to drive the mule, which he proceeded to do, and was caught by some low-hanging coal and his left collar bone broken. To drive mules hauling cars was not among the duties Damron was employed to perform, and plaintiff in error insists that he had stepped outside his employment to do something he was not required or expected to do when injured, and therefore the injury did not arise out of the employment. The assistant mine manager, it is true, did not direct Damron to drive the mule. His orders to the men were to get the timbers and haul them to the place designated. This required the timbers to be loaded on the car and then driven to the place desired. The mere fact that Damron, being on the front end of the car, was requested to, and did, drive the mule, was not such a departure from the work he was directed to do at the time as would justify holding that the injury did not arise out of and in the course of his employment. He was assisting in the execution of the order of the assistant mine manager to load the timbers on the car and move them to the place needed, and his injury occurred while obeying that order. That it may have been more

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convenient in expediting the order for Damron to drive the mule the 150 or 200 feet the timbers were to be moved, and for that reason he did so, would not justify holding that he was on that account not entitled to compensation. It was not such a departure from the line of Damron's employment as was held in Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764, and subsequent cases, would place him outside the protection of the act when injured. Hartz v. Hartford Faience Co., 90 Conn. 539, 97 Atl. 1020. See, also, Sunnyside Coal Co. v. Industrial Com., 291 Ill. 523, 126 N. E. 196, and cases cited.

[2] The award of $13 per week for a period of $66^2/_3$ weeks was made under paragraph (e) of section 8 of the Workmen's Compensation Act, "for the reason that the injuries sustained caused $33^1/_3$ per cent. permanent loss of the use of the left arm." We think, if the facts justified it, the award was authorized under clause 13 of paragraph (e) of section 8.

[3] It is also insisted that the finding of the proportion of loss of use of the arm is based on incompetent evidence. Damron testified before the arbitrator, over the objection of plaintiff in error, that the loss of the use of his arm he believed to be one-third, and it is insisted that under Peabody Coal Co. v. Industrial Com., 289 Ill. 449, 124 N. E. 566, and International Coal Co. v. Industrial Com., 293 Ill. 524, 127 N. E. 703, the award should be reversed. We do not think the error complained of would justify reversal. In the last case cited it was said:

"It is competent to prove conditions, such as the comparative ability of the applicant to do certain things in the use of the injured member before and after the accident, as well as any other fact which would enable the commission to draw an inference as to the ultimate fact to be determined."

Damron was examined and testified fully before the arbitrator as to the effect of the injury on the use of his arm, and was asked to and did illustrate, during direct and cross examination, how the use of his arm was interfered with, by various movements he could or could not make. He also exhibited to the arbitrator, and again to the Industrial Commission at the hearing on review, his injury, which was inspected and examined by the arbitrator and commissioner. Independently of his testimony that he believed the loss of use of his arm was one-third, his testimony tended to show that he had sustained loss of the use of the arm to that extent, and the fact that the injury was exhibited to and examined by the triers of facts is also entitled to some weight.

We would not be authorized to reverse the judgment for the errors complained of, and it is affirmed.

Judgment affirmed.

PAYNE, Director General of Railroads, v. INDUSTRIAL COMMISSION et al. (No. 13541.)

(Supreme Court of Illinois. Feb. 15, 1921.)

129 Northeastern Reporter, 830.

1. MASTER AND SERVANT — INJURY TO COMPENSATION CLAIMANT BY INTRASTATE TRAIN ASSUMED BY SUPREME COURT IN ABSENCE OF CONTRARY SHOWING.

On writ of error to review judgment of circuit court confirming award of Industrial Commission for injuries to railroad employee, where

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the record does not show whether the train causing injury was engaged in interstate or in intrastate commerce, it will be assumed by the Supreme Court that it was an intrastate train.

(For other cases, see Master and Servant, Dec. Dig. § 418[5].)

2. MASTER AND SERVANT—RAILROAD SEEKING TO AVOID COMPENSATION MUST PROVE INTERSTATE COMMERCE EMPLOYMENT.

In proceedings under Workmen's Compensation Act for injuries to railroad employee, where the railroad was engaged in both intrastate and interstate commerce, it was incumbent on the railroad, in order to relieve itself of the obligation to pay compensation, to show that the work being done by employee at the time of the injury was interstate commerce.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

3. MASTER AND SERVANT — TRAINMAN DEADHEADING HELD EMPLOYED WITHIN COMPENSATION ACT.

Where train crew had been relieved from service under the Hours of Service Act (U. S. Comp. St. § 8678) but had obtained permission from train dispatcher to ride into a terminal on the first train going in that direction, and where under the rules of the company the employees were paid while deadheading into the terminal, the employees, though not on duty within the Hours of Service Act while deadheading into the terminal, were in the employ of the railroad at such time within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

4. MASTER AND SERVANT—AMPUTATION 10 INCHES ABOVE THE ANKLE JOINT LOSS OF "LEG" WITHIN COMPENSATION ACT.

Employee whose leg was amputated 10 inches above the ankle joint *held* entitled to compensation for loss of a leg under Workmen's Compensation Act, § 8, par. e, item 15, fixing compensation recoverable for loss of the leg; no distinction being made between the loss of a leg or the loss of a part of the leg.

(For other cases, see Master and Servant, Dec. Dig. § 385[14].)

(For other definitions, see Words and Phrases, Second Series, Leg.)

Error to Circuit Court, Marion County; Thomas E. Ford, Judge.

Proceedings under Workmen's Compensation Act by Edward C. Koch for compensation for injuries, opposed by John Barton Payne, Director General of Railroads, employer. Award of Industrial Commission for claimant was confirmed by circuit court, and the employer brings error. Affirmed.

Frank F. Noleman and June C. Smith, both of Centralia, and Andrew J. Dallstream, of Hoopeston (J. A. Connell, of Chicago, of counsel), for plaintiff in error.

Wham & Wham, of Centralia, for defendant in error.

THOMPSON, J. This writ of error is prosecuted by leave of court to review a judgment of the circuit court of Marion county confirming an award of the Industrial Commission awarding to Edward C. Koch, defendant in error, compensation for the loss of his left leg.

Defendant in error was employed as a locomotive engineer by plaintiff in error. On June 4, 1918, he was directed to take a train of empty coal cars from Centralia to West Frankfort, both stations in Illinois. He reached West Frankfort during the night and was directed by the train

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dispatcher to take a train of loaded coal cars from West Frankfort to Centralia. Some of the cars in this train were billed to points outside this state. About 2:40 o'clock in the morning of June 5, 1918, defendant in error pulled this train to Sesser, a station 32 miles from Centralia. For some reason unaccounted for in the evidence this train stood on the side track at Sesser for more than 5 hours. About 7:45 a. m. the train crew had been on duty almost 16 hours, and because of the provisions of the Hours of Service Act (U. S. Comp. Stat. § 8678) defendant in error and his coemployees were relieved from duty. A section crew took charge of the train and defendant in error left the premises of plaintiff in error. The conductor of the relieved train crew communicated with the train dispatcher and obtained permission for the train crew to deadhead into Centralia. While defendant in error and other members of the crew were eating breakfast in a restaurant near but off the right of way, they learned that an extra freight train was coming from the south, and they left the restaurant and went to the right of way for the purpose of riding this train to Centralia. Some member of the crew signaled the engineer of the approaching train to slow down and the speed of the train was reduced to about 10 miles an hour. All of the crew were successful in boarding the train except defendant in error. In making the attempt he slipped and fell beneath the wheels, and his left leg was so injured that it was necessary to amputate it at a point about 10 inches above the ankle joint.

[1, 2] The first question presented for our consideration is whether defendant in error was employed in interstate commerce. While the general rules governing the determination of this question are well settled, the application of the rules to the facts here presented has not before been considered by this court, and so far as we know has not been considered by any other court of last resort. The record is silent as to whether the train of empties pulled by defendant in error from Centralia to West Frankfort contained interstate cars, and it must therefore be assumed, for the purposes of this case, that it was an intrastate train. Chicago, Rock Island & Pacific Railway Co. v. Industrial Board, 273 Ill. 528, 113 N. E. 80, L. R. A. 1916F, 540. The train pulled by defendant in error from West Frankfort to Sesser was an interstate train, and the question presented is whether the employment of defendant in error at the time of his injury was a continuation of the employment in connection with this interstate train. We have often said that the true test is that at the time of the injury the employee was engaged in interstate transportation or in work so closely related to it as to be practically a part of it. Plaintiff in error was engaged in both intrastate and interstate commerce, and to relieve himself of his obligation to provide and pay comcompensation under the Workmen's Compensation Act it was incumbent upon him to show the fact that the work being done at the time of the injury was interstate commerce. Illinois Central Railroad Co. v. Industrial Board, 284 Ill. 267, 119 N. E. 920; Chicago & Alton Railroad Co. v. Industrial Com., 290 Ill. 599, 125 N. E. 378; Grand Trunk Western Railway Co. v. Industrial Com., 291 Ill. 167, 125 N. E. 748.

[3] As we have said, defendant in error was relieved from duty at 7:45 a. m. His time stopped at the moment he was relieved and he was then out of the service of plaintiff in error. After he left the premises of his employer and was no longer fulfilling any duty of his employment he was not employed by plaintiff in error within the meaning of the Workmen's Compensation Act. Fairbank Co. v. Industrial Com., 285 Ill. 11, 120 N. E. 457; Schweiss v. Industrial Com., 292 Ill. 90, 126 N. E. 566. Under the Hours of Service Act defendant in error was required to be off duty at least eight hours. During this rest period his time was his own and he could do with it as he pleased. He could have remained in Sesser during the full period or he could have gone to any other place

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to which he chose to go. It was the custom of employees released under the Hours of Service Act to obtain permission from the train dispatcher to ride into a terminal on the first train going in that direction. If the relieved employees chose to go into the terminal, their contract of employment with plaintiff in error provided that they would receive full compensation during the time they were traveling from the point where they were relieved to the terminal. In the instant case the train dispatcher advised the conductor of the relieved crew that he was sending another crew to Sesser to bring in the train and gave the relieved crew authority to deadhead into Centralia. According to the testimony of defendant in error and of the conductor, they were going into Centralia to be ready, after their rest period had terminated, to receive further orders from their employer. While the members of this relieved train crew were not "on duty," within the meaning of the Hours of Service Act, when they were deadheading into Centralia (Osborne's Adm'r v. Cincinnati, N. O. & T. P. Railway Co., 158 Ky. 176, 164 S. W. 818, Ann. Cas. 1915D, 449), they were in the employ of plaintiff in error within the mean- of the Workmen's Compensation Act (St. Louis Southwestern Railway Co. v. Brothers [Tex. Civ. App.] 165 S. W. 488; Lamphere v. Oregon Railroad & Navigation Co., 196 Fed. 336, 116 C. C. A. 156, 47 L. R. A. [N. S.] 1). In the Brothers Case it was held that where an extra brakeman was employed on an interstate train from one division point to another, and was, under orders to immediately return to his home, deadheading back, the return trip was a part of the round trip service, and his employment, while deadheading back, was therefore in interstate commerce; and in the Lamphere Case it was held that an engineer ordered to report at a distant point to relieve a crew on an interstate train was engaged in interstate commerce while on his way to take charge of the engine to which he had been assigned. The exact question presented in those cases is not before us and we do not express any views on it. We have held that where an employee is injured on the premises of the employer in going to or returning from his employment he is then in the employment of his master because the thing he is doing is necessarily incident to his employment, and the character of his employment at that particular time is determined by the character of the employment he is assigned to do when he goes on active duty or the character of the employment which he has just left. Wabash Railway Co. v. Industrial Com., 294 Ill. 119, 128 N. E. 290.

The record shows that the time of the crew of which defendant in error was a member was kept by plaintiff in error on three separate trip-sheets. The first covered the time of taking the intrastate train from Centralia to West Frankfort; the second covered the time of taking the interstate train from West Frankfort to Sesser. and the third covered the time the crew was deadheading in from Sesser to Centralia. Between the time covered by the second trip-sheet and the time covered by the third trip-sheet was a period when defendant in error was not in the employ of plaintiff in error and when he was off the premises of plaintiff in error. We consider the trip from Sesser to Centralia a separate employment, in no way connected with the trip from West Frankfort to Sesser. It was not necessary, in the performance of the duties connected with this interstate train, that the train crew deadhead into Centralia. After they were relieved from duty at 7:45 a. m., they had no further connection with this train, and if the train dispatcher of plaintiff in error had not directed them to return to Centralia they would not have been in the employ of plaintiff in error for at least eight hours. Plaintiff in error gave defendant in error permission to deadhead into Centralia and paid him for the time necessary for him to perform this service. It must be presumed that this employment was for the benefit of plaintiff in error, and that he wanted defendant in error at the terminal so that he

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might be available for other service. Whether the service was to be intrastate or interstate employment is not shown by anything that appears in this record, and, as we have said, it will be assumed for the purposes of this case in the absence of a showing to the contrary, that the service was an employment within the terms of the Workmen's Compensation Act. The Industrial Commission has determined that this employment was in intrastate commerce and that the injury arose out of and in the course of the employment, and in the proper exercise of the jurisdiction of this court in case of this character the decision ought not to be disturbed.

[4] Plaintiff in error contends, further, that the award of the Industrial Commission should have been for the loss of a foot and not for the loss of a leg. Under item 15 of paragraph (e) of section 8 of the Workmen's Compensation Act (Laws of 1917, p. 496), it is provided that compensation shall be paid for the loss of a leg or the permanent or complete loss of its use. No distinction is made under the act between the loss of the whole leg and the loss of a part of the leg. The loss of any substantial portion of the leg constitutes the loss of the leg within the meaning of the act, and the commission correctly decided that the amputation of the leg 10 inches above the ankle joint entitled defendant in error to compensation for the loss of the leg.

The judgment of the circuit court is affirmed.

Judgment affirmed.

RICHARDSON SAND CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13558.)

(Supreme Court of Illinois. Feb. 15, 1921.)

129 Northeastern Reporter, 751.

1. MASTER AND SERVANT — "DEPENDENCY" WITHIN COMPENSATION ACT DEFINED.

The test of dependency within the Workmen's Compensation Act is whether the contributions were relied on by the dependent for his means of living, judged by the position in life, or whether the dependent was to a substantial degree supported by the deceased, and not whether claimant would have been without the necessities of life in the absence of such contributions.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependency.)

2. MASTER AND SERVANT — FINDING OF DEPENDENCY WITHIN COMPENSATION ACT CONCLUSIVE.

In proceedings under Workmen's Compensation Act, the questions of dependency and extent thereof are questions of fact, and the courts will not interfere with the finding of the Commission on such question if there is evidence to sustain its finding.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—CHILD CONTRIBUTING SUBSTANTIAL SUM CONTRIBUTES TO PARENTS' SUPPORT WITHIN COMPENSATION ACT.

Under the Workmen's Compensation Act, a child contributes to the support to its parents when it contributes a substantial sum to the sup-

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port of the family. although that sum is less than the actual cost and expense of its support and maintenance, if the child is a minor or is in a condition to demand legal support from its parents.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

4. MASTER AND SERVANT — PARENTS HELD DEPENDENTS WITHIN COMPENSATION ACT.

Where a son's contributions to support of his parents were not needed when crops on father's farm were good, but were needed when father's income because of poor crops was insufficient to pay their living expenses, making it necessary for son to contribute to their support in addition to amount paid for his room and board, the Industrial Commission's finding that the parents were dependents entitled to compensation for his death under Workmen's Compensation Act will not be disturbed by the court.

(For other cases, see Master and Servant, Dec. Dig. § 405[5].)

Error to Circuit Court, Kane County; Adam C. Cliffe, Judge.

Proceedings under Workmen's Compensation Act (Hurd's Rev. St. 1919, c. 48, §§ 126–152i) by William Natzke. Sr., and others for compensation for death of William Natzke, Jr., opposed by the Richardson Sand Company, the employer. Award of Industrial Commission for petitioner confirmed by the circuit court, and the employer brings error. Affirmed.

E. L. Lyon, of Aurora, and J. C. M. Clow, of Chicago, for plaintiff in error.

Charles B. Hazelhurst and Ernest C. Luther, both of Elgin, for defendants in error.

CARTER, J. William Natzke, Jr., between 19 and 20 years of age, was killed in an accident arising out of and in the course of his employment by plaintiff in error. Compensation was awarded by the Industrial Commission and that award was confirmed by the circuit court. The case has been brought here by writ of error for review.

William Natzke, Sr., the father of deceased, had resided for 10 years previous to the accident on a 15-acre truck farm four miles south of Elgin, Ill. The family consisted of the father and mother, a son who was in the regular army, where he had been about 18 years, and William Jr., who was killed by the accident. The father at the time of the hearing was 60 years of age and the mother 56. The farm was improved with a house and barn and the usual small outbuildings. The land was used for a truck garden, raising strawberries, raspberries, vegetables, grain, hay, and corn. The applicants kept one horse, two cows, and chickens. Produce sufficient for the family's use was raised, and the dairy, poultry, and garden produce not used by the family were sold. The sole question argued in the briefs is whether or not, under the statute, the parents of the deceased were dependent upon him at the time of his death on the facts shown on this record.

The deceased son quit attending school when about 14 years old and began helping with the work at home and on nearby farms. Several months before his death he was employed in a grocery at Elgin, but lived at home and assisted with the chores and work around the house, and he did the same during the five months that he worked for plaintiff in error, before his death. He arose about 5 o'clock in the morning and did chores until he went to town, about 6:45. This had been his practice for two years. He did the milking and fed the stock. He paid $4 a week for his room and board and also gave his mother other money, about $22 every two weeks, and she bought his clothes and other things; the son only

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keeping spending money. When he worked at the grocery store he brought home flour and groceries amounting to $7 or $8 a month, which also came from his own income.

His father testified on the hearing that his farm stock and implements were worth about $5,000 or $6,000; that the buildings were in good shape and well taken care of; that he owned a note of $8,000, which paid him 5 per cent. interest, and $100 in Liberty bonds; that after receiving the family living from the place he sold $800 or $1,000 worth of produce, ordinarily making over all expenses $100 a year, but that during the last year he had raised only about $200 worth of produce and did not make living expenses; that the money the son gave them was used for the support of the three members of the family. The father also stated that he himself had not been well during the last year or two and was under a doctor's care. that the estimated value of room and board of any one, without doing any work on the farm would be $6 a week; and that the boy's services on the farm were reasonably worth $30 a month and board.

An investigator for the insurance company in this case testified that the father stated to him after the accident that they never needed any contributions from the boy, and that the $4 a week which he paid just covered his living expenses. The father denied this statement was made, and the mother's testimony did not agree with that of the investigator.

[1-3] Partial dependency may exist even though the testimony shows that the claimant could have subsisted without the contributions of the deceased. It is not necessary to show that the claimant would have been without the necessaries of life in the absence of such contributions, nor is it necessary to show that the dependent was without other means of support. The test is whether the contributions were relied on by the dependent for his or her means of living, judging this by the position in life of the dependent, or whether the dependent was to a substantial degree supported by the deceased at the time of the death. These are questions largely of fact. Pratt Co. v. Industrial Com., 293 Ill. 367, 127 N. E. 754, and cases cited. Dependency and the extent thereof are questions of fact, and the courts will not interfere with the finding of the commission on those questions if there is evidence to sustain its finding. Rock Island Iron Works v. Industrial Com., 287 Ill. 648, 122 N. E. 830. Within the meaning of our statute a child contributes to the support of its parents when it contributes a substantial sum to the support of the family, although that sum is less than the actual cost and expense of its support and maintenance, if the child is a minor or is in a condition to demand legal support from its parents. Metal Stampings Corp. v. Industrial Com., 285 Ill. 528, 121 N. E. 258. Where there was evidence that the father of the deceased owned buildings which brought him in income, that all the children lived with the father and contributed to the family expenses that the deceased had paid board, but had not lived with the father until recently, it was held that the fact that the father had an income from the rental of his property would not affect the question whether the parents were dependent. Mallers v. Industrial Board, 281 Ill. 418, 117 N. E. 1056. See, also, to the same effect, Fennimore v. Pittsburg-Scammon Coal Co., 100 Kan. 372, 164 Pac. 265; Harper on Workmen's Comp. (2d Ed.) § 137. In law a dependent is one who is sustained by another or relies upon another for support or for reasonable necessaries consistent with the dependent's position in life. Rock Island Iron Works v. Industrial Com., supra. See, also, 1 Honnold on Workmen's Comp. § 70. The test of dependency is not whether the family could support life without the contributions of the deceased, but whether they depended upon such contributions as a part of their income or means of living. Bradbury on Workmen's Comp. (3d Ed.) 743.

[4] While there may be some apparent conflict in the evidence, taking into consideration the investigator's statement as to what the father

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of the deceased stated to him, yet reading the evidence of the father and mother in connection with the affidavit they made for the investigator, we do not think there is any substantial conflict in their testimony on the vital question whether they were dependent upon the deceased. The conclusion may readily be drawn from the father's testimony that when the farm produced well the son's contributions were not needed for their support, but when they had poor crops the situation was different and their income was insufficient to pay their living expenses, and what the son gave his mother in addition to the amount for room and board tended to assist in their support. The Industrial Commission had a right to consider all this testimony in reaching the conclusion as to the question of dependency. Under the authorities already cited, this court is not justified, on this award, in interfering with the finding of the Industrial Commission on that question.

The judgment of the circuit court will therefore be affirmed.

Judgment affirmed.

SESSER COAL CO. v. INDUSTRIAL COMMISSION ET AL.
(No. 13475.)

(Supreme Court of Illinois. Dec. 21, 1920. Rehearing Denied Feb. 3, 1921.)

129 Northeastern Reporter, 536.

2. MASTER AND SERVANT — CONCLUSION IN COMPENSATION CASE THAT MINE EXAMINER WAS KILLED BY ACCIDENT HELD JUSTIFIED.

Where a mine examiner last seen on an electric motor was found lying in front of the motor across the track with his head forming a point of contact between the motor and the rail, and the motor, which was going up grade, ran back down the grade when the power was turned off, the conclusion that he came to his death by an accident was justified.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

3. MASTER AND SERVANT — EVIDENCE IN COMPENSATION CASE HELD TO SHOW RULE OF EMPLOYING MINE OPERATOR WAS NEVER ENFORCED.

In a proceeding under the Workmen's Compensation Act for the death of a mine examiner, evidence *held* to show that a rule that no one should ride electric motors except motormen and truck riders was a mere paper rule, and never enforced.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

4. MASTER AND SERVANT—MINE EXAMINER'S DEATH HELD NOT TO HAVE RESULTED FROM VIOLATION OF RULE OF EMPLOYER.

Where a mine superintendent and the manager in the presence of deceased spoke of locking up electric motors to prevent their use by the night shift, and deceased asked that one be left out for him, but was told that all would be treated alike, but the motors had not been locked up when deceased was killed while using one, his death was not in consequence of violation of a rule by the employer, so as to defeat the right to compensation.

(For other cases, see Master and Servant, Dec. Dig. § 380)

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5. MASTER AND SERVANT — RESPONDENT SHOULD REPLY TO PETITION AND FILE ADDITIONAL ABSTRACT AS PERMITTED BY RULE.

If a petition for a writ of error or the accompanying abstract is incorrect or incomplete, respondent should reply to the petition, and file an additional abstract, as permitted by rule 43 (125 N. E. vii), so as to prevent an award of the writ without apparently good cause.

(For other cases, see Master and Servant, Dec. Dig. § 418[3½].)

Error to Circuit Court, Franklin County; Charles H. Miller, Judge.

Proceedings under the Workmen's Compensation Act (Laws 1913, p. 335) by Kezia Ogilvie, administratrix, for compensation for the death of her husband, John Ogilvie, opposed by the Sesser Coal Company, employer. Compensaton was awarded, and the award confirmed by the circuit court, and the employer brings error. Affirmed.

A. B. Manion, of Chicago, for plaintiff in error.

A. W. Kerr, of Chicago, and J. B. Lewis and A. C. Lewis, both of Harrisburg, for defendant in error.

CARTWRIGHT, C. J. John Ogilvie, an extra examiner and gas brusher employed by the Sesser Coal Company, plaintiff in error, was killed while riding on and operating an electric motor in the mine of plaintiff in error at about 5 o'clock on January 29, 1918, and his widow, as administratrix of his estate, applied to the Industrial Commission for compensation for his death. It was stipulated that if her claim was good she was entitled to the maximum of $4,000, and the claim was sustained by the arbitrator. On a review by the Industrial Commission the testimony of a doctor at the inquest was read into the record by stipulation, and the decision of the arbitrator was confirmed. On a writ of certiorari from the circuit court of Franklin county the application was remanded to the Industrial Commission, with instructions to take further evidence on the question of the cause of death. Further evidence was taken in pursuance of the remanding order, and the award of the arbitrator was again confirmed. The cause again coming before the circuit court on a writ of certiorari, judgment was entered confirming the award. The court, upon consideration of a petition containing a partial statement of the evidence, and accompanied by an abstract afterward shown by an additional abstract to be insufficient, awarded a writ of error for a review of the judgment.

The duties of Ogilvie as extra examiner and gas brusher were to enter the mine in the morning before the day shift commenced work and clear the rooms or entries of gas, and examine other parts of the mine, and after the day shift quit work at 4 o'clock and the shot firers had finished their work, to again make the examination and perform the same work before the night shift would go to work at about 7:45. The mine examiners entered and left the mine by the elevator shaft, and the rooms or entries which Ogilvie was required to examine were about 1½ miles from the bottom of the shaft. The mine was equipped with an electric tramway, on which loaded and empty coal cars were hauled to and from the bottom of the shaft. The motors were operated by electricity by means of a trolley pole running along a trolley wire at the top of the entries. In the afternoon of January 29, 1918, Ogilvie, in returning to the place where he performed his duties, passed a shot firer, who testified that he was riding a motor and going towards the bottom of the shaft. About 10 minutes later the shot firer found Ogilvie lying in front of the motor at a place where the motor was going upgrade, his body doubled up under the front of the motor and his head lying on the south rail. The trolley was on the wire, the electric power was on, and the motor

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was on fire. The place was about 1 mile from the bottom of the shaft, and the shot firer called other shot firers, and when the power was shut off the motor rolled back down grade off from Ogilvie.

[1, 2] One disputed question related to the cause of death. The testimony of the doctor at the inquest, read into the record by agreement, was that there was no evidence of any injury outside of skin abrasions, and he had no opinion as to what was the cause of death. On the hearing on the remanding order a doctor testified that he looked at the body two or three hours after death and mortification had set in, and there was a bad odor, from which he formed an opinion that Ogilvie had been electrocuted. The basis of the opinion was that decomposition had set in so quickly, but he testified that he knew nothing about the subject, nor if any medical authorities concerning it, and had never examined after death a body kown to have been electrocuted. He was not qualified to give any opinion on the subject, and an expert, qualified by learning and experience to give an opinion, testified that early decomposition was no evidence of death by electrocution. The facts proved, however, were sufficient to justify a conclusion that Ogilvie came to his death by an accident from lying in front of the motor across the track with his head forming a point of contact between the motor and rail. The motor was going up grade, and when the power was turned off it ran back down the grade. The agency likely to cause death was present, and he was found where the deadly agency was in effectual operation and practically certain to cause death, and whether Ogilvie was electrocuted or not, the fact that there was a fatal accident is beyond question.

[3, 4] The principal defense was that Ogilvie was forbidden to use the motor, and was killed in consequence of violating a rule of his employer. The chief clerk testified that the rules of the company were that no one should ride the motors except motormen and truckriders; that Ogilvie was aware of the rule, and had been cautioned and warned by the mine manager, and the witness did not know that it was the custom of Ogilvie to use a motor in making his examinations. H. S. Maitland, superintendent of the mine, said that he commenced work on January 26, three days before the death of Ogilvie; that it was a rule of the company that examiners should not use motors, and it did not permit any examiner to use a motor: that a day or two before the accident the motor boss complained that the motors were out of commission in the morning, and suggested that they be put under lock to prevent the night shift from using them; that on the day of the accident, in the presence of Ogilvie, the mine manager, Gilmore, in an exploration of the working, said to the witness that a certain bend would be a good place to lock the motors in, and Ogilvie asked the witness to leave one out for him, and the witness said, "We will treat every one alike; you all look alike to me." The witness also testified that a state mine inspector's notice, dated January 23, six days before the accident, had been posted at the mine containing this statement:

"That no person be allowed to ride on motors except those necessary to operate trucks."

This document, called a notice, was a recommendation for improvements, and, for the better protection of the lives and health of the employees, recommended, among other things, the matter above quoted, which was no indication that there was a rule in operation. On the part of the administratrix an extra examiner and gas brusher testified that he and Ogilvie had been buddies about 18 months before the death of Ogilvie; that all of that time they had been using motors to do the work, and the witness had been using a motor in his work for about two years; that it was the custom of the extra examiners to use the motors; that during the time he was using motors prior to the death of Ogilvie, Gilmore and Brown were mine managers, and knew that the examiners were

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using the motors, and did not forbid such use; that Gilmore was mine manager at the time Ogilvie was killed, and that the witness was still employed at the same work at the time he testified, about 5 months after the death of Ogilvie, and had continuously used motors. A witness stated that the mine examiners were supposed to walk to their work. All the evidence was that the motors were used for the personal convenience of the mine examiners both in saving time and effort, which in the case of Ogilvie would involve walking about 3 miles twice each day. Whatever rule there may have been with respect to the use of the motors, it was a mere paper rule and never enforced. The extra mine examiners had been using the motors in their work for more than two years, and they continued to use them up to the time of the last hearing, on September 25, 1919, about 20 months after the death of Ogilvie, and there was evidence that there had been two mine managers since the death of Ogilvie who knew that the motors had been used, and had never forbidden their use. The talk between the superintendent, Maitland, and Gilmore, the mine manager, in the presence of Ogilvie, on the same day that Ogilvie was killed, related to locking up the motors in the future, and the plan was never carried out. The reference at the time to unauthorized use of the motors was to the night shift, to which Ogilvie did not belong, but if the motors were locked up the mine examiners could not use them, and Ogilvie was told that everybody was to be treated alike. The exclusion was to take effect when the motors were locked up, and might well be so regarded by Ogilvie. The plan, if finally determined on, was abandoned, and the examiners costinued to use the motors without objection or warning. The examiners found the motors at the bottom of the shaft, used them, and left them there, and in view of the usual practice it cannot be said that Ogilvie met his death in consequence of a violation of a rule of his employer.

[5] The respondent did not reply to the petition for a writ of error, and only filed a brief and argument and additional abstract on submission of the cause for decision. Rule 43 (125 N. E. vii) permits the respondent to reply to the petition and file an additional abstract, if necessary. These petitions receive the consideration of the entire court, and if the petition or abstract is incorrect or incomplete, the respondent should exercise the right given by the rule, and give the court the benefit of a complete statement of the case, so as to prevent awarding a writ without apparently good cause.

The judgment is affirmed, and the cost of the additional abstract will be taxed to the plaintiff in error.

Judgment affirmed.

SINGER SEWING MACH. CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13543.)

(Supreme Court of Illinois. Feb. 15, 1921.)

129 Northeastern Reporter, 771.

MASTER AND SERVANT—EMPLOYMENT TO SELL, DELIVER, AND SET UP SEWING MACHINES NOT WITHIN COMPENSATION ACT; "EXTRAHAZARDOUS EMPLOYMENT."

The employment of one hired by a sewing machine company to sell machines, deliver them, and set them up in the purchasers' places of

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business was not included in any of the classes mentioned in Workmen's Compensation Act, § 3, as extrahazardous, and his employment did not come within the act.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceeding under the Workmen's Compensation Act by Walter K. Rudder, the employee, against the Singer Sewing Machine Company, the employer, wherein an arbitrator made an award, which was confirmed by the Industrial Commission, and again confirmed on writ of certiorari from the circuit court, and the employer brings error. Judgment of the circuit court reversed.

Charles C. Carnahan and Thomas H. Slusser, both of Chicago, for plaintiff in error.

Morris Kompel, of Chicago, for defendant in error.

CARTWRIGHT, C. J. The Singer Sewing Machine Company had a sales department at 1015 West Jackson boulevard, in Chicago, and Walter K. Rudder was employed by it to set up machines for purchasers. Some machines were set up singly and sometimes there were several in a row, used in the manufacture of clothing, boots, shoes, or other merchandise. Rudder was sent to the Florsheim Shoe Company to set up about 20 sewing machines sold to that company. The tables of the sewing machines were supported by iron legs fastened to the bottom by screws that went in from the bottom side. He was sitting on the floor putting screws in to fasten the legs to the bottom of a sewing machine table, and the screwdriver slipped, or the side of the screw broke, and he was struck in the right eye and injured. He applied for compensation, and the defense was that the work in which he was engaged was not extrahazardous, and the Compensation Act (Hurd's Rev. St. 1919, c. 48, §§ 126–152i) had not been adopted by the company. An arbitrator made an award, and the Industrial Commission confirmed it. On a writ of certiorari from the circuit court of Cook county, the award was again confirmed, and this court allowed a writ of error.

The Singer Sewing Machine Company occupied a part of two floors in the building where machines were kept and sold, and Rudder was one of six men employed in the outside work of putting up machines, with ordinary simple tools for setting them up, such as screwdrivers, wrenches, and the like, which are in general use, not confined to any art or employment. No machines were manufactured at the place, but there was a shop in which repairs were made to sewing machines which got out of order. Rudder was not employed in that shop, and had no connection with the repair of machines; but he had been in the shop a few times to grind bobbin winders that belonged to a certain class of machines and sometimes required grinding. But little work of any kind was done in the repair shop, and Rudder had neither duty nor employment in the repair work. Some of the sewing machines, when set up, were run by a motor, and Rudder would connect the belting on the machine, or connect with a transmitter while the wires were dead. He would not test the motor, or any part of the machine, and there was no electric current in connection with any motors that he worked on. It was not his duty to connect any of the wires with the outside current, and while he was working the wires were dead.

Whether there was any part of the work in the repair shop which was extrahazardous or not the business of selling sewing machines, delivering and setting them up in the purchasers' places of business, as carried on, was not included in any of the classes mentioned in section 3 of the

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Workmen's Compensation Act to which the act automatically applies. The question whether repair work was within the act is not involved, because that was a separate and independent branch of the business, and Rudder was not employed to repair sewing machines, and did not repair them. Occasions when he went into the shop and ground bobbins on the emery wheel were merely incidental and casual, and not a part of his general employment. McLaughlin v. Industrial Board, 281 Ill. 100, 117 N. E. 819. His employment did not come within the Workmen's Compensation Act, and the circuit court erred in confirming the award. Uphoff v. Industrial Board, 271 Ill. 312, 111 N. E. 128, L. R. A. 1916E, 329, Ann. Cas. 1917D, 1; Vaughan's Seed Store v. Simonini, 275 Ill. 477, 114 N. E. 163, Ann. Cas. 1918B, 713; Fruit v. Industrial Board, 284 Ill. 154, 119 N. E. 931; Brennan v. Industrial Com., 289 Ill. 49, 124 N. E. 297; Bowman Dairy Co. v. Industrial Com., 292 Ill. 284, 126 N. E. 596.

The judgment of the circuit court is reversed.

Judgment reversed.

OLD BEN COAL CORPORATION v. INDUSTRIAL COMMISSION ET AL. (No. 13714.)

(Supreme Court of Illinois. Feb. 15, 1921.)

129 Northeastern Reporter, 772.

1. MASTER AND SERVANT — PERMITTING TESTIMONY BEFORE COMMISSION AS TO INCOMPETENT TESTIMONY BEFORE ARBITRATOR DOES NOT WAIVE OBJECTION.

Permitting an injured employee to testify without objection on the hearing before the commission that he had testified before the arbitrator that he had lost 50 per cent. of his earning capacity does not waive the employer's objection to that testimony, when given before the arbitrator.

(For other cases, see Master and Servant, Dec. Dig. § 415.)

3. MASTER AND SERVANT — ACTUAL EARNINGS SINCE INJURY NOT CONCLUSIVE AS TO IMPAIRMENT OF CAPACITY.

The actual earnings of an injured employee in other employment since receiving his injury is not conclusive on the commission as to the extent of the impairment of earning capacity, but other matters may also be considered by it.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

4. MASTER AND SERVANT—EVIDENCE OF INABILITY TO DO CERTAIN WORK DOES NOT DETERMINE PERCENTAGE OF IMPAIRMENT.

Testimony by defendant that he was unable to lift as much as before, that his hip was stiff in walking, and that his back was stiff and pained him, though competent to be considered in determining his present earning ability, is insufficient to enable the commission to fix therefrom the amount of the impairment of his earning capacity.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

5. MASTER AND SERVANT — FINDING OF IMPAIRMENT OF CAPACITY MUST BE BASED ON COMPETENT TESTIMONY.

The Industrial Commission is to be allowed latitude in determining from the condition of the applicant and the circumstances of his employ-

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ment subsequent to his injury what reduction in his earning capacity was occasioned by the injury, but the award must rest on competent legal evidence, and not on conjecture or surmise.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

6. MASTER AND SERVANT — EVIDENCE HELD NOT TO SUSTAIN FINDING OF IMPAIRMENT OF EARNING CAPACITY.

Evidence that an employee, formerly earning $26.53 per week, since his injury had earned $18 a week, without other competent evidence as to impaired earning capacity, except his inability to do certain work, is insufficient to sustain a finding by the Industrial Commission that he was capable of earning after his injury only $14 a week.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

Error to Circuit Court, Franklin County; C. H. Miller, Judge.

Proceedings under the Workmen's Compensation Act by William Tucker, employee, for compensation for injuries, opposed by the Old Ben Coal Corporation, employer. Award by the Industrial Commission of compensation for partial permanent disability was confirmed by the circuit court, and the employer brings error. Reversed and remanded, with directions.

Hart & Hart, of Benton, for plaintiff in error.

A. W. Kerr, of Chicago, and J. B. Lewis and A. C. Lewis, both of Harrisburg, for defendant in error.

STONE, J. Defendant in error, William Tucker, on the 12th day of January, 1919, while employed in plaintiff in error's mine laying a switch on the main line track, received an injury to his back. It is stipulated that the parties were operating under the Workmen's Compensation Act (Hurd's Rev. St. 1919, c. 48, §§ 126–152i); that the injury arose out of and in the course of Tucker's employment; that he was incapacitated from doing any work from the 12th of January, 1919, the date of the injury, until the 24th of March, 1919, at which time he secured employment in a garage; and that his average weekly wage prior to the injury was $26.53—leaving nothing in dispute but the extent of his injuries and the amount of compensation to be paid therefor. A hearing was had before the arbitrator July 7, 1919. The petitioner was awarded $14 per week for a period of 9 weeks for temporary total incapacity for work. A petition for review of the decision of the arbitrator was filed with the Industrial Commission by Tucker on the ground that the amount of the award was not such as is provided by law. Hearing upon review before that body was held on the 30th day of October, 1919. The commission found that the average annual earnings of the applicant during the year preceding the accident were $1,380 and the average weekly wage $26.53. It also found that the applicant was temporarily totally incapacitated for work for a period of 10 weeks. and awarded compensation at the rate of $14 per week for and during 9 weeks. He was also awarded an additional compensation for a period of 407 weeks, or until the disability ceased, not to exceed 407 weeks, the sum of $7.20 per week, or 60 per cent. of the difference in his earning capacity before and after the injury, he having two children under the age of 16. This finding was confirmed by the circuit court, and the case was brought to this court on writ of error.

It is not contended that defendant in error did not sustain partial permanent disability through injury to his back. The only contention on the part of plaintiff in error is that the compensation awarded for partial permanent disability is excessive. It contends that the only testimony with

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reference to partial permanent disability was that given by defendant in error, over the objection of plaintiff in error, that he had lost 50 per cent. of his personal efficiency as a worker in coal mines, and that there is no other testimony to substantiate this claim nor to substantiate the award of the commission of $7.20 per week for a period of 407 weeks; that the measure of compensation in cases of partial permanent disability is the difference between the earnings of the injured person before the injury and what he is able to earn at some other suitable pursuit after the injury, and not the difference in his ability to labor.

Defendant in error testified that he was able to earn about $18 or $20 per week since his injury, and that he had earned the sum of $518. The record is not clear as to whether or not he testified that he had earned that sum between the time he went to work on March 24, 1919, and October 30 of that year —the date of the hearing before the Industrial Commission—or whether, as contended by plaintiff in error, he earned that amount after the hearing before the arbitrator on July 7. It is evident from all his testimony that he referred to the amount he had earned since beginning work on March 24. He testified that he was being paid for his work in the garage the sum of 50 cents an hour, and that he worked not to exceed three-fourths of the time. Computation would show that at that rate the sum of $518 earned would more nearly approximate a period of service from March 24 to October 30.

[1, 2] The applicant was allowed to testify before the arbitrator, over objection, that he had lost 50 per cent of his earning capacity. On the hearing before the commission he was asked, without objection, if he had testified before the arbitrator that he had lost 50 per cent of his earning capacity. Defendant in error now contends that, not having objected to this testimony before the commission, plaintiff in error is precluded from urging objection to it now. His testimony before the commission in this regard was evidently no more than a reference to the testimony before the arbitrator, and we are of the opinion that the objection was properly in the record. It has been many times decided that testimony of this character on the part of the applicant is not competent.

[3] But it is urged on the part of the defendant in error that even admitting this to be incompetent testimony, there is sufficient competent testimony in the record to sustain the finding as to his present earning capacity. As we have seen, the record shows that prior to the injury the defendant in error earned an average of $26.53 per week. The Industrial Commission fixed his present earning capacity at $14.25, which is $12.42 less than he was able to earn prior to the accident. It is evident that this could not have been based upon the testimony concerning what the defendant in error has actually earned since his injury, as that testimony showed he earned $18 per week after the injury. Under the rule in this state, however, the commission is not limited to evidence of the amount actually earned after the injury. Other matters than the amount earned may be considered. O'Callaghan v. Industrial Com., 290 Ill. 222, 124 N. E. 811.

[4, 5] The testimony showed that there has been a reduction in the ability of the defendant in error to work. He testified that he is unable to lift more than 50 pounds, whereas before his injury he could lift 200 pounds; that his left hip seems stiff in walking; that his back is stiff and pains him if he attempts to lift anything from the floor; and that in his employment in the garage others do the lifting in connection with his work. This testimony is competent to be considered in the matter of determining the present earning ability, but there is nothing in the testimony nor in the record which shows, or tends to show, the quantum of the reduction, aside from the testimony of the defendant in error that his earning capacity has been reduced 50 per cent. While, as we have stated, the amount actually earned since the injury is not conclusive in the matter of

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determining the reduction of earning capacity, yet where it is the only competent evidence in the record tending to show the extent of the reduction in earning capacity it is error on the part of the commission to ignore it. While the commission is to be allowed latitude in determining from the condition of the applicant and the circumstances of his employment subsequent to his injury what reduction, if any, in his earning capacity has taken place, yet in determining that reduction the award must rest on competent legal evidence, and not on conjecture or surmise. Peoria Cordage Co. v. Industrial Board, 284 Ill. 90, 119 N. E. 996, L. R. A. 1918E, 822; Savoy Hotel Co. v. Industrial Board, 279 Ill. 329, 116 N. E. 712; Goelitz Co. v. Industrial Board, 278 Ill. 164, 115 N. E. 855.

[6] Considering defendant in error's evidence aside from his incompetent statement that his earning capacity has been reduced 50 per cent., and taking his average weekly wage before the injury as $26.53, as stipulated, it will be seen that his testimony that after the injury he is receiving the sum of $18 per week, considered with his description of his physical condition since his injury, does not form a sufficient basis in legal evidence for the finding of the commission that his present earning capacity has been reduced to $14.25 per week. We are of the opinion, therefore, that the finding of the Commission is not justified by the evidence.

The judgment of the circuit court confirming the award will be reversed, and the cause remanded to that court, with directions to remand the same to the Industrial Commission for a finding in accordance with the views herein expressed, or for the taking of further testimony, if the defendant in error be so advised.

Reversed and remanded, with directions.

WASSON COAL CO. v. INDUSTRIAL COMMISSION ET AL.
(No. 13656.)

(Supreme Court of Illinois. Feb. 15, 1921.)

129 Northeastern Reporter, 786.

1. MASTER AND SERVANT — COMPENSATION AWARD CANNOT REST ON CONJECTURE.

In a proceeding under the Workmen's Compensation Act, the burden is on the applicant to prove by direct and positive evidence, or by evidence from which such inference can be fairly drawn without being based on mere conjecture, that the accident arose out of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT — EVIDENCE HELD TO SUPPORT COMPENSATION AWARD FOR DEATH FROM ELECTROCUTION.

In a proceeding under the Workmen's Compensation Act for the death of a miner, evidence as to his physical condition resulting from influenza and of his proximity to an insulated electric wire carrying a deadly current *held* to support an award on the theory that his sudden death resulted from contact with the electric wire, and not from heart failure due to the disease.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

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Error to Circuit Court, Saline County; A. W. Lewis, Judge.

Proceeding under the Workmen's Compensation Act (Laws 1913, p. 335) by J. W. Grigsby, administrator of Frank Smith, deceased, for an award for decedent's death, opposed by the Wasson Coal Company, employer. Compensation was awarded by an arbitrator, and confirmed by the Industrial Commission, and the award affirmed by the circuit court upon certiorari, and the employer brings error. Affirmed.

W. C. Kane, of Harrisburg, for plaintiff in error.

A. W. Kerr, of Chicago, and J. B. Lewis, and A. C. Lewis, both of Harrisburg, for defendants in error.

FARMER, J. Frank Smith, a miner employed by the Wasson Coal Company to dig and load coal in its mine, died in said mine November 28, 1918. His administrator made application foı compensaton on the ground that his death was due to accidental injuries arising out of and in the course of the employment. Compensation was awarded by an arbitrator which was confirmed by the Industrial Commission on review. The cause was then removed to the circuit court by certiorari, and the award was by the judgment of the circuit court affirmed. The record is brought here by writ of error.

The only question presented for our determination is whether the death arose out of the employment. Smith died very suddenly in an entry of the mine in the vicinity of his working place. No one saw what caused his death. The light on his cap was seen by a trapper boy 16 years old, who was 70 or 80 feet distant from him. The light suddenly went out, and at the same time the boy heard a noise or struggle, and on going to the place where he heard it, he found Smith lying on the ground in the entry about opposite the mouth of room 11. He hallooed, and other parties came to the place very quickly. Smith was not then dead, but never spoke, and after a few gasps for breath life became extinct. Defendant in error's contention was and is that deceased came in contact with a live electric wire and was thereby killed. Plaintiff in error's contention is that the electric wire had no connection with his death, but that he died from heart failure, resulting from a recent attack of the "flu."

The roof of the mine at the place where Smith's body was found was about 6 feet high. Two uninsulated wires were strung on poles in the entry for furnishing power to the machines. One wire was positive and the other negative. The positive or live wire was about 6 inches below the roof and the dead wire about a foot lower. They were fastened to posts 11 or 12 feet apart. When Smith was first found he was lying on his face, with his miner's cap bill down over his eyes and nose. His head was a foot or two from the rail of the track, which was 7 or 8 feet from the rib. Smith was about 6 feet tall, and his feet extended toward the side of the entry in front of the mouth of room 11. There were some abrasions on his nose or chin. There was no indication of a burn. The proof shows deceased had not worked in the mine for a few days prior to his death.

Everett Foster, who was also employed in the mine testified he saw Smith standing directly in front of room 11 three or four minutes before his death. Witness was room boss. Smith was looking for a driver. Witness asked him where he had been, as he had been off several days. Smith replied he was not able to work that day; that he was feeling awfully bad and was dizzy. The witness passed on, and had gone about 250 feet when he heard the trapper boy hallooing, and went back to where he had seen Smith. When witness reached him he was lying on the ground at the same place where he had talked to him, with his head on the lap of a man named Johnson, and was dead. Witness testified

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that when Smith told him he was not feeling well he was pale, and did not look to be strong. Another witness, Walker, who worked in the same territory Smith did, testified that the morning of the day of Smith's death he was walking with him in the mine, and Smith said he was feeling bad and could not walk very fast; that he was just getting out of bed with the "flu." Marshall, a mine examiner, testified he saw Smith in the mine the morning of his death. He was in room 12, and told witness he felt dizzy. Witness noticed that when he stooped down to get a pick he did not seem to find where the pick was lying, and reached to the side of it, like he could not see. "He looked funny out of his eyes." Hicks, the boy trapper referred to, testified he saw Smith as he was going to work the day of his death. He told witness he had been sick, and that he helped dig a grave the day before; that he would load a car or two, or maybe three, and then go home; that he was sick and not able. He seemed like he felt bad. He was working in room 12, and had a car loaded, and told witness to tell the driver. "He had been out some before this day; said he felt bad."

[1] The testimony does not show how long Smith had been sick with the "flu," nor how violent the attack was. The period of his absence from the mine is referred to as "several days," "some days," and "a few days." Medical witnesses testified the effects of the "flu" were impairment of the nervous system, heart, respiration, and circulation, and where the attack was severe, especially if complicated with pneumonia, was liable to produce paralysis of the heart and sudden death. These results did not usually follow a slight attack of "flu." One doctor testified he had had one case of such sudden death where the attack was slight—not complicated with pneumonia—but that such a result is not likely to occur, and is an exception to the rule. The same doctor testified a man who had been weakened with the "flu" would be more susceptible to an electric current. This testimony, together with the fact that there was no indication of a burn on the body of Smith, is the basis of plaintiff in error's contention that the death did not arise out of the employment. The burden was on the applicant to prove by direct and positive evidence, or by evidence from which such inference can be fairly drawn, without being based on mere conjecture or surmise, that the accident arose out of the employment. Wisconsin Steel Co. v. Industrial Com., 288 Ill. 206, 123 N. E. 295. In Peterson & Co. v. Industrial Board, 281 Ill. 326, 117 N. E. 1033, it was said:

"Liability cannot rest upon imagination, speculation, or conjecture, upon a choice between two views equally compatible with the evidence, but must be based upon facts established by evidence fairly tending to prove them."

To the same effect are Savoy Hotel Co. v. Industrial Board, 279 Ill. 329, 116 N. E. 712, and Mepham & Co. v. Industrial Com., 289 Ill. 484, 124 N. E. 540.

[2] Defendant in error contends the evidence fairly brings the case within the above rule, as the facts and circumstances proved fairly tend to show that the death resulted from accidental contact with a live electric wire. As we have said, two uninsulated wires were strung along the entry next to the rib in front of the mouth of room 11. The track in the front part of that room had been removed, and it was no longer used as a haulage way. The usual way to get to the face of the coal in rooms 11 and 12 was through room 12, but there was no gob or obstructions at the mouth of room 11, and one could get to the face of the coal through that room. The upper wire across the mouth of that room, in front of which Smith's body was found, was a live wire, and was about six inches below the roof. It carried a voltage of 120 to 275. The testimony fairly showed that electrocution is not always indicated by a burn; that electrocution sometimes occurs without leaving a mark on the body. The

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trapper boy testified he was at the body of Smith within two or three minutes after he heard the noise, and saw Smith's miner's lamp disappear; that he looked up and one of the electric wires was vibrating, but he could not remember which one. There was no testimony that the abrasions on the deceased's face were burns, but some of the medical and other testimony was that the marks had been examined by the witnesses, and might have been made by the electric wire. Two of the witnesses who were at the body before life was extinct testified it was damp. In view of Smith's condition of health and dampness of his body it is contended he was very susceptible to an electric current. He was about 6 feet tall, which would bring his face about to the height of the live wire. One of the wires was vibrating when the trapper boy reached the body, which would indicate that it had just been hit by something, and there was nothing else that could have caused the vibration, and no one was there but Smith. One witness testified for plaintiff in error that he put his bare hand on the live wire and received no severe shock; that the wire felt warm, and he could tell it carried an electric current. The proof further was to the effect that some men are much more susceptible to an electric current than others, and a current which may be fatal to one would not be to another.

As tending to discredit the testimony of the trapper boy that the wire was vibrating when he reached the body, there was testimony for plaintiff in error that fine dust had settled on the wire and not been disturbed; also that a test had been made as to how long the wire would vibrate when struck, and that it would not vibrate more than about a minute. We do not regard that testimony of much importance. The dust that might adhere to a wire would not be reliable evidence that the wire had not vibrated, for it would hardly be sufficient in quantity to be disturbed in that manner.

No autopsy was held, and it may be admitted that the proof does not show with absolute certainty just what caused the death. The undisputed fact remains that Smith did suddenly die from some cause. There was at the place of his sudden death and within easy contact by him an electric wire carrying a current which is not disputed to have been of sufficient voltage to cause death. We have above stated the substance of the testimony relating to the effects of "flu" and the possibility of sudden death resulting from it. To our minds that death resulted from that cause is much more remote and less probable than that it resulted from deceased's contact with the electric wire. We do not think it can be said the two views are equally compatible with the evidence. The cause of death need not be shown by positive and direct testimony, but it is sufficiently shown if the facts and circumstances proved are such that on the whole evidence the reasonable inference to be drawn is that it arose out of the employment. Smith-Lohr Coal Co. v. Industrial Com., 286 Ill. 34, 121 N. E. 231. It has been repeatedly held that we cannot weigh the evidence and determine upon which side it preponderates, but it seems to us to require more conjecture and speculation to say from the testimony that the death did not result from electrocution than to say it was so caused.

The judgment is affirmed.

Judgment affirmed.

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WESTERN COAL & MINING CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13611.)

(Supreme Court of Illinois. Feb. 15, 1921.)

129 Northeastern Reporter, 779.

1. MASTER AND SERVANT — INJURY WHILE GOING TO CHANGE CLOTHES HELD TO "ARISE OUT OF AND IN COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT.

A miner, who had arrived on employer's premises and was killed while going toward the washhouse to change clothes preparatory to entering mine, *held* killed as the result of an accident "arising out of and in the course of the employment" within Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE NO BAR TO COMPENSATION.

Contributory negligence is not a bar to an award under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 356.)

Error to Circuit Court, Williamson County; D. T. Hartwell, Judge.

Proceedings under the Workmen's Compensation Act by Liuga Sergi, administratrix of the estate of Frank Sergi, for compensation for her decedent's death, opposed by the Western Coal & Mining Company, employer. Award by the Industrial Commission confirmed by the circuit court, and the employer brings error. Affirmed.

Whitnel & Whitnel and Edgar P. Holly, all of East St. Louis, for plaintiff in error.

George R. Stone, of Marion, for defendant in error.

DUNN, J. The Industrial Commission made an award of $4,000, payable in weekly installments, as compensation for the accidental death of Frank Sergi, against his employer, the Western Coal & Mining Company. The circuit court of Williamson county confirmed the award, and on petition of the employer a writ of error was awarded to review the judgment of the circuit court.

The death was caused by a train of the Missouri Pacific Railroad Company in the switchyards of the plaintiff in error, and plaintiff in error claims it is not liable because the accident was not one occurring in the course of or arising out of the employment of the deceased. The railroad company maintained four tracks on the premises of the mining company. The plaintiff in error's hoisting shaft is about two miles north of the village of Bush, and the tracks, which run south on the east side of the shaft and are on the plaintiff in error's premises, connect the mine with the village of Bush. A passenger train leaving Bush at 6:20 every morning when the mine is in operation and arriving at the mine about 6:45, when the miners begin going down into the mine, was operated by the railroad company for the transportation of the miners from Bush. The fare was 10 cents, and any person could use the train upon payment of the fare. The miners from Bush sometimes used the train and sometimes walked to the mine on the railroad track, though there was

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a highway on the east side of the railroad. The track was the shortest, driest, and best walking. Sergi, the deceased, was a loader in the mine and lived about 1½ miles south and 250 or 300 yards east of the shaft. Sometimes he rode to his work on the train and sometimes he walked. When he walked he usually walked on the railroad track. On March 19, 1919, the train ran as usual and Sergi was run over and killed by it at 6:45 in the morning, at the place where the train was accustomed to stop to discharge its passengers, about 685 feet south of the shaft. The evidence does not disclose how he arrived at that place. The train consisted of two cars pulled by an engine, which was running backward. Sergi was found under the middle of the car next to the engine, with his right hand and left leg cut off, and died immediately. He was dressed in his ordinary clothes—not those which he wore into the mine—and had his dinner bucket and a pick head, an instrument used in mining coal, with him. The washhouse where the men change their clothes before going into the mine was about 300 yards from the place of the accident and between it and the shaft.

[1, 2] It is fairly to be inferred from the evidence that the deceased was on his way to his work. In Fairbank Co. v. Industrial Com., 285 Ill., 11, 120 N. E. 457, it is said that an injury occurs in the course of employment when it occurs during the period of employment at a place where the employee may reasonably be and while he is fulfilling the duties of his employment, doing something incidental to it, and that the question whether the employee in going to and returning from his place of employment is in the line of his employment depends upon the particular circumstances of each case. The going to work was necessarily incident to the deceased's contract of employment and was necessary to its performance. He had arrived on the premises of his employer and was engaged in the course of his employment in going toward the washhouse preparatory to entering the mine. There is reason to suppose that the accident by which he lost his life, was a risk growing out of the nature of his employment. The premises of the employer where the deceased had to pass in going to his work were occupied by railroad tracks on which trains of cars were operated. The causal connection between this condition and the resulting injury is apparent. The deceased might reasonably be crossing thetrack or walking along it going to the washhouse to change his clothes before going to work, and in so doing might reasonably be regarded as doing something incidental to his employment. He was not compelled to use this track to get to the washhouse, but he with all the other men was permitted to use it, and the railroad tracks had apparently long been used habitually for walking to and from the mine—in fact, from the commencement of its operation. In an action at common law such use of the tracks might have constituted contributory negligence, but contributory negligence is not a bar to an award under the Workmen's Compensation Act (Hurd's Rev. St. 1919, c. 48, §§ 126-152i).

The cases of Schweiss v. Industrial Com., 292 Ill. 90, 126 N. E. 566, and Wabash Railway Co. v. Industrial Com., 294 Ill. 119, 128 N. E. 290, sustain the finding that the accident occurred in the course of and arose out of the employment of the deceased. In the latter case it is said that if an employee is accidentally injured on the premises of his employer in going from his work, leaving within a reasonable time and following the customary or permitted route off the premises, the accident would be held to arise out of the employment. The same rule applies, of course, to an employee going to his work, for going to work is an incident as necessary to employment as quitting.

[3, 4] The plaintiff in error contends that there was no legal or competent evidence of the marriage of the deceased to the claimant. She testified that she and the deceased were married in Wyoming 10 or 11 years ago and had lived together ever since as husband and wife.

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having five children born to them. There was a marriage license and she got a certificate, but it was blown away in the cyclone at Bush in 1912. There was no evidence to the contrary. In civil actions, except the action for criminal conversation, record or direct evidence of marriage is not required, but marriage may be shown by reputation, the testimony of witnesses, or by circumstances. Lowry v. Coster, 91 Ill. 182; Conant v. Griffin, 48 Ill. 410.

Judgment affirmed.

BUCKLEY v. INLAND STEEL CO. (No. 10961.)

(Appellate Court of Indiana, Division No. 1 Feb. 23, 1921.)

129 Northeastern Reporter, 860.

MASTER AND SERVANT—COMPENSATION AWARD SUPPORTED BY EVIDENCE FINAL.

In a proceeding under the Workmen's Compensation Act, a finding and award of the Industrial Board will not be disturbed where there is competent evidence to sustain it.

(For other cases, see Mastor and Servant, Dec. Dig. §417[7].)

Appeal from Industrial Board.

Proceeding by Daniel Buckley under the Workmen's Compensation Act (Laws 1915, c. 106), opposed by the Inland Steel Company, the employer. There was an award, and an appeal is taken. Award affirmed.

T. Joseph Sullivan, of Whiting, for appellant.

Wm. J. McAleer, Francis J. Dorsey, and Gerald A. Gillett, all of Hammond, for appellee.

REMY, C. J. The only question involved in this appeal is the sufficiency of the evidence. There is competent evidence to sustain the finding and award of the Industrial Board. The award is affirmed.

MILLER ET AL. v. BEIL ET AL. (No. 10759.)

(Appellate Court of Indiana, Division No. 1., Jan. 28, 1921.)

129 Northeastern Reporter, 493.

1. MASTER AND SERVANT—FINDING EPILEPTIC'S DROWNING TO BE ACCIDENT ARISING OUT OF EMPLOYMENT AUTHORIZED.

Where an epileptic employe hauling water in a tank on which he had to stand while filling it was drowned in the partially filled tank and there was no direct evidence that he fell in as a result of a fit, a finding that

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the accident arose out of the employment was authorized and not subject to the objection that from the evidence it conclusively appeared that his death was the result of disease, within Workmen's Compensation Act, § 76, cl. (d).

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—ACCIDENT ARISING OUT OF EMPLOYMENT QUESTION OF FACT FOR INDUSTRIAL BOARD.

Whether or not an employe's death was the result of an accident arising out of the employment a question of fact for the Industrial Board.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act for the death of Carl Beil, employe, by Frank J. Beil and Charlotte E. Beil, opposed by Jacob Miller and John Young, employers. Compensation awarded by the Industrial Board, and the employers appeal. Judgment affirmed.

Superseding former opinion, 127 N. E. 567.

REMY, J. Appellants were in the business of threshing wheat and other grain. Steam power was used, and appellants had in their employ at the time one Carl Beil, whose duty it was to haul water from a nearby reservoir, in a water tank drawn by horses. The water tank was made of wood, and was 7½fee long, 3 feet wide, and 28 inches deep, with an opening in the top 23 inches square. By the side of the opening, and fastened to the top of tank, was a pump. When the tank was being filled, the water was pumped through a hose which connected the pump with the reservoir. In operating the pump it was necessary for Beil to stand on the top of the tank near the opening. On the morning of July 12, 1919, and a short time after Beil in the course of his employment had gone to get water, the tank, partially filled with water, was found at the reservoir; and in the tank was the lifeless body of Beil. The employe who thus lost his life was subject to epilepsy.

Appellees, who were the dependents of Beil, made application to the Industrial Board for compensation, and, upon hearing the evidence showing the above facts, the board found that said employee died as the result of an injury received by him by reason of an accident arising out of and in the course of his employment, and made an award.

[1] Appellants have assigned as error that the findings and award are not sustained by sufficient evidence, and are contrary to law. It is urged by appellants that there is no evidence to show that the death of the employee was the result of an injury arising out of his employment; but that "from all the evidence in the case it appears conclusively that the death was the result of a disease to which deceased was subject; and that, under clause (d) of section 76 of the Workmen's Compensation Act (Acts 1915, p. 416), the dependents are not entitled to compensation.

There is no direct evidence that appellee's decedent fell in the tank as a result of an epileptic fit, and we cannot say that the Industrial Board found that appellee's decedent, at the time of his death, fell as a result of the disease of epilepsy. There is authority, however, which would support the award even if the board had so found. Carroll v. What Cheer Stables Co., 38 R. I. 421, 96 Atl. 208, L. R. A. 1916D, 154, Ann. Cas. 1918B, 346; Wicks v. McDowell & Co., 2 K. B. 225, 2 Ann. Cas. 732; Vulcan Detinning Co. v. Industrial Commission, 295 Ill. 141, 128 N. E. 917. The theory of the court in each of these decisions is that an epileptic fit might not have caused injury or death, except for the fact that the

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work of the employee required him, at the time, to be at the particular place where he fell. It is stated by the court in the Wicks Case, above cited, that—

An accident none the less arises out of the employment because its remote cause is to be found in the employee's physical condition."

[2] The question as to whether or not the death of the employee was the result of an accident arising out of his employment was a question of fact for the Industrial Board. American Hominy Co. v. Davis. 126 N. E. 703. There was some evidence to support the finding.

Judgment affirmed.

SHELMADINE v. CITY OF ELKHART ET AL. (No. 10930.)

(Appellate Court of Indiana, Division No. 1. Feb. 18, 1921.)

129 Northeastern Reporter, 878.

3. MASTER AND SERVANT — POLICEMAN HELD A "PUBLIC OFFICER," AND NOT AN "EMPLOYEE," WITHIN COMPENSATION ACT.

One appointed as policeman of the city of Elkhart by the board of metropolitan police commissioners in accordance with the Metropolitan Police Act of 1897 (Laws 1897, c. 59), as amended by the acts 1907 (Laws 1907, c. 175), 1909 (Laws 1909, c. 56), and 1911 (Laws 1911, c. 75), was a "public officer," and not an "employee," of the city, as defined by Workmen's Compensation Act, § 76, cl. "b."

(For other cases, see Master and Servant, Dec. Dig. § 364.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

Appeal from Industrial Board.

Proceeding for compensation under the Workmen's Compensation Act by Lettie M. Shelmadine against the City of Elkhart and the State of Indiana. From an order of the Industrial Board denying compensation, claimant appeals. Order affirmed.

Edward B. Zigler and Walter R. Arnold, both of Elkhart, for appellant.

Verne G. Cawley, of Elkhart, and Ele Stansbury, of Indianapolis, for appellees.

REMY, C. J. This is an appeal from an order of the Industrial Borrd denying compensation to appellant for her husband's death, alleged to have been the result of an accident which arose out of and in the course of his employment as policeman. As stated in the order of the Board, compensation was denied on the ground that appellant's decedent was "at the time of his injury and death a public officer, and was not an employee of the city of Elkhart."

That an employer, as defined by clause (a) of section 76 of the Workmen's Compensation Act (Acts 1919, p. 175), includes municipalities. is not in dispute. Nor is it controverted that appellant's decedent, at the time he received the injuries which resulted in his death, was in the discharge of his duties as policeman. That fact was at the hearing stipulated by the parties. The sole question for our consideration is whether

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a policeman appointed by the board of metropolitan police commissioners of the city of Elkhart is an employee of the city within the meaning of the term "employee" as used in the Workmen's Compensation Act of this state.

[1] The court will take judicial notice that the city of Elkhart, at the time of the injury and death of appellant's decedent, was a city having a population of between 10,000 and 35,000, and that its police force was established under, and regulated by, the act known as the Metropolitan Police Act of 1897 (Laws 1897, c. 59), as amended by the acts of 1907 (Laws 1907, c. 175), 1909 (Laws 1909, c. 56), and 1911 (Laws 1911, c. 75). Burns' Ann. St. 1914, §§ 9033, 9046. This act provides for a board of metropolitan police commissioners with power to appoint policemen and fix their compensation within certain limitations; such appointees to serve during good behavior. The act also fixes the powers and duties of policemen so appointed.

[2] A public officer may be defined as a position to which a portion of the sovereignty of the state attaches for the time being, and which is exercised for the benefit of the public. The most important characteristic which may be said to distinguish an office from an employment is that the duties of the incumbent of an office must involve an exercise of some portion of the sovereign power. Groves v. Barden, 169 N. C. 8, 84 S. E. 1042, L. R. A. 1917A, 228, Ann. Cas. 1917D, 316.

It is apparent that the position of one appointed as a policeman by the board of metropolitan police commissioners in accordance with the provisions of said act of 1897 comes within the above definition, and is a public officer. See Hopewell v. State, 22 Ind. App. 489, 54 N. E. 127.

[3] It is urged by appellant, however, that even if it be conceded that appellant's decedent was, at the time he met his death, a public officer, and was discharging his duties as such, still he was an employee of the city within the meaning of the word "employee as used in the Indiana Workmen's Compensation Act. This contention of appellant's is without merit, as will be seen by an examination of the definition of the word "employee" as found in clause (b) of said section 76 of said act, which clause is as follows:

" 'Employee' shall include every person, including a minor, lawfully in the service of another under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation or profession of the employer."

It is clear that the term "hire" as used in this definition does not relate to public officers elected or appointed, and whose duties are fixed by law. Appellant's decedent, being a public officer whose duties were specifically prescribed by statute, was, under his oath of office, obligated faithfully to perform his official duties, and was subject to impeachment for failure so to do; but he was not the servant or employee of the city under any "contract of hire" either express or implied. Little v. City of Richmond, 12 N. C. C. A. 1191; People ex rel. v. Sturgis, 78 App. Div. 460, 79 N. Y. Supp. 969.

The case of Frankfort General Ins. Co. v. Conduitt, 127 N. E. 212, does not, as assumed by appellant, decide the question presented by this appeal. In that case this court held that an insurance carrier was estopped to deny that a city fireman was an employee of the city within the meaning of that term as used in the Workmen's Compensation Act, because it had, by its policy of insurance issued to the city, intended to, and did, cover such fireman, and had accepted and retained the premium on said policy.

Appellant has cited some decisions of the courts of appeal of other states which hold that compensation may be allowed to policemen or their dependents. These decisions can be no authority on the question present-

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ed by this appeal, for the reason that the compensation acts of those states contain special provisions not found in the Workmen's Compensation Act of this state.

The order of the Industrial Board is affirmed.

REPUBLIC IRON & STEEL CO. v. MARKIOWICZ ET AL.
(No. 10915.)

(Appellate Court of Indiana, Division No. 2. Feb. 4, 1921.)

129 Northeastern Reporter, 710.

MASTER AND SERVANT—COMPENSATION ALLOWABLE FOR DEATH FROM TUBERCULOSIS, LATENT UNTIL INJURY.

Where there was ample evidence that a servant's personal injury resulted in weakened vitality and resistance, so that latent tuberculosis was aggravated and accelerated into active tuberculosis from which he died, his dependents were entitled to compensation under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

Appeal from Industrial Board.

Proceeding by Emilia Markiowicz and others, dependents of Mike Markiowicz, deceased, under the Workmen's Compensation Act (Laws 1915, c. 106) for an award, opposed by the Republic Iron & Steel Company, employer. From an award of the Industrial Board, the employer appeals. Award affirmed.

Fred C. Crumpacker and Edwin H. Friedrich, both of Hammond. for appellant.

A. P. Twyman and R. M. Royce, both of East Chicago, for appellees,

NICHOLS, J. Appellees are dependents of Mike Markiowicz, deceased. The Industrial Board found that the deceased was in the employment of appellant on February 18, 1918, at a weekly wage of $24, and that on said date he received a personal injury by accident arising out of and in due course of his employment, as a result of which he died December 28, 1918. There was an award accordingly for appellees. Appellant contends that the evidence does not support the finding and award, while appellees contend that the evidence is sufficient. The deceasd was injured by an explosion which enveloped him with steam and gas, and struck him with debris, injuring his head, his hip, and side. He was confined to his bed for a month, and received compensation for total disability, 57 days. He was apparently a healthy man up to the time of his injury, but appellees' physician testified that there was evidence of chronic disease, and the examination, his cough, and the history showed tuberculosis of the lungs. He was never well after the accident. The physician testified that the history would indicate that his trouble was the result of his injury. There was ample evidence that the injury resulted in a weakened vitality and resistance, and that latent tuberculosis was aggravated and accelerated into active tuberculosis from which he died. Without going further into the evidence, we hold that it was sufficient to

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sustain the finding and award. In re Bowers, 65 Ind. App. 128, 116 N. E. 842; Sallie Robinson v. National Life & Accident Insurance Co., 129 N. E. 707 (decided in this term).

The award is affirmed.

STANDARD COAL CO. v. GALLAGHER. (No. 10937.)

(Appellate Court of Indiana, Division No. 2. Jan. 27, 1921.)

129 Northeastern Reporter, 482.

MASTER AND SERVANT — COMPENSATION AWARD SUPPORTED BY SOME EVIDENCE CONCLUSIVE.

An award of compensation under the Workmen's Compensation Act will not be disturbed on appeal on the ground that the evidence is insufficient to support it, where there is some evidence to support it.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from Industrial Board.

Proceeding by Daniel Gallagher under the Workmen's Compensation Act (Laws 1915, c. 106) to obtain compensation for personal injuries, opposed by the Standard Coal Company, the employer. From an award of compensation, the employer appeals. Award affirmed.

Will H. Hays, Hinkle C. Hays, Alonzo C. Owens, W. Paul Stratton, and George W. Buff, all of Sullivan, for appellant.

John A. Riddle, of Vincennes, for appellee.

NICHOLS, J. This was a proceeding by appellee against appellant before the Industrial Board for compensation for an injury alleged to have been received while in appellant's employ, January 29, 1920. Appellee alleged that while drilling a hole he struck his hand against coal causing an injury which resulted in blood poison. There was an award by the full board of compensation at the rate of $13.20 per week, not to continue beyond 500 weeks, and not to exceed $5,000. The error assigned is that the award of the full board is contrary to law, under which assignment it is contended that the evidence is insufficient to support the award. But there is some evidence to support the award, and it will therefore not be disturbed on appeal. This has been many times decided. Two late authorities are Alexander Box Co. v. Cutshall, 127 N. E. 287; Board of Commissioners of Greene County v. Shertzer, 127 N. E. 843.

The award is affirmed, and by virtue of the statute the amount is increased 5 per cent.

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COX v. KANSAS CITY REFINING CO. (No. 22942.)

(Supreme Court of Kansas. Feb. 12, 1921.)

195 Pacific Reporter, 863.

(Syllabus by the Court.)

1. MASTER AND SERVANT — EPILEPTIC'S INJURY BY FALL DURING WORK HELD "IN COURSE OF EMPLOYMENT," BUT NOT ONE "ARISING OUT OF EMPLOYMENT," SO AS TO BE COMPENSABLE.

A workman who had long been afflicted with periodical recurrences of epilepsy was seized with an epileptic fit in the course of his employment in a refining plant, but such epileptic fit was not traceable to his work, nor did his employment contribute in any measure toward bringing on such affliction. During his epileptic seizure the workman became unconscious and fell against some hot pipes and severely injured his back. *Held*, that the accident and consequent injury did not arise out of his employment but out of his affliction, and compensation for his injuries cannot be awarded against his employer.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(Additional Syllabus by Editorial Staff.)

2. MASTER AND SERVANT — "COURSE OF EMPLOYMENT" CONSTRUED.

The phrase "in course of employment" as used in the Workmen's Compensation Act relates to the time, place, and circumstances under which the accident occurred, and means that it happened while the employee was at work in his employer's services.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Appeal from District Court, Wyandotte County.

Proceedings under the Workmen's Compensation Act by W. C. Cox for compensation for injuries, opposed by the Kansas City Refining Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions.

A. L. Berger, of Kansas City, Kan., and J. W. Rogers, of Kansas City, Mo., for appellant.

W. J. McCarty and David F. Carson, both of Kansas City, Kan., for appellee.

DAWSON, J. This was an action for compensation for an injury sustained by plaintiff while in the defendant's employment. Judgment was entered for plaintiff, and the principal contention in this appeal is whether the injury sustained by plaintiff was a "personal injury by accident arising out of and in the course of employment," within the terms of the Workmen's Compensation Act (Gen. St. 1915, §§ 5896–5942).

The plaintiff testified that he was a common laborer, 49 years old, and that he was subject to epileptic fits, and had been afflicted with such fits about once a month ever since he was 21 or 22 years of age. He had been employed at the defendant's refinery for a few weeks. During that time on one occasion he had been put at work on top of a building, but owing to his affliction he knew it was dangerous work for him, and he decided to quit.

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"I came down off that building at noon, and went to Mr. Taylor and I says, 'You give me my time, and I will quit and not get hurt.' I says, 'I won't work in these dangerous places; I won't risk it.' He says, 'I can't let you go, Cox, I have got to keep you here; I need the labor too bad, and I am going to keep you.' I told him why I was going to quit. I said, 'I have epileptic spells and if I work in these dangerous places I am going to quit. I want my money and I will go home.' I went home that evening; he did not give me my money; if he had, I would have gone home; he did not send me back up on that building again; he put me to work right in the yard, outside the inclosure, shoveling concrete and such as that, monkeying around on the ground, just like he said."

Some days later, while plaintiff was digging a trench in the ground, he desired to get a drink of water. The water was about 125 or 150 feet away. When he left the ditch to go for the water his periodical epilepsy overtook him, his mind left him, as he said it always did at such times, and when his senses returned he was about 75 feet away from where he had been at work. He had fallen against some hot pipes which came out of a building and ran down into the ground near the path towards which the drinking water was located. The hot pipes severely and permanently injured his back.

"Q. Now, on the day you were hurt, you was working in the ditches there? A. Yes, sir. They had a water boy there, but he wasn't around where he was. He would come around there and bring us water. We couldn't call him. He wasn't there when I wanted a drink. It was just like I would say to myself, 'I want a drink of water,' and that is the last I remember. I started off by myself to get a drink of water, and when I went a little distance I got dizzy and lost my mind. Had one of those spells while walking along, and while I had one of those spells I lost my head.

"Q. And while in that condition you then fell, didn't you? A. Yes, sir.

"Q. And your fall was on account of your epileptic spells? A. Sure. * * *

"Q. So you started off by yourself to get a drink of water, and when you went a little distance you got dizzy? A. Lost my mind.

"Q. And had one of those spells. That is the first thing you remember, while you was walking along? A. Yes, sir.

"Q. And while you had one of those spells you, of course, lost your head? A. Yes, sir. * * *

"Q. You didn't fall over anything, that is, you didn't slip on anything and fall, but you fell on account of your epilpetic spells? A. Sure; overbalanced.

"Q. Overbalanced by virtue of your epilepsy? A. Yes, sir.

"Q. And you happened to fall on some hot pipes that are not in the ground? A. Yes; there is four of them. * * * These spells last sometimes about three-quarters of an hour and sometimes two hours, according to how hard they are."

[1, 2] Under the facts and circumstances thus narrated by the plaintiff himself, can it be said that the injuries sustained by him arose out of and in the course of his employment? "In the course of"—yes. If he had died of heart failure, or had been stunned by lightning, assaulted by a drunken stranger, or shot by a maniac, while at work, such mishap would have arisen in the course of his employment. "In the course of his employment," as a phrase, simply means that it happened while he was at work in his employer's service. The phrase relates to the time, place, and circumstances under which the accident occurred. But it is not sufficient to impose liability upon the injured workman's employer that the injury arose in the course of the employment. There is another and more

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important prerequisite. The injury must also arise out of the employment. It must arise because of it, or in some reasonable way be traceable to it. The injury must in some sense be due to the employment. The philosophy on which the Workmen's Compensation Act is founded is that the wear and tear of human beings in modern industry should be charged to the industry just as the wear and tear of machinery has always been charged. And while such compensation is primarily chargeable to the industry, and consequently to the employer or owner of the industry, eventually it becomes a part of the fair money cost of the industrial product, and to be paid for by the general public patronizing such product.

In McRoberts v. Zinc Co., 93 Kan. 364, 366, 367, 144 Pac. 247, 248, it was said:

"In the enactment of the Compensation Law the Legislature recognized that the common-law remedies for injuries sustained in certain hazardous industries were inadequate, unscientific, and unjust, and therefore a substitute was provided by which a more equitable adjustment of such loss could be made under a system which was intended largely to eliminate controversies and litigation and place the burden of accidental injuries incident to such employments upon the industries themselves, or rather upon the consumers of the products of such industries."

"There is no doubt that it was the legislative intent to compensate workmen for injuries resulting from industrial accidents, and that such compensation is charged against the industry because [with or without fault] it is responsible for the injury."

Klawinski v. Lake Shore, etc., R. Co., 185 Mich. 643, 645, 152 N. W. 213, 214, L. R. A. 1916A, 342, 343; Industrial Commission v. Ætna Co., 64 Colo. 480, 174 Pac. 589, 3 A. L. R. 1336, 1339.

But in order to charge the industry with compensation for the workmen's injury, such injury must in some sense, in some degree, be due to the workman's employment in the industry.

In discussing the phrase "out of the employment" in McNicol's Case, 215 Mass. 497, 499, 102 N. E. 697, L. R. A. 1916A, 306, 307, it was said:

"It 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a casual connection between the conditions under which the work is required to be performed and the resulting injury. * * * But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

In Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164, it was said:

"The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work, or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment. * * * It 'arises out of' the occupation where there is a causal connection between the conditions under which the servant works and the resulting injury. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." Syl. 4.

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But how can this plaintiff's misfortune be charged against the industry in which he was employed? How can it be said that his injury arose out of his employment? The injury to his back was occasioned by his epileptic fit. It was the misfortunate effect of it, and not of his work. His fit was not provoked or induced or rendered more likely to happen because of his work. He was subject to such fits. For over 25 years he had been thus afflicted, with almost monthly regularity. We have had to consider a case (Madey v. Swift & Co., 101 Kan. 771, 168 Pac. 1105) where a workman, while standing on a wet and slippery platform in a packing house, in the course of his employment, fell backwards, and received injuries from which he died. There was some evidence tending to show that the workman fell while in an epileptic fit and that his death was caused by epilepsy. But in that case there was the question of fact whether he fell because of the slippery platform, which would be an accident arising out of his employment, or by reason of the epileptic fit, which would not be such an accident.

Cases there are too, many of them, where workmen by reason of constitutional infirmities are predisposed to sustain injuries while engaged in their labor, yet the leniency and humanity of the law permit them to recover if the employment itself contributes in some degree to bring about or intensify the physical condition which renders them susceptible to such accident and consequent injury. But in all such cases the employment must have some definite, discernible relation to the accident. Thus in Gilliland v. Cement Co., 104 Kan. 771, 180 Pac. 793, a workman whose labors in the dust of a cement mill for three years had impaired his lungs, and who had not fully recovered from typhoid fever, miscalculated his strength while swinging a heavy sledge to break rock in a quarry, and suffered a pulmonary hemorrhage from which he died. It was held that, notwithstanding his physical weakness predisposing him to such fatality, his employment was a contributing cause of the accident; that it arose out of his employment; and his dependents were permitted to recover compensation for his death. The court cited pertinent and instructive English cases, and concluded:

"It is not material that the workman's blood vessels were weakened by disease, or that he was predisposed to hemorrhage because, for example, he had breathed the dust of the sacking department for three years. The statute establishes no standard of health for workmen, entitling them or their dependents to compensation, and if the added factor of physical exertion in the employment were required to effect the lesion, and did so, the injury arose out of the employment. That the injury occurred in that way, and is referable to a definite time, place, and circumstance, is indicated by the workman's apparent good health and strength, the suddenness and profusion of the hemorrhage, the absence of previous extravasation of blood, and other circumstances."

See, also, Blackburn v. Brick & Tile Co., 107 Kan. 722, 193 Pac. 351.

In this case, if the added factor of his labor had aided in provoking the epileptic fit, it would bring the present case within the rule, and we would not hestitate to say that there was an accident arising out of the employment. But here there was no factor inherent in the employment or arising out of it which can be characterized as an accident which can be added to the disease as a contributing cause of plaintiff's injury.

Our attention is directed to some border line cases where compensation was allowed:

In an English case (Wicks v. Dowell & Co., Limited [1905] K. B. 225), where an employee, while unloading coal near an open hatchway of a ship was seized with an epileptic fit and fell into the hold and was seriously injured, it was held that regard must be had to the proximate cause of the accident resulting in the injury, "which was to be found in the necessary proximity of the workman to the hatchway," and that it therefore arose "out of" as well as "in the course of" his employment.

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In Driscoll v. Employers' Liability Assurance Corp., Ltd. (1912-13) Mass. C. W. C. A. 125, compensation was allowed for the death of an employee who while driving an express wagon was seized with an epileptic fit and fell from the wagon and fractured his skull.

We would not say dogmatcially that these cases were erroneously decided, but certainly they are border line cases. Perhaps they can be justified because of the substantial and increased risk to which the workmen in each of these cases were exposed owing to the position in which they had to work. We note that the Driscoll (Mass.) Case was decided on the authority of the Wicks (Eng.) Case. The Wicks Case, supra, has not been consistently followed in England. Thus in Butler v. Burton-on-Trent Union, 5 B. W. C. C. 355, the master of a workhouse, while on duty, was sitting on the top of a flight of steps at the hospital in which he was employed. He was suffering from tuberculosis, and while seized with a fit of coughing became dizzy and fell down the steps and sustained fatal injuries. Compensation was denied, the court holding that the accident did not arise out of the employment; that it was not due to the nature of the employment, nor to anything to which the employment required him to expose himself.

In Honor v. Painter, 4 B. W. C. C. 188, a workman while driving a delivery van was seen to fall from his van, "in what looked like a fit—it may not have been—and died three weeks later." The Court of Appeal held that these facts did not establish, even by legitimate inference, that the accident and injury arose out of his employment.

In Carroll v. What Cheer Stables Co., 38 R. I. 421, 96 Atl. 208, L. R. A. 1916D, 154, Ann. Cas. 1918B, 346, a hack driver had an attack of dizziness and fell from his vehicle and was injured. Compensation was allowed, but the court said:

"The evidence does not show, as claimed by the appellant, that the petitioner's fall was caused solely by the workman's previously diseased condition, nor does the justice of the superior court so decide; the justice says in his decree 'the fall probably being due to dizziness or unconsciousness induced by a disease from which he was suffering,' etc. But the decree also finds that the accident was one 'arising out of * * * said employment'; there is at least as much evidence that the fall was due to an unexpected and accidental lurch of the hack into the gutter and towards or against the curbstone, as that it was due to dizziness or unconsciousness induced by disease. It seems to this court that the decision and the decree appealed from embody a conclusive finding of fact that dizziness or unconsciousness was not the sole cause of the fall and that there was evidence from which the justice could find as he did that the accident arose out of the employment."

In Kowalski v. Trostel & Sons (1915) 4 Ann. Rep. (Wis.) I. C. 17, a workman claimed that he bumped his head against an overhanging door while working in the respondent's plant, and fell in an unconscious state, and that he remembered nothing further until he roused from his condition in the hospital several days later. On arrival at the hospital he was found to have a dislocated shoulder, a contused wrist, and an incomplete inguinal hernia. No injuries of any sort were found on or about his head. The commission disbelieved his testimony that he had struck his head against the door, and found from the other evidence that his injuries were caused by his fall, and that the fall was the result of a faint or epileptic seizure, and his claim for compensation was denied.

In the case at bar the jury rendered special findings, one of which (No. 5) was that the proximate cause of the accident was not due to the plaintiff becoming dizzy and falling. The plaintiff was himself more candid and truthful than the jury, as is disclosed by his testimony quoted above.

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It must be held that the accident which caused plaintiff's injury flowed from his epileptic seizure, and that this particular recurrence of periodic malady from which plaintiff had suffered for so many years was not provoked by his employment, nor did his employment contribute in any degree to bring on such epilpetic seizure. Therefore this is not a case of a personal injury arising out of the employment, for which compensation chargeable to plaintiff's employer can be allowed.

The judgment of the district court is reversed and the cause remanded, with instructions to render judgment for defendant.

All the Justices concurring.

PENN v. SWIFT & CO. (No. 22951.)

(Supreme Court of Kansas. Feb. 12, 1921.)

195 Pacific Reporter, 620.

(Syllabus by the Court.)

MASTER AND SERVANT — AMOUNT OF VERDICT UNDER COMPENSATION LAW HELD NOT SUPPORTED BY SPECIAL FINDINGS OR UNDISPUTED FACTS.

In an action under the Workmen's Compensation Law, the evidence, findings, and verdict are examined, and *held,* that the special findings are inconsistent with the undisputed evidence, and that the amount of the verdict cannot be sustained upon any theory consistent either with the special findings or with the undisputed facts, and therefore a new trial is ordered on the sole issue as to the amount of compensation to which the plaintiff is entitled.

(For other cases, see Master and Servant, Dec. Dig. § 411½, New, vol. 5A Key-No. Series.)

Appeal from District Court, Wyandotte County.

Proceedings under the Workmen's Compensation Law by Martin L. Penn against Swift & Co. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Russell Field, of Kansas City, Mo., for appellant.

David F. Carson and W. K. Ward, both of Kansas City, Kan., for appellee.

PORTER, J. The action was under the Workmen's Compensation Law (Laws 1911, c. 218, as amended by Laws 1913, c. 216). From a judgment in plaintiff's favor the employer appeals, and claims that the court erred in refusing to grant a new trial on the ground that the verdict of the jury was for an excessive amount and in conflict with the special findings and with the undisputed evidence.

On January 21, 1919, the plaintiff, while at work in the packing house of Swift & Co., received accidental injuries which resulted in inguinal hernia on the right side. A successful operation for this was performed by his physician, and 14 weeks after his injuries the plaintiff went to work in the packing house of Morris & Co. at the same line of employment. During the 38 weeks previous to the trial, which occurred just

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one year from the time his injuries were received, he had been paid on the average considerably higher wages than while in the employ of the defendant. This is explained to some extent by the increased wages that were paid laborers generally during 1919.

The evidence showed that his average weekly earnings while in the employ of the defendant were $27.44 per week, and the jury made a finding to that effect. They found, however, that his weekly earnings since the accident and while in the employ of Morris & Co. were only $26.72. The defendant insists that the latter finding is in direct conflict with the plaintiff's own evidence, which showed that he received as high as $38 per week while working for Morris & Co. after he recovered from the operation.

The plaintiff's physician testified that the operation which was performed by another physician, was a skillful and successful one, but that in his opinion the plaintiff's vitality was not up to what it should be in a young man of his age; that the right scrotal region was swollen, tender to touch, and the circulation on that side not as good as on the other. Another physician called by plaintiff testified he had examined him at the time of the trial and found him suffering from a hydrocele on the right side, and that an operation for hydrocele is one that is readily performed by a skillful physician, and that in 98 per cent. of the cases the operation is entirely successful. He further testified that he did not consider the hydrocele as resulting from plaintiff's rupture. The defendant insists that on the undisputed facts the jury should have found that the slight partial incapacity of the plaintiff is the result solely of his neglect or refusal to submit to the very simple operation for hydrocele, and, further, that no explanation or evidence was offered for his refusal to submit to such an operation.

It is conceded that plaintiff is entitled to $150 for medical attention, and that for total incapacity, which lasted for 13 weeks, he was entitled to $15 per week, which would amount to $195. Notwithstanding the jury's special finding to the effect that the difference between his average weekly earnings prior to his injury and the average while in the employ of Morris & Co. was but 72 cents per week, the jury returned a verdict allowing him a judgment in the aggregate for $1,792. The court instructed that the plaintiff was entitled to recover as compensation for partial incapacity caused by his injury a sum equal to 60 per cent. of the difference between his average weekly earnings prior to his injury and the average that he had been and will be able to earn after such injury for the 402 weeks remaining of the statutory period.

The principal contention of the defendant is that after allowing plaintiff the $195 total disability for 13 weeks and $150 hospital and medical fees, and 60 per cent. of the difference in earnings as found by the jury, which was 43 cents per week, the verdict and judgment should have been for $517.86. Plaintiff's evidence showed that when he first went to work at the Morris packing plant after his injury he told his foreman that he had been recently operated on for hernia and the foreman told him not to lift anything he thought he could not lift, and that he, the foreman, would see that plaintiff got plenty of help. The plaintiff further testified that, although he had been earning $38 per week with Morris & Co., he was not able to do as much work as he had before his injury on account of his physical condition.

In his brief counsel for the plaintiff suggests as a plausible explanation for the amount of the verdict that, in addition to the $195 total disability and $150 medical attendance, the jury found plaintiff's partial incapacity to the time of the trial to be 60 per cent. of 72 cents per week for 38 weeks, which would be $16.34, and that they then allowed him 60 per cent. of what they considered the difference in his earning capacity would be after the trial and during the remaining portion of the statutory

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period, and fixed that amount at $1,430.66. The difficulty with this theory is the absence in the evidence of any basis upon which the jury would be warranted in finding such an amount, and, of course, the jury had no right to arrive at their verdict upon mere speculation. There was no testimony indicating that after the trial plaintiff's condition and capacty to earn would be any different from what it was the day before the trial.

In our opinion the verdict cannot be sustained by the evidence, but we do not think we would be justified in ordering judgment for the amount of $517.86, which defendant insists is the extent of its liability. We think there should be a new trial on the single issue of the extent of plaintiff's partial incapacity, leaving also for further inquiry how far that question is affected by the duty, if any, resting upon the plaintiff to submit to an operation for hydrocele, which would wholly or partially relieve him from any further incapacity.

What is called an abstract, but which is in fact a transcript, was filed by the defendant. There was no dispute over the fact that plaintiff received his injuries in the course of his employment, and that both parties were under the Compensation Act is conceded. There was therefore no cause for loading the abstract with copies of the pleadings. There was no occasion to print the long drawn out verbal controversies over the introduction of evidence on issues which were finally agreed upon before the case was submitted to the jury. Whatever testimoy was necssary to show in the abstract should have been abstracted. Instead of a paper book consisting of more than 100 pages, one consisting of 20 pages could have been prepared, which would have more readily served every purpose. The cost of the abstract will be taxed to defendant.

The judgment is reversed and a new trial ordered.

All the Justices concurring.

SMITH v. HEINE SAFETY BOILER CO. ET AL.

(Supreme Judicial Court of Maine. Feb. 12, 1921.)

112 Atlantic Reporter, 516.

2. MASTER AND SERVANT — FINDING COMPENSATION CLAIMANT HAD NOT SUSTAINED BURDEN OF PROOF AS TO MARRIAGE REVERSIBLE FINDING OF LAW.

The finding of the chairman of the Industrial Accident Commission that claimant widow had not sustained the burden of proof on the point of her marriage was not a finding of fact, but of law, based on rules of law, and, being erroneous, was reversible by the Supreme Judicial Court under the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

4. MASTER AND SERVANT—REQUISITES OF COMPENSATION CLAIM STATED.

Under Workmen's Compensation Act, § 17, claim for compensation for injuries or death need not be in writing or made in unequivocal language or terms; the statute requires that the claim shall be made within a year after the injury, but it may be oral, or may be made in writing, and the terms will meet the act if the employer is apprised that com-

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pensation is claimed and he is put on his notice that claimant seeks the benefit of the act.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

5. MASTER AND SERVANT — NOTICE OF COMPENSATION CLAIM WAIVED.

Notice to the employer of claim for compensation under the Workmen's Compensation Act may be waived, and was waived where the employer through its manager and superintendent immediately after the death of the employee corresponded with claimant widow offering counsel and assistance and seeking to take charge of the proceedings and expenses of enforcing the claim for compensation.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

6. MASTER AND SERVANT — COMMISSION HAS JURISDICTION OF CLAIM FOR COMPENSATION FOR DEATH OF NONRESIDENT EMPLOYEE OF FOREIGN CORPORATION.

Where the employee of a New York corporation was killed in Maine while doing work for it there in repairing boilers, the Industrial Accident Commission of Maine has jurisdiction to hear the claim of his widow, a resident of New York, for compensation for his death, though the employer was a foreign corporation, and the deceased employee was not a resident of Maine.

(For other cases, see Master and Servant, Dec. Dig. § 368.)

7. MASTER AND SERVANT—COMPENSATION ACT APPLICABLE TO CONTRACT OF EMPLOYMENT MADE IN OTHER STATE.

That the contract of employment of an employee of a New York corporation killed in doing work for it in Maine was made in Massachusetts does not affect the rights of the deceased employee's widow to compensation under the Maine Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 368.)

8. MASTER AND SERVANT — FOREIGN BOILER COMPANY'S BUSINESS IN STATE NOT "CASUAL AND TRANSITORY" WITHIN COMPENSATION ACT.

The business of a foreign boiler company engaged in selling boilers in Maine and setting them up and repairing them, if necessary, was not of a casual and transitory character within the meaning of the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

9. MASTER AND SERVANT — COMPENSATION CLAIMANT NOT PRECLUDED BY PRIOR ADJUDICATION OF COURT OF OTHER STATE NOT ON MERITS.

Where the Court of Appeals of New York in effect denied jurisdiction of the New York workmen's compensation tribunals over the death of the employee of a New York corporation killed in its service in Maine, and did not adjudicate the merits of the case, its decision does not preclude the employee's widow from seeking compensation for the death in Maine under its compensation act; mistake in seeking a forum will not work forfeiture of right if petitioner seeks the proper forum within the time prescribed by its law.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

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10. MASTER AND SERVANT—NEW YORK COMPANY "ASSENTING EMPLOYER" UNDER MAINE COMPENSATION ACT.

A New York boiler company, whose employee was killed in repairing boilers in the state of Maine pursuant to his employment with it, *held* an "assenting employer" under the Workmen's Compensation Act Me. § 1, pars. 2 and 3.

(For other cases, see Master and Servant, Dec. Dig. § 368.)

11. MASTER AND SERVANT—BOILER COMPANY'S EMPLOYEE NOT IN "CASUAL EMPLOYMENT" WITHIN COMPENSATION ACT.

One employed for 15 years by a New York boiler company in setting up boilers in various states was not engaged in a "casual employment" to prevent him from coming under the operation of the Maine Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

Appeal from Supreme Judicial Court, York County, in Equity.

Proceedings for compensation under the Workmen's Compensation Act by Bessie M. Smith, claiming as dependent widow of Warren H. Smith, the employee, against the Heine Safety Boiler Company, the employer, and the Ocean Accident & Guaranty Corporation, Limited, insurers. From a decree of a single justice, in conformity with decision of the chairman of the Industrial Accident Commission denying compensation, claimant appeals. Appeal sustained, decree reversed, and compensation ordered for petitioner.

Argued before Spear, Hanson. Philbrook, Morrill, and Wilson, JJ.

Benedict F. Maher, of Augusta, and James L. Boyle, of Waterville, for appellant.

William H. Gulliver and William B. Mahoney, both of Portland, for appellees.

HANSON, J. This is an appeal from the decree of a single justice in conformity with the decision of the late chairman of the Industrial Accident Commission, denying compensation to Bessie M. Smith claiming as dependent widow of Warren H. Smith.

Warren H. Smith, the deceased employee, a man 40 years of age, was at the time of the accident causing death, and for many years preceding, a resident of Elmira, N. Y. He had been employed by the Heine Safety Boiler Company since 1900, and at the date of his death, and for two years prior thereto, he had been receiving $90 per month for his services. His employment required him to work wherever his employers had contracts to erect boilers. This duty made it necessary during the years since 1900 to visit various states, and he had several times prior to the date of his death worked for his employer in Maine.

On March 20, 1916, decedent came to Biddeford to superintend the erection of four boilers for the Pepperell Manufacturing Company. He brought with him his own crew of skilled mechanics, and secured his unskilled laborers in Biddeford. The work was finished November 16, 1916, and decedent and his crew returned to Massachusetts. Later, on receipt of notice that a leak had occurred in some of the connecting pipe, decedent with a helper returned to Biddeford to make necessary repairs

The work was performed on Sunday, December 10, 1916, and was nearing completion in the evening of that day when decedent fell from a ladder sustaining injuries causing death 35 minutes later.

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The defendant's general superintendent, Edward S. Cline, was at once notified, through the Boston office of the company, and he on December 18, 1916, caused an employer's report to be filed with the Commission, and also made a report to the Ocean Accident & Guaranty Corporation.

Upon advice of counsel the petitioner herein filed a claim before the New York Industrial Commission and received an award of compensation. On appeal by the respondents to the Supreme Court the award was affirmed (169 N. Y. Supp. 1114), but on further appeal to the Court of Appeals the decision of the lower court and Commission was reversed (119 N. E. 878) and the claim dismissed, May 28, 1918.

On October 21, 1918, the claimant filed her petition with the Industrial Commission of Maine.

The respondents in their answer admit that the accident occurred as claimed, that the cause of the injury was as stated, and that decedent was in the employ of the defendant company, but

(1) Not denying that the applicant is the widow of Warren H. Smith, and as to whether there are any other dependents of said Warren H. Smith, they allege they are not informed, "and leave the applicant and others interested to make such proof thereof as to them may seem material."

(2) They deny liability under the Compensation Insurance Act of the State of Maine, or

(3) That the defendant was carrying on business in the state of Maine within the meaning of the statute, and deny that it had in its employ in said state employees to the number of five or more.

(4) They deny that any notice or claim for compensation with respect to said injury was made upon either of the respondents within one year after the occurrence of the same.

(5) They deny the jurisdiction of Industrial Accident Commission, because the defendant is a Missouri corporation, and because decedent was not a resident of Maine, and

(6) Because the contract of employment was made in the state of Massachusetts, and

(7) Because the business of the Heine Safety Boiler Company in Maine was of purely transitory and casual character, and

(8) Because the claim has been finally adjudicated in the state of New York.

The chairman considered but two of the defenses raised by the respondents, to wit, the first and fourth, and holding thereunder in the order named:

(a) That the petitioner had not proved her marriage to the decedent, or that she was a dependent widow of Warren H. Smith, and

(b) That no claim for compensation under the laws of the state of Maine had been made by the petitioner or by any person in her behalf upon the respondents within one year from the time of the injury.

On the question of proof of marriage and dependency, the chairman says:

"As evidence of her marriage claimant offered what purports to be an original certificate of marriage issued in another state and signed by John Masterson, justice of the peace or alderman—claimant's Exhibit H. This certificate was admitted on condition that it be later substantiated by testimony. No oral testimony whatever was later offered as to the source from which this certificate came, as to identity of the parties or qualification of person solemnizing the marriage. It was simply produced by the witness Smith. This bare certificate unsupported by testimony either as to its genuineness or applicability to the parties in interest is not admissible evidence and has no probative value as evidence of the fact it was offered to prove The chairman would not care to base a

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finding of dependency in whole or in part on this certificate. He is not satisfied that the certificate is genuine.

"No evidence was presented by any one who had witnessed the ceremony of marriage. Evidence was given by Cline, Smith and Weatherhold as to cohabitation of parties, and their reputation as man and wife. This alone from these witnesses is not sufficient.

"The question of who are legal dependents of a deceased employee is a matter that should not be lightly passed on by a compensation commission. Claimants as dependents are frequently residents of other states far removed from the place of injury, and often reside in foreign countries. This fact is an inducement to fraudulent claims and each claim must be closely scrutinized.

"While perhaps a strict proof of marriage as required in criminal indictments is not necessary, yet the Commission should be supplied with such evidence as to make a reasonable certainty of any finding based thereon. In this case a marriage in the state of Pennsylvania was to be proved. It seems to the chairman that it would have been a simple matter by the production of the record and testimony of Bessie M. Smith to have established this fact, if fact it is, beyond any doubt or suspicion instead of depending for proof of this fact on a kind of evidence that is never convincing.

"The chairman is not satisfied with the evidence offered and finds as a fact that the claimant has not sustained the burden of proof upon this point of marriage, upon which her dependency is based."

As to the question of proof of marriage, the burden of proof, and the character of testimony necessary to prove marriage in a case coming under the act, we think the finding of the chairman is erroneous.

[1] In the progress of the case and in his deliberations thereon, upon the question of marriage, he was dealing with a question of law. He rejected the marriage certificate unless substantiated by testimony. Such testimony of its authenticity was not produced, but the certificate of marriage was admissible nevertheless, without authentication. What its probative value might be was a question for him to consider with all the other evidence in the case upon the issue involved. Camden v. Belgrade, 78 Me. 209, 3 Atl. 652.

[2] In addition, he rejects as insufficient the very definite testimony of witnesses, including witnesses for the defendants, as to "cohabitation of the parties and their reputation as man and wife." And he holds that—

"While a strict proof of marriage as required by the criminal indictments is not necessary, yet the Commission should be supplied with such evidence as to make a reasonable certainty of any finding based thereon."

In conclusion the chairman "finds as a fact that claimant has not sustained the burden of proof upon this point of marriage." Such finding is not a finding of fact but of law, based upon rules of law, and being erroneous is reversible under the act.

For 15 years decedent had worked with Mr. Cline in the same employment for the defendant. He was the immediate superior of decedent, and they were friends. Mr. Cline knew the wife and children of decedent and testified to their friendship and his knowledge of their home surroundings, and that as the agent of the defendant he immediately communicated with her by letter as the wife of decedent tendered his sympathy and aid, as appears in his letter hereinafter quoted.

[3] Until the question arose in this case no denial of the relation of husband and wife was ever made, nor is it denied here. The respondents challenge proof merely, and we think the petitioner has maintained the burden of proof.

In Cram v.Burnham, 5 Greenl. 214-216, the court said:

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"In most cases, cohabitation, as husband and wife is evidence from which the law presumes lawful marriage. So also, where the presumption may be repelled, it will fix upon the party, who thus holds himself out to the world in the character of a husband, liabilities as it respects others, which attach to this relation. * * *

"In Cunninghams and Cunninghams, also in the House of Lords on an appeal from the court of sessions in Scotland, 2 Dow, 482, which is to be found in a note to 4 Johns. 53, Lord Eldon and Lord Redesdale held 'that in cases of cohabitation, the presumption was in favor of its legality.' "

In Carter v. Parker, 28 Me. 509, the court said:

"In the case of Birt v. Barlow, Doug. 174, Lord Mansfield is reported to have said 'an action for criminal conversation is the only civil case where it is necessary to prove an actual marriage.' The remark was in substance repeated by Lord Kenyon in the case of Leader v. Barry, 1 Esp. R. 353. In other civil cases a marriage may be inferred from long cohabitation as man and wife, and other usually attending circumstance, unless such cohabitation appear to have been illicit in its origin."

In Taylor v. Robinson, 29 Me. 328, the court said:

" 'It seems to be a general rule, that in all civil personal actions, except that for criminal conversation, general reputation and cohabitation are sufficient evidence of marriage.' 2 Stark., Ev. 939. Mr. Greenleaf in his treatise on Evidence, vol. 2, § 461, says, 'The proof of marriage as of other issues, is either by direct evidence establishing the fact, or by evidence of collateral facts and circumstances, from which its existence may be inferred. Evidence of the former kind, or what is equivalent to it, is required upon the trial of indictments for polygamy and adultery and in actions of criminal conversation; but in all other cases, any other satisfactory evidence is sufficient.' And he says in section 462, 'It is competent to show their conversation, addressing each other as man and wife. Their cohabitation also as man and wife is presumed to be lawful, till the contrary appears. The evidence introduced in proof of the marriage, was such as had been allowed in all civil cases.' And we find no authority for a distinction in cases where the party to the marriage is a party to the suit, and wishes to prove the marriage, and where the attempt to establish the marriage, is by one who is a stranger thereto." Fenton v. Reed, 4 Johns, 52, 4 Am. Dec. 244; Pratt v. Pierce, 36 Me. 448, 58 Am. Dec. 758; Taylor v. Robinson, 29 Me. 323; Camden v. Belgrade, 78 Me. 209, 3 Atl. 652, in which is cited 2 Greenleaf, Ev. chap. 462-3; 1 Gr. Ev. chap. 104 et seq.; Snowman v. Mason, 99 Me. 493, 59 Atl. 1019; L. R. A. 1915E, 35, and cases cited; Voshall v. Kelley Island L. & T. Co., 13 Ohio Law Rep. 278; Rossi v. St. Oil Co., 2 Cal. Ind. Acc. Co. 339. See note, 13 Neg. & Com. Cases, 199, 200; Hill v. Fuller Co., 1 Cal. Ind. Acc. Comm. 155; cited also in No. 6 Neg. & Com. cases, 253; Travers v. Reinhardt, 205 U. S. 423, 27 Sup. Ct. 563, 51 L. Ed. 865; Davis v. Pryor, 112 Fed. 274, 50 C. C. A. 579; Barnum v. Barnum, 42 Md. 251; Eaton v. Eaton, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605, 1 Ann. Cas. 199.

As to the claim for compensation, chapter 50, R. S. 1916, section 17 of the act provides that—

"No proceedings for compensation for an injury under this act shall be maintained unless a notice of the accident shall have been given to the employer within thirty days after the happening thereof; and unless the claim for compensation with respect to such injury shall have been made within one year after the occurrence of the same, or, in case of his physical or mental incapacity, within one year after death or the removal of such physical or mental incapacity."

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That written notice of the accident was given to the employer is conceded, and the chairman in his findings states that, "It is the latter part of this section alone that we have to consider under this part of the answer," and rejecting the oral testimony offered by the brother of decedent that he had made claim for compensation representing the widow, as well as declining to admit a copy of a letter of petitioner's attorney to the defendant stating that a claim would be filed, the chairman ruled thereon as follows:

"A fair construction of that part of section 17 relative to claim for compensation would seem to be this: That an unequivocal claim for compensation under the Maine law should be made by the employees upon the employer within the period named, and should be made in such unequivocal language or terms as will clearly convey to the employer the knowledge that compensation under the Maine law is claimed."

The chairman concludes in these words:

"The chairman finds as a fact that claim for compensation, as provided for in section 17, was not made either by the claimant or by any one in her behalf upon the respondent employer within one year after the death of Warren H. Smith. At the trial the chairman ruled, and now holds, that any notice of a claim or the making of a claim for compensation, under the New York act would not satisfy the necessity for making the same under the Workmen's Compensation Act of the State of Maine."

Again we think the chairman erred in his ruling and finding upon questions of law.

His construction of the statute is too strict and its adoption would deprive the act of the broad and liberal interpretation which the Legislature intended it should have.

[4, 5] The act does not require the claim for compensation to be in writing, or that it should be made in unequivocal language or terms. It does require that claim for compensation shall be made within one year after the injury. Such claim may be made orally, by a claimant or some person in his behalf, may be made in writing and the terms will meet the requirements of the act if the employer is thereby apprised that compensation is claimed, and is put upon his notice that a claimant seeks the benefit of the act. And too the notice of a claim for compensation may be waived, and was waived in this case by the defendant through its manager and superintendent, Mr. Cline, who immediately after the accident corresponded with petitioner, offering counsel and assistance and seeing to take charge of the proceedings and expenses of enforcing the claim for compensation. And he very frankly states that he conferred for hours with the brother of decedent upon this question, and that acting upon advice of counsel the brother decided to seek compensation in New York with the result as above stated. Smith v. Heine Safety Boiler Co., 224 N. Y. 9, 119 N. E. 878, Ann. Cas. 1918D, 316.

In Conway v. Industrial Board of Ill., 282 Ill. 313, 118 N. E. 705, the court said:

January 21, 1915, claimant filed an application for adjustment of claim for injuries received August 25, 1914. The company had no notice of this claim until April 27, 1915. The act provides claim must be made within six months. "Section 24 of the Workmen's Compensation Act of 1913 provided that no proceeding for compensation should be maintained unless claim for compensation had been made within six months after the accident. This provision is mandatory. * * * But the claim need not be in writing. A verbal claim is sufficient. * * * To ask for a right as due is to make a claim of that right, and there is every tendency to show Koss did this. He talked the matter over with Murray, his foreman, and asked if he was not under the compensation act and ought not be getting half wages, and Murray told him he guessed

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he was under the act. Another time Murray told him his money was as good as gold; that the Conway Co. was going to pay it, and he should come and see McCarthy, who was going to pay it. * * * It was manifest that Koss was asking for compensation and the plaintiff in error was admitting its liability. This was sufficient claim for compensation."

See, also, Hornbrook-Price Co. v. Stewart, (Ind. App.) 118 N. E. 315, and Moustgard v. Ind. Board of Ill., 287 Ill. 156, 122 N. E. 49, case decided in 1919 in which the court said:

"The claim need not be in writing but may be verbal, * * * and is sufficient if the employer is informed by it that the employee intends to claim the benefit of the act." Suburban Ice Co. v. Ind. Bd. of Ill., 274 Ill. 630. 113 N. E. 979; Lowe v. Myers & Sons, 2 K. B. 265; Thompson v. Gould, 103 L. T. R. N. S. 81, supra; Luckie v. Merry, 3 K. B. 83.

See Thompson v. Gould, 103 L. T. R. N. S. 8.

The letter herein referred to reads as follows:

"General Office, St. Louis, Mo. Shops, St. Louis, Mo., and Phœnixville, Pa.

"Heine Safety Boiler Co.,
"Water Tube Boilers and Superheaters.

"Answering yours of By
"Subject:

Phœnixville, Pa., 1—18—17.

"Mrs. Bessie M. Smith, The Phœnix, 410 E. Second St., Elmira, N. Y.—Dear Mrs. Smith: I am just in receipt of your letter of the 16th, and have just received a letter from our attorney, Mr. Samuel A. Whitaker, which I am inclosing to you. Had a long talk with Mr. Whitaker last night and it is his opinion that the law of the state of Maine will apply to this accident, and from his letter you will note you will be entitled to $10.00 a week for a period of three hundred weeks. He only received a copy of the Maine law yesterday and it has to be returned to the State Department at Harrisburg and he has not had time to go thoroughly into it. It seems that a lawyer in the state of Maine will have to be employed to look after that end of it. However, the act or the law provides the fees they can charge so that they will not be allowed to hold you up for any big amount. I have asked Mr. Whitaker to write to a lawyer in Maine and get copies of the legal forms that must be filled out. Mr. Whitaker's services won't cost you anything as we will take care of that so that if you have not gone to any expense or made any agreement with any attorney, do not do so for the present as Mr. Whitaker advises me that everything so far has been done to comply with the law so that your interests are being protected.

"It may be a week before getting a reply from the lawyer in Maine as these lawyers do not seem to be very prompt. The Secretary of the State of Maine is certainly very dilatory as we have written him twice for a copy of the law but have not even received a reply.

"Yours very truly,

"Heine Safety Boiler Co.,
"ESC—S [Signed] Per E. S. Cline,
"Supt. Erection, S."

The rejection of the copy of the letter of January 9, 1917, by which petitioner sought to show written claim for compensation, works no injury to petitioner's rights in view of the frank statement in the above letter from the Heine Safety Boiler Company, signed by E. S. Cline, and dated January 19, 1917, that—

"Mr. Whitaker's services (their own lawyer's services) won't cost you anything as we will take care of that, so that if you have not gone to any expense or made any agreement with any attorney, do not do so for the present as Mr. Whitaker advises me that everything so far has

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been done to comply with the law so that your interests are being protected."

The defendant employer on the 14th day of December, 1916, wrote to Mrs. Smith at her home at Binghamton, N. Y., as follows:

"I feel sure that the Insurance Co. will have to settle with you liberally but do not know how long it will take or what law will apply, whether the New York, Penna. or Maine, but write me fully and I will do all I can to get as much as possible for you.

"I assure you I regret this unfortunate accident and sincerely sympathize with you in your bereavement."

In the presence of such admissions of liability the defendants cannot now prevail in their contention that the petitioner failed to make a proper legal claim under the law, and it would be difficult to recall a more complete instance of waiver.

In Roberts v. Packing Co., 95 Kan. 726, 149 Pac. 414, the court said:

"Apart from the fact that the defendant and its officers knew the circumstances and extent of the injury and plaintiff was treated by defendant's physician, there were admissions of liability and offers to confess judgment as well as motions that judgment be awarded in favor of plaintiff and against defendant for limited sums. * * * The defendant thereby waived the failure of the plaintiff to make a claim within the prescribed time or at a time earlier than it was made." Ackerson v. Zinc Co., 96 Kan. 781, 153 Pac. 530; Halverhout v. S. W. Milling Co., 97 Kan. 484, 155 Pac. 916; Gailey v. Manuf. Co., 98 Kan. 53, 55, 157 Pac. 431; Knoll v. City of Salina, 98 Kan. 428, 157 Pac. 1167; Gailey v. Manuf. Co., 98 Kan. 484, 157 Pac. 431; Thompson v. Gould, 103 L. T. R. N. S. 85, 86.

See, also, Wright v. Bagnall, 2 Q. B. 240, 82 L. R. T. N. S. 346, 69 L. J. N. S. 557; L. R. A. 1916A, 92.

In Bank v. Marston, 85 Me. 493, 27 Atl. 530, the court said:

"A statutory, or even a constitutional provision, made for one's benefit is not so sacred that he may not waive it, and having once waived it he is estopped from thereafter claiming it."

See, also, Banking Co. v. Riley, 108 Me. 24, 25, 78 Atl. 980, Ann. Cas. 1913A, 1219.

In Allen v. Goodnow, 71 Me. 425, the court said:

"When one by his words or conduct, willfully causes another to believe the existence of a certain state of facts, and induces him to act on that belief, so as to alter his own previous position, or to omit to assert some right which he otherwise would have asserted, he shall not afterwards be permtted to set up a different state of facts to the injury of him thus deceived."

See, also, Copeland v. Copeland, 28 Me. 539. See, also, Foster v. Dwinel, 49 Me. at page 48; Holt v. Telephone Co., 110 Me. 12, 85 Atl. 159; Rogers v. St. Railway, 100 Me. 90, 60 Atl. 713, 70 L. R. A. 574; Libby v. Haley, 91 Me. 331, 39 Atl. 1004; Titus v. Morse, 40 Me. 352, 63 Am. Dec. 665; Martin v. M. C. Ry. Co., 83 Me. 104, 21 Atl. 740.

[6-9] The remaining contentions of defendants are not sustained by the facts and the law of the case, for it is manifest that the petitioner is: (1) Entitled to receive the compensation provided by law; (2) the Safety Boiler Company was carrying on business in the state of Maine at the time of the accident; (3) that the defendants were notified of the claim for compensation within the meaning of the act, and further that by their acts they waived such notice; (4) that the Industrial Accident Commission of the State of Maine has jurisdiction to hear the claim, and the facts that the defendant Heine Safety Boiler Company was a foreign corporation, and that decedent was not a resident of Maine, are

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immaterial; and (5) that the contract of employment was made in Massachusetts does not affect the rights of petitioner, and it is manifest as well that the business of Heine Safety Boiler Company was not of casual and transitory character, within the meaning of the act, as applicable to this case; and finally that the petitioner is not precluded by the decision of the Court of Appeals of New York. That court in effect denied jurisdiction, and did not adjudicate on the merits of the case. The injury occurred in Maine, not in New York, and the decision of that court was in harmony wth the intention of the laws of New York. Mistake in seeking a forum will not work a forfeiture of a right if a petitioner seek the proper forum in the time prescribed by the law of that forum, and that requirement and all others have been met by the petitioner herein.

In Douthwright v. Champlin, 91 Conn. 524, 100 Atl. 97, Ann. Cas. 1917E, 512, 15 Neg. & Com. Cases, 870:

"Nor does our act provide compensation for residents alone. Its language is not that of restriction or limitation, but all-embracing. For example, it applies to 'all contracts of employment,' and this was intended to mean wherever and by whomsoever made. It gives compensation for 'any injury,' and this was intended to furnish to nonresident and resident alike the new remedy. It defines an employer and an employee as 'any person.' It excepts certain classes, and the designation of these exceptions marks the only limitation upon the definition."

Section 1 of chapter 50, R. S., par. 2, reads:

" 'Employee' shall include every person in the service of another under any contract of hire, express or implied, oral or written."

Paragraph 3 reads:

" 'Assenting employer' shall include all employers who have complied with the provisions of section six hereof."

The exceptions not being necessary are omitted.

[10] The defendant Heine Safety Boiler Company was an assenting employer under the act.

In Scully v. Industrial Commission of Illinois, 284 Ill. 567, 120 N. E. 492, the court said:

"The word 'casual,' as applied to employment in Workmen's Compensation Act, has reference to the contract for service, and not to the particular item of work being done at the time of injury; and injured employee having been regularly employed for five months at time of accident, his employment was not casual."

[11] Warren H. Smith had been employed by the defendant in the same work for 15 years. His employment was therefore not casual.

Our conclusion therefore is that the appeal should be sustained, the Decree reversed, and that the petitioner is entitled to receive compensation at the rate of $10 per week for a period of 300 weeks from the date of the injury, the maximum amount fixed by section 12 of the act. Decree in accordance with this opinion.

So ordered.

SCHILLER v. BALTIMORE & O. R. CO. (No. 27.)

(Court of Appeals of Maryland. Dec. 2, 1920.)

112 Atlantic Reporter 272.

1. MASTER AND SERVANT—SUBMISSION OF ISSUES ON APPEAL IN COMPENSATION CASE REGULATED BY GENERAL PRACTICE.

Code, art. 101, § 56, providing that on appeal from the State Indus-

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trial Accident Commission "the court shall, upon motion of either party filed with the clerk of the court according to the practice in civil cases, submit to a jury any question of fact," refers to the practice of submitting questions of fact, and not to motions.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

3. MASTER AND SERVANT—SPECIAL ISSUES FOR JURY ON APPEAL IN COMPENSATION CASE LIMITED TO ULTIMATE FACTS.

On appeal from the State Industrial Accident Commission under Code, art. 101, § 56, providing for submission to a jury of any question of fact the jury is not empowered to find a verdict for any amount, or to fix the rate or period of compensation, or to make an award as in the ordinary jury trial, but a party is entitled merely to have special issues submitted as to the ultimate facts, as in equity or in cases sent up from the orphan's court, so that the court may determine whether the finding of the commission shall be confirmed, reversed, or modified.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

4. MASTER AND SERVANT—GENERAL VERDICT ON ONLY CONTROVERTED FACT IN COMPENSATION CASE SUFFICIENT.

On appeal from the State Industrial Accident Commission under Code, art. 101, § 56, where a verdict for either party would be equivalent to a finding of the only fact in controversy, a verdict in that form is sufficient without submitting the fact in controversy in the form of an issue.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

5. MASTER AND SERVANT—SPECIAL ISSUES ON APPEAL IN COMPENSATION CASE HELD IMPROPER.

On appeal from the State Industrial Accident Commission involving the issue of whether compensation should have been continued beyond the time which would have been required for recovery after an operation, where only issue of fact involved was whether the employee, claiming total temporary disability as found by the Commission, should have submitted to the operation, court's refusal to submit issues as to the character of the disability, the extent of the injuries, and as to the amount and mode of compensation *held* proper.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

6. MASTER AND SERVANT—COMPENSATION CLAIM DEFEATED BY REFUSAL TO SUBMIT TO OPERATION FOR HERNIA.

An employee refusing to submit to an operation for hernia cannot recover compensation under Workmen's Compensation Act for the period of time beyond that which would have been required for his recovery after the operation if the danger incident to such operation was practically negligible.

(For other cases, see Master and Servant, Dec. Dig. § 385[18].)

9. MASTER AND SERVANT—TESTIMONY AS TO COMPENSATION CLAIMANT'S CONDITION AT TIME OF HEARING APPEAL HELD INADMISSIBLE.

On appeal from the State Industrial Accident Commission, testimony as to employee's condition at the time of the trial on a previous appeal from the award *held* irrelevant; the question being the propriety of the

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award in view of his condition at time of the hearing before the Commission.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

Appeal from Baltimore City Court; James M. Ambler, Judge.

"To be officially reported."

Proceedings under the Workmen's Compensation Act by Charles Schiller for compensation for injuries, opposed by the Baltimore & Ohio Railroad Company, employer. From judgment for employee giving him insufficient relief, on appeal from award of the State Industrial Accident Commission, the employee appeals. Reversed, and new trial ordered.

Following are the appellant's prayers and granted prayers of appellee referred to in opinion:

Claimant's First Prayer.

The claimant, Charles Schiller, prays the court to instruct the jury that, if they shall find from the evidence that said claimant sustained injuries while in the employ of the Baltimore & Ohio Railroad Company, a body corporate, and in the course of his said employment, then the verdict of the jury must be for said claimant, and the jury is further instructed that they shall determine by their verdict whether the injuries, if the jury so find, here complained of created a permanent total disability, a temporary total disability, a permanent partial disability, or a temporary partial disability. And, if the jury so find, it shall fix the amount of compensation to which the said claimant is entitled.

(Refused.)

Claimant's Second Prayer.

The appellant prays the court to instruct the jury to determine the nature of the injury sustained by him, herein complained of, if the jury so find, and the amount of compensation to which he is entitled, if the jury so find, and the length of time during wnich he may be thereunto entitled, if the jury so find.

(Refused.)

Claimant's Third Prayer.

The claimant prays the court to instruct the jury that, if they find that the claimant is entitled to recover as per the instructions marked in claimant's first prayer, then the jury may find that the inguinal incomplete hernia of the claimant sustained in the course of his employment by the Baltimore & Ohio Railroad Company, if the jury so find, is permanent in its character, and the jury is further instructed that it is within tne power of the State Industrial Accident Commission to modify said finding of permanency if the events should hereafter justify such modification.

(Refused.)

Defendant's Third Prayer.

The court instructs the jury that the plaintiff cannot recover compensation beyond a time at which the jury, under the evidence, may find he could have been cured, if the jury further find that by the exercise of reasonable care and prudence he could have been cured by an operation as testified in this case.

(Granted.)

Defendant's Fourth Prayer.

The court instructs the jury that the decision of the State Industrial Accident Commisison awarding the plaintiff compensation for a period of eight weeks is prima facie correct, and that the burden of proof is on the plaintiff to snow this period of eight weeks is incorrect, and that

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this burden has not been met unless the jury are so convinced by a preponderance of the evidence; that is to say, if after weighing all the evidence the minds of the jury are in a state of equipoise so that they find it just as likely that the period of eight weeks, as awarded by the Commission, is correct as that such period is not correct, then they can only allow the plaintiff compensation for a period of eight weeks.

(Granted.)

Defendant's Fifth Prayer.

(Withdrawn.)

Defendant's Sixth Prayer.

The court instructs the jury that, if they find that under the evidence in this case an ordinarily careful and prudent man would have submitted to an operation for the cure of hernia, and if they further find that the period of incapacity from doing heavy work as the result of such operation would not under the evidence of this case have been more than eight weeks, then they cannot allow the plaintiff compensation for a period longer than eight weeks.

(Granted.)

Defendant's Seventh Prayer.

The court instructs the jury that, even if they find that the plaintiff is entitled to recover some compensation, and that the hernia complained of is existing at this time, if the jury so find, yet if the jury shall further find that the plaintiff could have prevented his present condition of hernia by promptly submitting to proper surgical treatment, and they shall further find tnat the plaintiff failed to use reasonable and ordinary care to avoid the continuation of the hernia he suffered, and shall further find that such failure on his part to exercise reasonable care and caution to prevent the continuation of his hernia, if the jury so find, is responsible for his present condition of hernia, then the plaintiff cannot recover any compensation for the loss which he has suffered, if any, by reason of his neglect in failing to have himself so treated.

(Granted.)

Argued before Boyd, C. J., and Briscoe, Thomas, Pattison, Urner, Stockbridge, Adkins, and Offutt, JJ.

David Ash, of Baltimore, for appellant.
Duncan K. Brent, of Baltimore, for appellee.

ADKINS, J. The conceded facts in this case are as follows:

Charles Schiller, the appellant, on the 21st day of December, 1917, sustained a hernia as a result of lifting a heavy cylinder head out of a pit while in the employ of the appellee. In February, 1920, when this case was tried in the Baltimore City court on appeal, he was still suffering from his injury. There is no dispute about the fact of the injury or that it occurred in the course of and grew out of his employment, and the liability of the appellee is admitted. The question raised is as to the permanency of the disability.

On March 14, 1918, Schiller filed a claim for compensation with the State Industrial Accident Commission in which he stated his average weekly wage was $13. The award of the Commission was that the Baltimore & Ohio Railroad Company, employer, pay to the said Schiller compensation at the rate of $6 per week for the period of eight weeks from the 7th day of January, 1918.

From this award an appeal was taken to the superior court of Baltimore City, and subsequently on suggestion and affidavit this case was removed to the Baltimore City court, where it was tried three times, the

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first two verdicts in favor of Schiller having been set aside on motions of the defendant.

This appeal is from the judgment entered on the third verdict, which was as follows:

"Verdict in favor of the claimant for eight weeks' benefit with compensation at the rate of $10.91 per week, making a total of $87.28" (it having been admitted the claimant at the time of the injury was earning $21.82 per week).

There are 17 bills of exception. The first, second, and sixteenth bring up for review a question of procedure under the Workmen's Compensation Act on which this court has not heretofore been required to rule, viz.: Is the trial court on appeal from Industrial Accident Commission bound, on the request of either party, to submit questions of fact to the jury in the form of issues, and, if so, what character of facts and in what form?

Section 56 of article 101 of the Code, which contains all the provisions of the act in regard to appeals in such cases, is as follows:

"Any employer, employee, beneficiary or person feeling aggrieved by any decision of the Commission affecting his interests under this article may have the same reviewed by a proceeding in the nature of an appeal and initiated in the circuit court of the county or in the common-law courts of Baltimore City having jurisdiction over the place where the accident occurred or over the person appealing from such decision, and the court shall determine whether the Commission has justly considered all the facts concerning injury, whether it has exceeded the powers granted it by the article, whether it has misconstrued the law and facts applicable in the case decided. If the court shall determine that the Commission has acted within its powers and has correctly construed the law and facts, the decision of the Commission shall be confirmed, otherwise it shall be reversed or modified. Upon the hearing of such an appeal the court shall, upon motion of either party filed with the clerk of the court according to the practice in civil cases, submit to a jury any question of fact involved in such case. The proceedings in every such an appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. No such appeal shall be entertained unless notice of appeal shall have been served personally upon some member of the Commission within thirty days following the rendition of the decision appealed from. An appeal shall not be a stay. If the decision of the Commission shall be changed or modified, the practice prevailing in civil cases as to the payment of costs and the fees of medical and other witnesses shall apply. Appeal shall lie from the judgment of the circuit court of the county or the common-law courts of Baltimore City to the Court of Appeals as in other civil cases, and such appeals shall have precedence over all cases except criminal cases.

"The Attorney General shall be the legal adviser of the Commission and shall represent it in all proceedings whenever so requested by any of the commissioners. In all court proceedings under or pursuant to this article, the decision of the Commission shall be prima facie correct and the burden of proof shall be upon the party attacking the same."

[1, 2] It is not entirely clear just what is meant by the provision that "upon the hearing of such an appeal the court shall, upon motion of either party filed with the clerk of the court according to the practice in civil cases, submit to a jury any question of fact involved in such case." What practice is referred to? Does it mean the practice as to filing the motion, as the punctuation seems to indicate, or the practice of submitting issues as in cases sent up from the orphans' court or in cases where questions of fact are submitted to a jury by a court of equity? There is no general practice in the courts of this state of filing motions with the

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clerk when a jury trial is desired, and it is not to be presumed that the Legislature was referring to a local practice of this sort if any such exists. If the punctuation is disregarded (as is permissible in construing a statute), and the sentence above quoted read as if the second comma followed "clerk of the court" instead of "civil cases," the reference would then naturally be to the practice of submitting questions of fact, and not to the practice of filing motions. But we are still left in doubt as to whether the right given to have "any question of fact" submitted to a jury means simply the right to the ordinary jury trial or whether it means the right to have special issues submitted, unless the true meaning can be gathered by considering this particular provision in connection with other provisions contained in the section, or unless the requirement that a motion be filed with the clerk indicates something more than the ordinary jury trial.

[3] It seems clear from the entire section that it is not within the powers of the jury on such an appeal to find a verdict for any amount or to fix the rate or period of compensation or to make any award. It may, however, find the facts upon which the court determines whether the finding of the Commission shall be confirmed, reversed, or modified. "The court shall determine whether the Commission has justly considered all the facts concerning injury, whether it has exceeded the powers granted it by the act, whether it has misconstrued the law and facts applicable in the case decided. If the court shall determine that the Commission has acted within its powers and has correctly construed the law and the facts, the decision of the Commission shall be confirmed, otherwise it shall be reversed or modified." The provision as to the right of either party, on motion, to have any question of fact submitted to a jury, following the language above quoted, would seem to be intended to protect the constitutional right to a jury trial of the facts involved, but in such a way as to enable the court to apply the law to the facts after they are found by the jury.

For the practical working of such a scheme there does not seem to be any method so appropriate as the submission of issues in a manner analogous to the practice in cases sent from the orphans' court or from courts of equity where it is desired that a jury shall pass on the facts.

In the majority of cases that have come before us on appeal no issues were framed. But it so happens that the omission has not been of practical importance until now, in some cases because appeals from the Commission were heard by the court, and in others by reason of the fact that only one issue of fact was involved. In any event the conditions were such that the finding of the jury for the appellant or appellee indicated clearly what the jury actually found, and no point has heretofore been made in this court either of the failure of the trial court to submit issues, or as to the form of the verdict or judgment.

[4] It may well be that in many cases a verdict for the appellant or for the appellee would be equivalent to a finding of the only fact in controversy, and in such cases that form of verdict would be sufficient; nor do we mean to say that on such cases it would be necessary to submit the fact in controversy in the form of an issue. Browne v. Browne et al., 22 Md. at page 115.

The present case illustrates not only the convenience, but the practical necessity in some cases, of the method of procedure above indicated. The real controversy here is as to whether the claimant should have submitted to an operation, and, if the jury so found, whether compensation should have been continued beyond the time which would have been required for his recovery after such an operation.

The Commission evidently found that he should have submitted to the operation; that compensation should stop after the period which would have been required for recovery thereafter, and fixed that time at

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eight weeks. But for some reason not apparent from the record they started the running of that time at least two months before. According to the evidence, the claimant could have been held blameworthy for neglecting or refusing to be so treated. The jury by its verdict undertook to make a new award which differed from that made by the Commission only in the amount of the weekly payments.

That verdict was not such as the jury was authorized to find. But suppose it had found either "for the appellant" or "for the appellee." In the one case it would have meant a reversal of the finding of the Commission without showing whether it was because of the incorrect finding as to the amount of weekly payments and the time from which the eight weeks were to start, or whether the jury disapproved of the Commission's view as to the duty of claimant to submit to an operation. If the verdict had been "for the appellee," it would have failed to correct the manifest error, not in principle, but in detail, of the finding appealed from.

It does not follow that the trial court is bound to submit as an issue every subordinate fact. That would only cause confusion. The facts submitted as issues should, as far as practicable, be confined to the ultimate issues involved in the finding of the Commission from which the appeal is taken, such as disability, dependency, whether the injury arose out of and in the course of employment, and the like, according to the ultimate fact or facts to be determined.

This brings us to a consideration of the questions which in the case at bar the trial court was asked to submit to the jury. There are two sets of them each with three questions. The motion and questions follow:

"And, said matter having been appealed to the Baltimore City court, said case regularly came on for trial; and after the opening statement to the jury, by the respective attorneys, the attorney for the appellant offered the following motion, to wit:

"The appellant respectfully moves that the following questions of facts be submitted to the jury:

"First. For the jury to determine the character of the injury herein complained of, as to whether it caused: (1) Permanent total disability; (2) temporary total disability; (3) permanent partial disability; and (4) temporary partial disability.

"Second. The extent of such injuries, if the jury so find.

"Third. The amount and mode of compensation, subject to the provisions of the Workmen's Compensation Act, to which the appellant is entitled, if the jury so find.

"And said appellant also offered the following motion:

"And the said Charles Schiller moves that without excluding other admissible evidence in this appeal the following questions of fact shall be submitted to the jury for their determination, to wit:

"First. What, if any, is the nature and extent of the injuries sustained by Charles Schiller, appellant, in his employment by the Baltimore & Ohio Railroad Company?

"Second. To what compensation, if any, is Charles Schiller, appellant, entitled because of said injury, if the jury so find?

"Third. For what length of time, if the jury so find, is Charles Schiller entitled to compensation?"

[5] There was no error in the refusal to submit these questions. They (except possibly the first) either do not raise the real question of fact at issue, or raise it in a form which would require cumbersome and discursive answers, or seek to limit matters which are not cognizable by the jury. The first question was not necessary because the award of the Commission shows that it found total temporary disability, which is all that the appellant claimed.

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We now come to exceptions relating to the ruling on evidence.

[6] The third, fourth, ninth, tenth, and eleventh exceptions are apparently based on the theory that the safety of an operation for hernia and its probable effect in removing the disability of claimant had no bearing on the merits of the case, and that such questions were therefore irrelevant.

It was vigorously contended by appellant that one should not, as a condition precedent to continued compensation during disability, be required to submit to an operation the result of which might be fatal even if such result is so unlikely as to make the danger practically negligible. To support this contention he has cited but three authorities, all being New Jersey cases. Newbaker v. New York, Susq. & W. R. R. Co., 38 N. J. Law, 175; McNally v. Railroad Co., 87 N. J. Law, 455, 95 Atl. 122; Feldman v. Braunstein, 87 N. J. Law, 20, 93 Atl. 679.

The overwhelming weight of authority is opposed to this view, holding that a man cannot continue to receive compensation and at the same time refuse to submit to proper medical or surgical treatment such as an ordinarily reasonable man would submit to in like circumstances. Donnelly v. Baird [1908] Sess. Cas. 536; Warncken v. Moreland [1909] 1 K. B. 184; Walsh v. Lock, [1914] 110 Law Times Rep. 452; Hutton v. The Majestic, [1909] 2 K. B. 54; Lesh v. Illinois Steel Co., 163 Wis. 124, 157 N. W. 539, L. R. A. 1916E. 105; Flocher's Case, 221 Mass. 54, 108, N. E. 1032; Donovan v. N. O. Ry. & Lt. Co., 132 La. 239, 61 South. 216, 48 L. R. A. (N. S.) 109; Bradbury's Workmen's Compensation Cases, 851; O'Brien v. Albert A. Albrecht Co., 206 Mich. 101, 172 N. W. 601, 6 A. L. R. 1257. The same principle is recognized in United Railways & Electric Co. v. Dean, 117 Md. 686, 84 Atl. 75.

There was no error in the rulings of the trial court on these exceptions.

[7] The fifth exception was to permitting Dr. Bay to testify that the place on the body which a witness pointed to as the place where he had a rupture which was cured by certain treatment which claimant testified he was using was not a place where the sort of hernia as claimant had could be. We find no error in this ruling.

[8] There was no error in the refusal of the court to strike out Dr. Edmonds' testimony that "to my knowledge none of these people I have operated on for the cure of hernia have returned to me with a recurrence," which constitutes the twelfth exception.

[9] The fourteenth exception embraces the ruling on two questions. The first was as to the condition of claimant found by Dr. Edmonds at the time of the trial in 1920 entirely unconnected with his condition at the time of the award by the Commission. The objection to the question was well taken and should have been sustained.

[10] We find no error in permitting the doctor to answer the other question embraced in this exception as to his opinion of the effect of the treatment which claimant had testified he was giving himself.

The sixth, seventh, eighth, thirteenth, and fifteenth exceptions were to questions as to the condition of claimant at the time of the trial in June, 1920, including conditions of heart and lungs. These questions were addressed to Drs. Bay and Edmonds, who, so far as the record shows, had not made any examination at the time of the hearing before the Commission and do not undertake to say what his condition then was. There is nothing in the record to show what was the condition of claimant's heart and lungs at the time of the award by the Commission from which this appeal was taken or that any examination was made at or before that time to ascertain the fitness of claimant to sustain an operation. In passing on the correctness of the order appealed from, his condition two years later, unconnected with his previous condition, is irre-

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levant. The objections to these questions should have been sustained and the failure to sustain them was prejudicial error.

The seventeenth and last exception relates to the ruling of the court on the prayers, of which three were offered by the appellant (the claimant) and seven by the appellee. All of appellant's prayers were refused, and all of appellee's granted except the first and second. The reporter will set out all of appellant's prayers and the granted prayers of appellee.

It will be apparent from what we have already said that appellant's first and second prayers were properly refused. As the third prayer was made to depend upon a recovery under the first, of course the third prayer could not be granted. It is also objectionable for other reasons.

All the granted prayers of appellee are bad in form under the practice above indicated as proper in such cases. It is therefore unnecessary to pass on the special exceptions.

Judgment reversed, and new trial ordered, with costs to appellant.

BELL v. STEEN ET AL. (No. 40.)

(Court of Appeals of Maryland. Jan. 11, 1921.)

112 Atlantic Reporter, 584.

1. MASTER AND SERVANT — BURDEN ON EMPLOYER TO OVERCOME FINDING OF COMMISSION THAT CLAIMANT WAS EMPLOYEE.

Where question whether accident arose out of and in the course of the employment had been decided in favor of the claimant by the State Industrial Accident Commission in a proceeding under the Workmen's Compensation Act, the burden of proof rested upon the employer and insurer, appealing from that decision and attacking the same, to show that claimant was not an employee.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

2. MASTER AND SERVANT — FOR JURY TO DETERMINE WHETHER APPELLANT SUSTAINED BURDEN OF PROOF UNDER WORKMEN'S COMPENSATION ACT.

In a proceeding under the Workmen's Compensation Act, where the question whether the accident arose out of and in the course of the employment had been decided in favor of the claimant by the Industrial Accident Commission, and the insurer and employer appealed, the question whether the injury arose out of and in the course of the employment was a question of fact for the jury to determine on the appeal, and the court was not authorized to say that the employer and insurer had met the burden imposed on it by 3 Code Pub. Gen. Laws, art. 101, § 56.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

Appeal from Superior Court of Baltimore City; Morris A. Soper, Judge.

"To be officially reported."

Proceeding by Evan H. Bell under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by Egil Steen and Edwin S. Steen, trading as E. Steen & Bros., the employers, and the United States Fidelity & Guaranty Company, insurer. There was an award of compensation, and the employers and insurer appealed. From a judgment reversing the award, the claimant appeals. Judgment reversed, and new trial awarded.

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Argued before Boyd, C. J., and Briscoe, Pattison, Urner, Adkins, and Offutt, JJ.

R. Lee Slingluff, of Baltimore (Christopher R. Wattenscheidt and Janney, Stuart & Ober, all of Baltimore, on the brief), for appellant.

J. Kemp Bartlett, Jr., and Guion Miller, both of Baltimore (Bartlett, Poe & Claggett, of Baltimore, on the brief), for appellees.

BRISCOE, J. Evan H. Bell, a carpenter by trade, filed a claim before the State Industrial Accident Commission of Maryland, and was awarded compensation for an injury received by him, while working for E. Steen & Bros., grain merchants, in the city of Baltimore and one of the appellees, on the record now before us.

It appears that the Industrial Accident Commission, after due notice to the employer, and the United States Fidelity & Guaranty Company, insurer, investigated the claim and held:

"That Evan H. Bell, was injured on the 18th day of October, 1917, while in the employ of E. Steen & Bros.; that his injuries consisted of laceration of nose, hip and fractured rib; that said injury arose out of and in the course of his employment; that his average weekly wage was $24; that he was temporarily totally incapacitated as a result of his injury, and the insurer of said employer is the United States Fidelity & Guaranty Company."

Thereupon on the 13th day of December, 1917, it was ordered by the Commission that compensation at the rate of $12 per week, payable weekly, be paid to Evan H. Bell by E. Steen & Bros., employer, and United States Fidelity & Guaranty Company, insurer, during the continuance of his disability, not to exceed, however, the period of time and aggregate amount as provided in section 35 of chapter 800, Acts of the General Assembly of Maryland of 1914, said compensation to begin as the 1st day of November, 1917, and that final receipt be filed with the Commission in due time.

Subsequently, upon application, the case was reopened, and a hearing was granted upon the question of whether the claimant was an employee of E. Steen & Bros., or an independent contractor.

Thereafter, on the 26th of January, 1918, upon the rehearing, the Commission affirmed the order previously passed by it and entered a final award against the parties, as follows:

"On the 13th day of December, 1917, this Commission passed an order awarding compensation to Evan H. Bell at the rate of $12 per week, payable weekly, during the continuance of his disability. Later the United States Fidelity & Guaranty Company, insurer, requested a hearing on motion to reopen and introduce evidence to determine whether claimant was an employee or an independent contractor. At said hearing all parties were present and heard, and, after due consideration, the Commission has come to the conclusion that the original order of December 13, 1917, should be affirmed, and will pass an order to that effect.

"It is therefore this 26th day of January, 1918, by the State Industrial Accident Commission, ordered that the order of this Commission passed in this case on the 13th day of December, 1917, be, and the same is hereby, affirmed."

On January 31, 1918, the employer and insurer appealed from the final award, and the record of proceedings before the Commission was transmitted to the superior court of Baltimore City for trial.

It appears that upon the first trial before the court and a jury on the 21st of May, 1919, the jury failed to agree and were discharged.

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At the conclusion of the testimony on both sides at the second trial on March 24, 1920, the appellants submitted the three following questions of fact to the jury for determination:

(1) Was the appellee, Evan H. Bell, an employee of the appellants E. Steen & Bros.?

(2) Was the employee, Evan H. Bell, a casual employee, of the appellants E. Steen & Bros.? and

(3) Was the appellee, Evan H. Bell, employed in a trade, business or occupation carried on by appellants E. Steen & Bros. for pecuniary gain?

Thereupon it appears that the court below, at the instance of the appellants (the employers and the insurer), granted the following instruction to the jury:

"The jury are instructed that, as it appears from the uncontradicted evidence in this case that the appellee, Evan H. Bell, was not a person engaged in the service of the appellants Steen Bros., and was therefore not an employee within the meaning of the Workmen's Compensation Act, the answer to the first question should be 'No.' "

It appears from the docket entries that the jury rendered its verdict as instructed, viz.:

"On the 24th of March, 1920, upon the first issue presented the jury answer 'No.' "

The record contains a single exception, and this brings up for review the action and the ruling of the court in granting the appellant's prayer, which instructed the jury that Evan H. Bell was not an employee within the meaning of the Workmen's Compensation Act, and that their answer to the first question should be "No."

The question presented in this case is identical with that recently passed upon by this court in the recent case of Jewel Tea Co. v. Weber, 132 Md. 178, 103 Atl. 476, and unless we are to overrule what was decided in that case, and approved in Beasman v. Butler, 133 Md. 388, 105 Atl. 409, we must hold in this case that the granting of the appellants' prayer was improper and reversible error.

In Weber's Case, supra, this court said:

"In the case at bar one of the questions of fact to be determined on appeal was whether the injury sustained by the deceasd arose 'out of and in the course of his employment' by the company, and, as the Commission had decided that question in the affirmative, under the provision of the act and the decisions of this court, the burden was on the appellant to show that the decision was wrong, and that such injury did not arise out of and in the course of such employment As the case was tried by a jury, with the burden on the appellant to show that the decision of the Commission was incorrect, it was for the jury to determine the questions of fact presented by the appeal, and, among them, the question whether the injury sustained by the deceased arose out of and in the course of his employment by the appellant; and the court was not authorized to say that the appellant had met the burden imposed on it, or to assume a fact to be found by the jury."

See Coastwise Shipbuilding Co. v. Tolson, 132 Md. 205, 103 Atl. 478; Beasman v. Butler, 133 Md. 384, 105 Atl. 409; Lemp Brewing Co. v. Mantz, 120 Md. 176, 87 Atl. 814; Frazier v. Leas, 127 Md. 573, 96 Atl. 764; Charles Schiller v. B. & O. R. R., October term, 1920, 112 Atl. 272; Code, art. 101, § 56.

[1] In the case at bar the question whether the accident arose out of and in the course of the employment had been decided in favor of the claimant by the State Industrial Accident Commission, and the burden of proof, as provided by the statute, rested upon the parties appealng from that decision, and attacking the same.

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[2] The question whether the injury arose out of and in the course of his employment was a question of fact for the jury to determine on the appeal, "and the court was not authorized to say that the appellant had met the burden imposed on it, or to assume a fact to be found by the jury."

It is clear, therefore, for the reasons stated and upon the authorities cited, that the court below committed an error in granting the appellee's prayer, and for this reason the judgment must be reversed.

We find nothing in the case of Harrison v. Central Con. Cor., 135 Md. 180, 108 Atl. 874, relied upon by the appellees on this record in conflict with our ruling in this case, nor in any way overruling the former decisions of this court in Jewel Tea Co. v. Weber, 132 Md. 178, 103 Atl. 476; Coastwise Shipbuilding Co. v. Tolson, 132 Md. 203, 103 Atl. 478; Beasman v. Butler, 133 Md. 382, 105 Atl. 409; Thistle Mills v. Laban Sparks, October term, 1920, 111 Atl. 769.

While the record contains no order or judgment of the court below, reversing the award of the State Industrial Accident Commission, yet the appellants and appellee have treated the case in their briefs as if a judgment had been entered. We have assumed, therefore, that the proper judgment was entered by the court below, and we have disposed of the case accordingly.

Judgment reversed, with costs, and new trial awarded.

CENTRAL CONST. CORPORATION ET AL. v. HARRISON. (No. 30.)

(Court of Appeals of Maryland. Dec. 2, 1920.)

112 Atlantic Reporter, 627.

1. MASTER AND SERVANT—INJURY WHILE BOARDING TRAIN BOUND FOR WORKING PLACE HELD ONE "ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Where employer agreed to furnish employees free transportation to and from work and arranged with railroad for such transportation, and where employees were at first transported by regular train, but later, because of increasing numbers, by special work trains, and where by subsequent agreemnt the payment for transportation of such employees was made direct to the railroad by the United States government for which the work was being done, an employee who was directed to board wrong work train, and, on discovery of mistake, was injured while boarding the following regular train which would carry him to his work, was injured by an accident which arose out of and in the course of his employment within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2 MASTER AND SERVANT — COMPENSATION ACT CONTEMPLATES SUBMISSION OF QUESTIONS OF ULTIMATE FACTS.

In proceedings under Workmen's Compensation Act, involving the issue of whether an accident which occurred while employee was boarding train on way to work arose out of and in the course of the employment,

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court's refusal to submit proposed questions of fact as to nature of accident, character of train, terms of contract between employer and railroad, and as to whether employer furnished employee free transportation, *held* proper under Code, art. 101, § 56, providing for submission of questions of fact; such statute having reference only to ultimate facts.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

3. MASTER AND SERVANT — REFUSAL TO SUBMIT ISSUE OF FACT NOT ERROR WHERE ONLY ONE ISSUE OF FACT IS INVOLVED.

In proceedings under Workmen's Compensation Act, the refusal to submit a proposed question of fact under Code, art. 101, § 56, was not error, where such fact was the only ultimate fact in issue, and it was clearly submitted to the jury by the instructions granted, since in such case a general verdict is a complete answer to the question.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

4 MASTER AND SERVANT—QUESTIONS OF FACT IN COMPENSATION CASE PRESENTED TO COURT BEFORE JURY IS SWORN.

In proceedings under Workmen's Compensation Act, questions of fact should be framed and presented so that they may be passed upon by the court before the jury is sworn.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

Appeal from Baltimore City Court; John J. Dobler, Judge.

"To be officially reported."

Proceedings under Workmen's Compensation Act by Joel Harrison for compensation for injuries, opposed by the Central Construction Corporation, employer, and the Maryland Casualty Company, insurer. From judgment of the Baltimore city court affirming award for claimant by the State Industrial Accident Commission, the employer and insurer appeal. Affirmed.

Appellants' proposed questions of fact referred to in opinion follow:

The employer and insurer, by their counsel, request the court to submit to the jury impaneled to try this case the following questions of fact in accordance with section 56 of the Workmen's Compensation Law of Maryland:

Question 1. Was the employee, Joel Harrison, injured while boarding a train of the Pennsylvania Railroad Company?

Answer.

Question 2. Was the train by which Harrison was hurt operated for the sole use of employees of the Central Construction Company?

Answer.

Question 3. Could any persons other than employees of the Central Construction Company ride upon the train by which Harrison was hurt?

Answer.

Question 4. Was the employee injured while upon any property on which the Central Construction Company was engaged in the performance of work?

Answer.

Question 5. Did Central Construction Corporation contract with the Pennsylvania Railroad Company to pay it for the transportation of Harrison from Baltimore to Magnolia on the day he was injured?

Answer.

The employer and insurer pray the court to submit to the jury the following additional questions of fact involved in this appeal:

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6. Did the Central Construction Corporation furnish the employee with transportation?

Answer.

7. By whom was the free transportation furnished the employee?

Answer.

8. Did the Central Construction Corporation provide the vehicle or means of conveyance which the employee was riding upon or attempting to board at the time he was hurt?

Answer.

9. Was the train which the employee was attempting to board a train provided by the railway company for the transportation of employees?

Answer.

10. Could the employees of the Central Construction Corporation have ridden on the train which this employee was trying to board by showing his card or button, or both?

Answer.

Argued before Boyd, C. J., and Briscoe, Thomas, Urner, and Offutt, JJ.

Austin J. Lilly and Walter L. Clark, both of Baltimore, for appellants.

Clifton S. Brown, of Baltimore (Milton Roberts, of Baltimore, on the brief), for appellee.

THOMAS, J. This is the second appeal in this case. On the first appeal, reported in 135 Md. 170, 108 Atl. 874, this court, in its statement of the case, said:

"Joel Harrison [the appellee here] was an employee of the Central Construction Company, a corporation which was doing certain construction work for the United States government at Edgewood Arsenal, Magnolia, Maryland. He was seriously injured on the 19th of June [July], 1918, and thereafter filed a claim for compensation with the State Industrial Accident Commission against the Central Construction Company, employer, and the Maryland Casualty Company, insurer, and was awarded compensation by that body. An appeal was taken by the employer and insurer. The appeal was heard in the Baltimore city court, without a jury, upon a transcript of the record from the Commission, in addition to certain facts set forth in a stipulation between the parties filed in the case and which appears in the record. * * * At the conclusion of the case the court ruled, as a matter of law, that the injury described in the stipulated facts and in the papers in the case, under the circumstances there described, was not one which arose out of and in the course of his employment within the meaning of the Maryland Workmen's Compensation Act, and in accordance with this holding the decree of the State Industrial Accident Commission was reversed. From the judgment reversing the award of the Commission the appeal before us was taken."

Having referred to the provisions of the Maryland act, this court said in disposing of the case:

"In this case it is not disputed that the appellant was engaged in an extrahazardous employment. The sole question in the case is: Did his injuries arise out of and in the course of that employment? The stipulation to which we have referred discloses the facts and circumstances of the employment as well as the circumstances under which the injuries were received, and, in the view we take of the case, it will be sufficient to refer to what we regard as the controlling and determining facts appearing in the stipulation. The appellant lived in Baltimore City. It was a part of this contract with the Central Construction Company that it would furnish him free transportation to his work at Magnolia. He

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and other workmen of the construction company used certain work trains over the Pennsylvania Railroad from Union Station, Baltimore. to and from their work. The construction company furnished him a button for identification, and this button was evidence to the conductor of his right to free transportation. The superintendent of the company said to the workmen. as expressed in the evidence before the Commission, 'You have free transportation on your button.' It appears from the stipulated facts that 'on July 19, 1918. Joel Harrison, the employee and claimant in this cause, proceeded to Union Station and there was directed to board what he understood to be a work train of the Pennsylvania Railroad Company bound for Magnolia, and that after boarding said train and after same had left Union Station he was told by a railroad official of said train, the Pennsylvania ticket collector, that the train did not stop at Magnolia. but stopped only at Aberdeen, and that he (Harrison) should leave the train where it made a stop just before reaching Back River station. and take the following work train.

" 'That accordingly Joel Harrison left said train at the point in the preceding paragraph indicated and walked a distance of several hundred feet into Back River station, and was there told by the Pennsylvania Railroad Company's policeman that the following train would not stop at Back River station, but would stop at the same point where the train which Harrison had just left had stopped, to wit. several hundred feet from the station; that thereupon Harrison went back to the point that he had just left the first train, and was proceeding to board the following train. which in the meantime had pulled in and stopped, when the train suddenly started and threw him under the wheels, causing an injury which directly resulted in the loss of his right foot at a point midway between the knee and ankle.'

"When the injury occurs before the beginning or after the termination of work. there are two general rules applicable to the question as to whether it arose out of and in the course of the employment. The first is that an employee, while on his way to work. is not in the course of his employment. The second is that, where the workman is employed to work at a certain place, and as a part of his contract of employment there is an agreement that his employer shall furnish him free transportation to or from his work, the period of service continues during the time of transportation, and if an injury occurs during the course of transportation it is held to have arisen out of and in the course of employment. The cases relied on by the appellees announce and apply the first rule. The second rule has the support of English and American cases."

After referring to these cases, this court held that the lower court had committed an error in its ruling referred to, and in reversing the award of the Commission. and the judgment was accordingly reversed and a new trial awarded.

Upon the handing down of the opinion and order of this court, the appellees in said case, the appellants here. filed a motion for a reargument, with an elaborate brief in support of their contentions, on the following grounds:

"(1) That this court had misapprehended vital and fundamental facts upon which the decision in this case necessarily turns and has applied to the facts, as so misconceived. decisions and authorities which. while entirely applicable to the facts assumed. would, if applied to the real facts. result in a contrary decision.

"(2) That it appears from the stipulation contained in the record that the claimant was hurt while trying to board a train of the Northern Central Railway at a point far from the premises and place of the work of the employer.

"(3) That said train was not provided for the exclusive use of the employees of this employer.

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"(4) That the train which the claimant was attempting to board was not furnished by the employer nor was the fare paid by the employer. either directly or indirectly, but on the contrary, the fare of all the workmen employed on the construction work was paid for by the United States government under its arrangement with the railroad company."

All of the facts relied on in the motion for reargument clearly appeared in the record of that appeal, and had not been overlooked by the court in its decision, and the motion was accordingly overruled.

The present appeal is by the employer and insurer from a judgment of the Baltimore city court affirming the action of the State Industrial Accident Commission.

At the second trial the case was submitted on the evidence taken before the commission and the facts agreed to in the stipulation, all of which were set out in the record of the former appeal and is contained in the present record, and some additional evidence produced by the appellants. The record contains four exceptions, three to the rulings of the court on the evidence. and one to the action of the court on the prayers. and its refusal to submit to the jury certain questions of fact proposed by the appellants.

[1] The additional evidence produced by the appellants at the second trial does not change or affect the material facts presented by the record of the former appeal. The present record shows, as did the record in the first appeal. that the appellee lived in Baltimore City, and that as a part of his contract with the Central Construction Corporation that corporation agreed to furnish him free transportation to his work at Magnolia; that after his employment, and prior to July 10, 1918. the Central Construction Corporation arranged for the payment of the transportation expense of its employees over the Pennsylvania Railroad Company's lines and was allowed therefor by the United States government under the terms of its percentage contract with the government. and after July 10, 1918, "the United States government. by virtue of an arrangement made through its War Department and by its direct representatives with the Pennsylvania Railroad Company, paid the Pennsylvania Railroad Company direct, without the intervention of the Central Construction Corporation. an agreed sum for transportation of employees of the Central Construction Corporation and employees of other contractors engaged upon work at Edgewood Arsenal"; that for some time after the appellee was employed the Pennsylvania Railroad Company had regular trains on regular schedules, which carried the workmen of the several contractors at Edgewood Arsenal to and from Magnolia; and that "the so-called special work trains were put on simply because the increasing number of workmen made it difficult, if not impossible, to handle the situation on the regular trains." The only new feature of the case presented by such additional evidence offered by the appellants is the testimony of William Bowen Lane, the conductor of the train which the appellee was attempting to board at the time he was injured, to the effect that that train was not a work train. but a regular passenger train. But it appears in this record. as it did in the former record, that the appellee left Union Station a train which he was informed was and believed to be a work train, and that he left that train and attempted to board the train by which he was injured in pursuance of directions given him by the agents of the Pennsylvania Railroad Company in order to reach the place of his work at Magnolia. On the former appeal it was not deemed necessary under the circumstances for it to appear that the train the appellee attempted to board was a work train, and the fact that it was not cannot be regarded as material here.

The rejected prayers of the appellants present the same legal propositions contended for by them on the former appeal. and in support of their motion for a reargument. and for the reasons stated in the deci

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sion of this court in that case, were properly rejected by the court below. For the same reasons there was no error in the modification by the court of the appellants' sixth prayer. The special exception to the appellee's prayer was on the ground that there was no evidence legally sufficient "to prove that the claimant was using the transportation which the employer agreed to furnish," and under the decision in the former appeal was properly overruled. The exceptions to the rulings on the evidence were not pressed in this court. and it is only necessary to say that we find no error in any of them.

[2] At the conclusion of the evidence the appellants asked the court to submit to the jury two sets of "questions of fact." and after submitting their prayers requested the court to submit to the jury another question of fact. In Schiller v. B. & O. R. R. Co. (No. 27 appeals of this term), 112 Atl. 272, we had occasion to consider section 56 of article 101 of the Code, providing:

"Upon the hearing of such an appeal the court shall, upon motion of either party filed with the clerk of the court according to the practice in civil cases. submit to the jury any question of fact involved in such case."

And we there held that the trial court is not required to submit as an issue every subordinate fact, and that to do so would cause confusion, but that—

The "facts submitted as issues should, as far as practicable, be confined to the ultimate issues involved in the finding of the Commission from which the appeal is taken, such as disability. dependency. whether the injury arose out of and in the course of employment, and the like. according to the material fact or facts to be determined."

Under this construction of the section of the Code mentioned it is clear that the court below properly refused to submit any of the questions of fact proposed in the first two sets of questions. These questions suggest the practice that grew up under chapter 185 of the Acts of 1894, authorizing special findings of fact by the jury in addition to a general verdict, and which fell into such disfavor in the profession that the act was repealed by chapter 641 of the Acts of 1900. 1 Poe's P. P. §§ 758, 758A; 2 Poe's P. P. § 332A. One of the purposes of the Workmen's Compensation Act was to secure to injured employees certain and prompt compensation for injuries sustained, without. as far as practical. the delays and pitfalls incident to technical procedure, and a return to the practice under the act of 1894 was not contemplated and should not be encouraged in such cases.

[3] There is no objection to the third question of fact proposed by the appellants, which was, "Did the injury complained of arise out of and and in the course of his [the appellee's] employment?" But that was the only issue of fact involved in the controversy, and it was clearly submitted to the jury by the instructions granted by the court below. A general verdict of the jury in favor of the appellants or appellee would have been a complete answer to that question. and there was therefore no error in the refusal of the court below to submit it in the form proposed by the appellants. 27 appeals October term, 1920. The reporter is requested to set out the questions of fact proposed by the appellants in his report of the case.

[4] It appears from the record that the questions of fact proposed by the appellants were not presented to the court below until after the conclusion of the testimony, and that was the practice followed under Acts 1894, c. 185. 1 and 2 Poe's P. P. supra; Baltimore Traction Co. v. Appel, 80 Md. 610 and 611. 31 Atl. 964. But if. as suggested in No. 27 appeals of this term, 112 Atl. 272. the practice in cases of issues sent from the orphans' courts and courts of equity to courts of law for trial is the most appropriate one to follow, the proper and better practice in

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cases under the Compensation Act would be to frame and present the questions of fact to the trial court so that they may be passed upon by the court before the jury is sworn.

Finding no error in the rulings of the court below, the judgment appea'ed from will be affirmed.

Judgment affirmed. with costs.

LAPAN'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 15, 1921.)

129 Northeastern Reporter, 607.

1. MASTER AND SERVANT — FINDING ON EVIDENCE IN COMPENSATION CASE FINAL.

The finding of the Industrial Accident Board must stand. if there is any evidence to support it.

(For other cases. see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT—FINDING OF EMPLOYER'S KNOWLEDGE OF ACCIDENT WARRANTED BY EVIDENCE IN COMPENSATION CASE.

In proceedings for compensation for the death of an employee, evidence *held* sufficient to warrant finding of Industrial Accident Board that employer had knowledge of the injury, within Workmen's Compensation Act. pt. 2, § 18; written notice of the injury not having been given.

(For other cases, see Master and Servant, Dec. Dig. § 405[1].)

Appeal from Superior Court, Suffolk County.

Proceeding for compensation under the Workmen's Compensation Act by Catherine A. Lapan. widow of Levi Lapan, the employee. opposed by the Sullivan Granite & Construction Company, the employer. and the Travelers' Insurance Company, the insurer. Compensation was awarded, the award affirmed by the superior court and from its decree the insurer appeals. Affirmed.

Walter I. Badger and Louis C. Doyle, both of Boston. for appel'ant.
Joseph T. Kenney, of New Bedford. for appellee.

CROSBY. J. This is a proceeding under the Workmen's compensation act (St. 1911, c. 751) and amendments thereto. The employee received an injury on July 10. 1919. which resulted in his death on the following day. The insurer concedes that there was evidence from which it could have been found that the injury arose out of and in the course of the employment and that death resulted therefrom. Written notice of the injury was not given as required by part 2. §§ 15 and 16, of the act, and the question presented is whether there was evidence sufficient to warrant the finding of the Industrial Accident Board that the subscriber had knowledge of the injury under part 2, § 18.

There was evidence that the employee received a strain while loading heavy stone into a wagon, which caused a rupture. The employer's foreman, Barry. under whom the emp'oyee worked, testified that another man was loading the team with the deceased, that "they were within his view. about 10 or 15 feet away from him." and that when the team was

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about half loaded the employee came to him and said "I got an awful pain across here"—pointing to his stomach; that Barry said. "Sit down, maybe it is cramps you got;" that he advised him to see a doctor, and sent him home in an automobile. This witness also testified that the employee did not explain to him "how it happened; that is all he knows about it."

On July 12, 1919, two days after the injury and after the employee had been removed to the hospital on July 11, where he died on the same day, the employer made a written report, of the injury, which was filed with the board on Ju'y 16, 1919; in this report under section D 3, calling for a description of how the injury occurred, it is stated that the employee "was taken ill suddenly while at work and was removed to the hospital; the physician said he had a strain which caused a rupture of which he died on Friday."

[1] As the injury occurred before the enactment of St. 1920, c. 223, amending section 18 of part 2, the case is not affected by the amendment. The board found that on the date of the report, the subscriber had knowledge of the injury; that finding must stand, if there is any evidence to support it. While it has been held by this court that a report of an injury by an employer, based upon an oral notice of it given by the employee, does not make out knowledge of the injury by the employer, and that oral notice is not knowledge, Brown's Case, 228 Mass. 31, 36, 116 N. E. 897, we are of opinion that in the case at bar it could not be ruled that the finding that the employer had know'edge of the injury was unwarranted. In referring to section 18 of part 2, it was said in Brown's Case, supra, that—

"The duty of the employer under this section is to make an investigation, find out the facts and to 'keep a record of' the facts, and having found out what the facts are then within forty-eight hours make a report of them to the Industrial Accident Board."

It may reasonably be inferred from the statement in the report, that in the performance of its duty, the employer had investigated and found what the facts were; that inquiry had been made of the attending physician, who testified that on the day of the injury he was called to attend the employee, and asked him if he hurt himself, "and Lapan said he thought he had when lifting. He said the first he felt was a quick pain take him when he was lifting a stone. * * * Lapan said he had hurt himself by lifting, he thought. He felt it when he was reaching for a chain and lifting on the stone. He said it got him very sharp as if something had broken or given way and he had all the appearance of a man being hurt."

The physician also testified that the emp'oyee's condition was acute and came on very suddenly; that this condition was caused by a strain. It is a rational inference from the statement in the report that the employer in the performance of its duty made an investigation of the facts. in the course of which it consulted the physician and from him obtained information upon which the report was made that "the employee had a strain which caused a rupture of which he died."

[2] The evidence that the employer's foreman, Barry, was present when the injury was received and knew that the employee was suffering great physical pain and had to give up work, together with the facts that the employer had knowledge that the employee had been removed to the hospital and was informed by the physician that he had suffered a strain which caused a rupture from which he died the next day, warranted a finding that the employer had knowledge of the injury. Bloom's Case, 222 Mass. 434, 111 N. E. 45; Carroll's Case, 225 Mass. 203, 114 N. E. 285. Jeremiah Murphy's Case, 226 Mass. 60, 115 N. E. 40. See Walkden's Case, 236 Mass. —, 129 N. E. 396.

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We find nothing in Brown's Case, supra, at variance with the conclusion here reached.

Decree affirmed.

ROURKE'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 20, 1921.)

129 Northeastern Reporter, 603.

1. MASTER AND SERVANT — RELATION FOR PURPOSE OF COMPENSATION SUSPENDED WHEN SERVANT LEAVES PLACE OF WORK.

Unless the incidents of an employment be exceptional the relation between master and servant is suspended when the servant leaves his place of actual employment at the close of his day's work to go to his home, and again becomes active when, after the interval of rest, the servant puts himself in a position where he can do the work of his employment at the place where it is to be performed.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

2. MASTER AND SERVANT — WORKMEN'S COMPENSATION; INJURIES TO STRIKE BREAKER, AFTER LEAVING FACTORY IN COMPANY OF SUPERINTENDENT NOT COMPENSABLE.

Where a strike-breaking moulder was employed, and during the negotiations the employer's superintendent stated he would see he was taken care of, that they had a boarding house for him, and that he, the superintendent, would be with him after such employee dropped his tools at the end of the working day and left the factory, he was not entitled to compensation, under the act for injuries, when a striker assaulted him though he was in company of the superintendent.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

Appeal from Superior Court, Suffolk County.

Proceedings under the Workmen's Compensation Act (St. 1911. c. 751, as amended by St. 1912, c. 571) by Robert Rourke, the employee, opposed by the Holyoke Machine Company, the employer, and the American Mutual Liability Insurance Company, the insurer. Compensation was awarded, the award affirmed by the Superior Court, and from its decree the insurer appeals. Decree reversed, and decree entered for the insurer.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason, of Boston, of counsel), for appellant.

Jacob Isaacs, of Boston, for appellee.

PIERCE, J. In response to an advertisement of the Holyoke Machine Company in a Boston newspaper "for a few first-class iron moulders" Robert Rourke, the claimant, knowing there was a strike on at the company's factory, May 21, 1919, went to the office of the Holyoke Machine Company, Worcester, Mass., in search of employment.

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He there met Mr. White, superintendent of the Holyoke Machine Company, and was hired by him on May 21, 1919, for an indefinite time at six dollars a day.

During their negotiations Mr. White said to Rourke:

"I will see that you are taken care of and give you plenty of protection and I will go home with you evenings." "I will guarantee you protection." "We have a boarding house for you." "I will be with you." "The boarding house was not running at the time, it was just a rooming house." "It was started exclusively with the idea of furnishing board for the National Association men because they had trouble in boarding them in their houses and they were willing also that the rest of the men should benefit by it." "White went to 166 Main street himself and made arrangements for boarding the men."

Rourke who did not come as a worker supplied by the National Association "was told by White to go to the boarding house as that would be the best place for him * * * in a large city with a strike on."

The night of May 21, 1919, Rourke went to the boarding house and slept there unmolested. On the next morning he went from the rooming house to the company's factory and as a moulder worked there until some time between 4:30 and 5 p. m. He then "dropped his tools, changed into street dress, rang in his time and left the factory going out on the street (with twelve) other men." While on Thames street, a public highway in the city of Worcester, at a point above one hundred and fifty feet from the shop, a man assaulted Rourke by striking him in the face. White "was walking with the men at the time of the assault."

He testified that—

"In the first place it was necessary that he be with the men on account of the bills at the restaurant, and then it was to his interest that none of the union pickets speak to the men, therefore he thought that his presence would prevent the union pickets from talking to the men."

He had before testified "that he went to the Capital Lunch with the men at night and in the morning, and at noon had the Lunch sent in from the Capital Lunch."

He described the assault as follows: When they came out of the factory there were twenty-five or thirty men on the opposite side of the street, he and the men were going to the boarding house. As they started up the street a man came across the street and started to talk with one of the men in front, he was in back of the line and he went up and told the man whom he did not know that he had no business talking to his men, that the man made a grab at him and that when he turned around and started back the whole crowd came over and mixed right in. The claimant did not know who assaulted him and White testified that the man "did not work in his establishment."

The Industrial Accident Board ruled "that the claimant's employment was continuous from the time he left his boarding house furnished by the subscriber to go to the place his work was actually to be performed until his return to the same boarding house at night." Shortly stated it ruled that the assault on the claimant was made in the course of his employment.

The Industrial Accident Board stated that it did "not rule that the guarantee of protection imposes liability upon the insurer solely because of that guarantee," but it did rule that "it is evidence, taken in connection with the fact that the superintendent was actually escorting the employee and others from their place of employment to the boarding place furnished by the employer, and the additional fact that the assault occurred as a direct result of the superintendent's talk with one of the group of pickets who committed the assault, that the employment was continuous and that the resulting injury arose out of and in the course of claimant's employment."

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[1] We cannot agree with the reasoning or with the result arrived at by the board. Unless the incidents of employment be exceptional the relation between a master and his servant is suspended when the servant leaves the place of his actual employment at the close of his day's work to go to his home, and again becomes active when after the interval of rest the laborer puts himself in a position where he can do the work of his employment at the place where it is to be performed. Langley v. Boston Elev. Ry., 223 Mass. 492, 496, 112 N. E. 79.

[2] In the case at bar the day's work of the claimant came to an end when he dropped his tools, rang in his time, left the place of his employment and entered upon the public highway. While not conclusive in the determination of the incidents of the employment, it is worthy of consideration that thereafter the employer under the contract of employment had no legal right to command the services of the claimant and he was under no duty of obedience thereto.

As bearing upon the question of the incidents of the employment, we can perceive no resemblance between a contract of protection against criminal acts of third persons who may seek to coerce a hostile employer to grant their demands through the intimidation of and assaults upon his servants and a contract of employment which has regard to conditions and circumstances which are the natural and not abnormal concomitants of the work to be performed under the contract, for example agreements for transportation, when the place of work is at a distance. McGuirk v. Shattuck. 160 Mass. 45, 35 N. E. 110, 39 Am. St. Rep. 454; Kilduff v. Boston Elev. Ry., 195 Mass. 307, 81 N. E. 191, 9 L. R. A. (N. S.) 873; Daniel Donovan's Case, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778. See Harbroe's Case, 223 Mass. 139, 142, 111 N. E. 709, L. R. A. 1916D, 933.

Without decision we assume the claimant under the terms of the employment had a contract to which he could look for compensation if harm should come to him because the company had failed to keep its agreement to provide protection, and we further assume that the agreement covered all the time he remained an employee of the company whether the harm and injury resulted to him during his hours of employment or in the intervals of time which are allotted to rest and recreation. But we do not think the effect of the contract was to make the employment of the claimant continuous or that it made him as the result of the contract a servant of the company after his day's work was done and he had left the place of his employment to go home. Poulton v. Kelsall, [1912] 2 K. B. 131.

It results that the decree must be reversed and a decree entered for the insurer.

Decree accordingly.

RAY v. COMMERCIAL ACID CO. (No. 16334.)

(St. Louis Court of Appeals. Missouri. Feb. 8, 1921. Rehearing Denied Feb. 24, 1921.)

227 Southwestern Reporter, 851.

1. MASTER AND SERVANT — WORKMAN EMPLOYED FOR PARTICULAR JOB NOT IN "REGULAR OR STABLE EMPLOYMENT" WITHIN ILLINOIS COMPENSATION ACT.

Plaintiff, employed for a particular job of unloading and placing heavy machinery on foundations, was not in "regular or stable employ-

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ment" within the Workmen's Compensation Act of Illinois, so that injuries to him did not fall within the act.

(For other cases, see Master and Servant, Dec. Dig. § 362.)

2. MASTER AND SERVANT — EMPLOYMENT OF WORKMAN CAUSING INJURY JURY QUESTION.

In a servant's action for injuries, whether or not the carpenter whose act in dropping a hatchet was employed by defendant *held* for the jury under the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 332[1].)

Appeal from St. Louis Circuit Court; Benjamin J. Klene, Judge.

"Not to be officia'ly published."

Suit by J. C. Ray against the Commercial Acid Company. From judgment for plaintiff, defendant appeals. Affirmed.

Jeffries & Corum, of St. Louis, for appellant.

W. H. Douglass, of St. Louis, for respondent.

BECKER, J. This is a suit for damages for personal injuries in which the plaintiff recovered a judgment against the defendant in the sum of $2,000. Defendant appeals.

It appears that plaintiff has been a resident of the city of St. Louis for a number of years, and in 1916 he was, and for several years prior thereto had been, in the employ of one Joseph Ruprecht. who was engaged in the city of St. Louis, in moving machinery. The defendant, Commercial Acid Company. is a corporation organized under the laws of the state of Illinois. and has a plant in East St. Louis, Ill., where it is engaged in the manufacture of corrosive acids. but has its general offices in the city of St. Louis, Mo.

In October, 1916, the defendant company was engaged in building, or having built for it. a manufacturing plant designed for the manufacture of chemicals. It entered into an agreement with the said Joseph Ruprecht to send over a number of his men who were then employed by the said Ruprecht in the city of St. Louis to its plant or building that was being erected in East St. Louis, Ill., to unload and place certain heavy machinery upon foundations in said building. Plaintiff was one of four men sent over by Ruprecht to do said work under the direction of the defendant's superintendent. While plaintiff and the other men were engaged in the work of placing the machinery upon the foundations therefor within the building, and while the building at the time was in the course of erection and work upon the roof thereof was under way, a hatchet which was being used by one of the carpenters at work on the roof of the said bui'ding fell and struck plaintiff's head. causing him serious injuries for which he recovered judgment as above stated.

Appellant presents for consideration two assignments of error: First, that plaintiff's claim for compensation falls within the provisions of the Workmen's Compensation Act of the state of Illinois, and must therefore be presented to the Industrial Board in the manner provided for in said act, and consequently that plaintiff is not entitled to prosecute this action. The second assignment is that there is no evidence in the record in this case on which to base a finding that the carpenter who permitted the hatchet to fall which struck plaintiff was an employee of the defendant.

In light of the facts as shown by the record in this case we are of the opinion that plaintiff's right to recover damages for his al'eged injuries is not controlled by the Workmen's Compensation Act of the state of Illinois. And our conclusion in the matter is not affected by the ques-

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tion of whether plaintiff was in fact at the time he met with his injuries in the actual employ of the defendant company or of Joseph Ruprecht; for in either event the record is clear that the work which the plaintiff was doing at the time was not regular employment. but work that was merely incidental to the building and equipping of the structure that was being erected by or for the defendant, and under the second paragraph of section 5 of the Workmen's Compensation Act of Illinois it is provided that—

"The term 'employee' as used in this act shall be construed to mean * * * but not including any person whose employment is but casual or who is not engaged in the usual course of the trade, business. profession or occupation of his employer." Hurd's Statutes of Illinois 1916. p. 1234.

There is nothing in this record to indicate that the plaintiff had any permanent employment with the defendant company, but it is clear that plaintiff was only employed for that particular job, as were the three other men who were supplied by Ruprecht with plaintiff for the purpose of unloading and placing the heavy machinery upon foundations.

[1] In this view of the evidence, and in light of the section of the statute quoted above from the Workmen's Compensation Act of Illinois, we rule that the employment of plaintiff was not a regular or stable employment within its meaning. and therefore does not fall within the provisions of the said Workmen's Compensation Act. See G. W. R. R. Co. v. Industrial Commission, 284 Ill. 573, 120 N. E. 508; Aurora Brew. Co. v. Industrial Board of Illinois et al., 277 Ill. 142, 115 N. E. 207. and cases therein cited.

We next address ourselves to the question as to whether or not plaintiff made out a prima facie case to prove the allegation in his petition that the defendant or one of its employees dropped the hatchet which plaintiff claimed injured him.

Defendant's second amended answer sets up that plaintiff was in the defendant's employ at the time he met with his injuries, and "engaged in the building of a structure, to wit, in the building and constructing of a manufacturing plant designed for the manufacture of chemicals. * * * " Thus the defendant itself concedes that the plaintiff was in its employ in the building and constructing of the manufacturing plant wherein plaintiff was at work when he met with his injuries. In addition to that plaintiff. when on the stand, was asked the question: "Who was building the building?" And he answered: "Commercial Acid Company." The plaintiff further testified: "We were handling a jack, and the men operating above us were putting sheeting on the roof above us, and he let a hatchet get away from him." And a witness for defendant. De Laflamboy, testified that he was the treasurer of the defendant company, and that while he could not say positively that the company was constructing the building in October, 1916, he "presumed they were."

[2] In this state of the record and absent any proof on the part of the defendant tending to prove the contrary. we are of the opinion and so hold that this evidence is sufficient to take the case to the jury on the question as to whether or not the carpenter was employed by defendant; in other words. from these facts, if from the evidence the jury believed them to be facts, the jury could infer therefrom that the carpenter who dropped the hatchet was in the employ of the defendant.

Having disposed of the only assignments of error raised by the appellant, and having determined them adversely to its contention, it follows that the judgment should be. and the same is hereby, affirmed.

Reynolds, P. J., and Allen, J., concur.

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RAY v. SCHOOL DIST. OF LINCOLN, IN LANCASTER COUNTY. (No. 21562.)

(Supreme Court of Nebraska. Dec. 23, 1920.)

181 Northwestern Reporter, 140.

(Syllabus by the Court.)

1. MASTER AND SERVANT — "GAIN OR PROFIT" IN WORKMEN'S COMPENSATION LAW DEFINED.

The term "gain or profit," as used in the workmen's compensation law, *held* to mean pecuniary gain or profit.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

2. MASTER AND SERVANT—WHEN STATE EMPLOYEES NOT WITHIN WORKMEN'S COMPENSATION LAW STATED.

Employees of the state and of its governmental agencies, when not engaged in an enterprise carried on for pecuniary gain or profit, are not within the operation of the workmen's compensation law.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

3. MASTER AND SERVANT—SCHOOL JANITOR NOT WITHIN WORKMEN'S COMPENSATION LAW.

A janitor in the employ of a school district of the city of Lincoln *held* not covered by the act.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

Appeal from District Court, Lancaster County; Stewart, Judge.

Action under the Workmen's Compensation Law by John P. Ray against the School District of Lincoln, in the County of Lancaster. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

R. O. Williams, of Lincoln, for appellant.

Holmes, Chambers & Mann, of Lincoln, for appellee.

FLANSBURG, J. Action, based upon the workmen's compensation law, in which the plaintiff, an employee of the school district of the city of Lincoln, a municipal corporation, seeks to recover compensation for injuries sustained by him in the course of and growing out of that employment.

The question for decision is whether or not employees of the school district come within the compensation law. It is contended by the defendant that no employees of the state, or of any subdivision thereof, are within the law, except in those instances where they are employed in some enterprise carried on for pecuniary gain or profit.

The sections of the statute, particularly involved, are as follows:

Section 3647: "The provisions of this act shall apply to the state of Nebraska and every governmental agency created by it, and to every employer in this state employing one or more employees, in the regular trade, business, profession or vocation of such employer." Rev. St. 1913, as amended by Laws 1917, c. 85.

Section 3655: "The following shall constitute 'employers' subject to the provisions of this article:

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"(1) The state and every governmental agency created by it.

"(2) Every person, firm or corporation * * * who is engaged in any trade, occupation, business, or profession."

Rev. St. 1913.

Section 3656: "The terms 'employee' and 'workman' are used interchangeably and have the same meaning throughout this article, the said terms include the plural and all ages and both sexes, and shall be construed to mean:

"(1) Every person in the service of the state or of any governmental agency created by it, under any appointment or contract of hire, express or implied, oral or written, but shall not include any official of the state or any governmental agency created by it, who shall have been elected or appointed for a regular term of office, or to complete the unexpired portion of any regular term.

"(2) Every person in the service of an employer who is engaged in any trade, occupation, business or profession. * * *

"(3) It shall not be construed to include any person whose employment is casual, or not for the purpose of gain or profit by the employer, or which is not in the usual course of the trade, business, profession or occupation of his employer."

Rev. St. 1913, as amended by Laws 1917, c. 85.

It is urged that the term "gain or profit" should not be construed in the ordinary sense of pecuniary gain or profit, but that the phrase should be held to designate any employment which should be found to be carried on for the benefit or advantage of the employer. We do not believe the statute capable of that construction. The original conception of workmen's compensation laws seems to have been based upon the principle that the servant should no longer be required to bear loss in consequence of personal injuries, sustained in and growing out of the service rendered his employer, since the benefit of that service, based in part upon the personal hazard and risk of loss to the servant, was received by the employer. It was not, however, intended that such loss should simply be shifted from the employee and saddled upon the employer, and he made to carry the burden alone, but that such loss through injuries, sustained by the employee, should be treated as a part of the cost of service to the employer, and he, in fixing the price of his product, could reimburse himself by passing it on to the consumer, who received the ultimate benefit. An employer, through the instrumentality of the enterprise carried on by him, was declared to be the cause of all accidents directly growing out of such enterprise, and such laws prevented him from gaining pecuniary advantage through such instrumentality, and required him to pay those losses as a part of the expense cost of his undertaking. It seems to have been for these reasons that workmen's compensation laws, originally applied to industrial accidents only, have been, in some instances, limited, in their operation, to those enterprises which are carried on for pecuniary gain.

Though it is true, as argued, that, in the case of employment by the state, the cost of service, including the payment of compensation for injuries, is equitably passed on to society through the process of taxation, still, it seems clear to us, that fact does not affect nor alter the meaning to be given to the terms now under consideration. Were we to interpret the words "gain or profit" to mean benefit or advantage, pecuniary or otherwise, that an employer might receive through an employment carried on by him, such meaning must apply not only to state employments but also to all other employments covered by the statute. That interpretation would only lead to uncertainty and confusion, which, under the plain wording of the statute, does not now exist.

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[1] That the phrase was intended to mean pecuniary gain or profit finds some support in the following cases: Allen v. State, 173 App. Div. 455, 160 N. Y. Supp. 85; Redfern v. Eby, 102 Kan. 484, 170 Pac. 800; Gray v. Board of Commissioners of Sedgwick County, 101 Kan. 195, 165 Pac. 867, L. R. A. 1918F, 182; Sexton v. Public Service Commission, 180 App. Div. 111, 167 N. Y. Supp. 493.

In this light and by reason of the common and ordinary meaning of the words used, we believe the statute, on that question, is not open to construction.

By a literal reading of the provisions of the statute in connection with subdivision "(3)," last above quoted, the term "employee" covers only such employees, whether in the service of private enterprises or in that of the state or of its subdivisions, as are employed for "gain or profit."

It is quite apparent that the "casual employee in the service of the state, covered by subdivision "(3)" of the statute, just as in the case of other emp'oyments, was intended to be excluded from the act; also that any employee, who was not engaged in the regular business and activities, carried on by the state and its subdivisions, was to be excluded. The term "employer" is expressly defined to include "the state and every governmental agency created by it," and, by reading that definition into the clause in question, the express language, as employed and interpreted by the legislature, would exclude from the operation of the law every employee of the state and of its subdivisions who is not employed "for the purpose of gain or profit by the state, or by any governmental agency created by it."

The plaintiff contends that, shou'd the literal wording of the act confine the act, in its operation, to those employees only who are employed for pecuniary gain or profit of the state and its subdivisions, then the literal wording must be found to be in conflict with the express purpose and intent of the act, and that such intent must be allowed to prevail. By the earlier provision of the act, every person in the service of the state, except officers holding for a regular term of office, is mentioned as being included within its operation. That provision, however, is not more general in its terms than the like provision covering private employments. It is necessary for the court, then, first to determine, from the language used, whether there can be any logical reason for the exception, as app'ied to state employees, or whether the exception is out of harmony with the act and opposed to a clearly expressed intent to the contrary.

It is no doubt the rule, as stated in State v. Drexel, 75 Neb. 614, 106 N. W. 791, that the object of the court when it construes an act of the legislature, it to ascertain the intention of the lawmakers and to follow that intention when clearly ascertained, though it many conflict with the literal sense of the words used. When the literal wording leads to absurdity or to illogical or unjust conc'usions, the intention of the legislature, as gathered from the entire act, will prevail. Kearney County v. Hapeman, 102 Neb. 550, 167 N. W. 792; Cram v. Chicago, B. & Q. R. Co, 84 Neb. 607, 122 N. W. 31, 26 L. R. A. (N. S.) 1022.

[4] We conclude. however, that these rules are no aid to the court in the present case. It is not for the court to say, where the language of the statute leads to logical conclusions, that its literal wording will not be fol'owed simply because it does not embrace cases which seem, for no good reason, to have been excluded. It is true that the workmen's compensation law is broad in its application. It is not confined to hazardous employments and covers a great mass of employees, engaged in private enterprises, whose duties are similar to the duties of the great majority of state employees. Clerical and office service is within the broad comprehension of the act. If the legislature, however, has not done so,

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the court cannot provide that the beneficent purposes of the act shall be extended to state employees, who are not employed for gain or profit, though they may be found to be engaged in the same character of work, subjected to the same exposures, and whose loss, through injury, enters as much, in principle, into the actual cost of services as if the service were performed for a private enterprise, carried on for profit. We have repeatedly given the act, as to the classes of workers brought within it, a liberal construction, but the rule, allowing a liberal construction of a statute, does not warrant us in overriding its terms in order to widen the remedy or bring about objects or results not within its expressed intent.

[2] It must be remembered that the state and its governmental agencies could not be held liable under the common law for personal injuries sustained by its servants in line of employment, though due to its own negligence, nor could such a recovery be had under the law as it existed in this state at the time of the enactment of the workmen's compensation act. The state could, however, be held for injuries to its employees resulting from its negligence, when such employees were engaged in corporate enterprises, carried on for profit. City water works and lighting plants, which furnish service to individuals generally, are carried on for profit, and have been in the past subjected to the same duties and liabilities towards their employees as if they were privately owned enterprises of like nature. Henry v. City of Lincoln, 93 Neb. 331, 140 N. W. 664, 50 L. R. A. (N. S.) 174. There are many employees of such establishments distributed throughout the state in the various cities and towns. From the language of the statute, an intention may reasonably be inferred that that class of governmental employees, who had no right of recovery at common law against the state and its agencies for injuries sustained in the course of employment, have been excluded, and that the remedial features of the act have been extended to that class of cases only, employments carried on for profit, to which the common-law liability attached.

The primary object of compensation acts was to do away with the inadequacies and defects of the common-law remedies, to destroy the common-law defenses and, in the employments affected, to give compensation, regardless of the fault of the employer. These remedies did not apply to state employees, not engaged in business enterprises carried on for profit, and the state employments, not within the common-law remedies, do not seem to have been expressly brought within the scope of our compensation law.

A statute in the state of Kansas specifically provides that municipal and county employees, who are not engaged for business gain or profit, shall not come within the act. We cannot say that the Kansas law is either absurd or unreasonable, for it follows the line of demarcation between those classes of cases, where recovery could be had at common law, and those classes where such recovery was not allowed. The language of our statute is in accord with an intent and purpose, on the part of the legislature, to follow that line of demarcation.

A case very similar to the one under consideration is that of Allen v. State, 173 App. Div. 455, 457, 160 N. Y. Supp. 85, 87, in which the court said:

"The theory of the law, and of the underlying constitutional authorization, is that the accidents growing out of the operation of industrial enterprises become a legitimate part of what is known in commercial life as the 'overhead' cost, the same as the breakage, wear, and tear of machinery and equipment, and it is only in those industries which are carried on for pecuniary gain that 'the cost of operating the business' can be taken care of in the fixing of the price of the product."

The court then referred to that provision of the law which provided that no employee should be within the act unless he were engaged in an

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employment for pecuniary gain, and held that such provision applied to government service, saying (173 App. Div. 459, 160 N. Y. Supp. 88):

"The amendment simply placed the state and its local political divisions upon the same footing as individuals and corporations, and the fact that the state may not conduct any business for pecuniary gain has no more bearing on the proper construction of the law than the fact that many individuals and corporations do things of a hazardous character without the purpose of pecuniary gain. The state has the power to engage in business undertakings for the purpose of securing pecuniary gain; the fact that it does not do so does not tend to show that the legislature intended to increase the liability of the state beyond that of corporations and individuals, and it is not the province of the courts to enlarge upon the clearly expressed or necessarily implied scope of statutes changing the rules of the common law."

The compensation act of the state of California was under consideration by the supreme court of that state and a question of statutory construction, very similar to that in the case here, was there presented. The court held in Miller v. Pillsbury, 164 Cal. 199, 128 Pac. 327, Ann. Cas. 1914B, 886, that, since by the wording of the statute it was doubtful whether or not the state, under certain circumstances, should or should not be included within the act, the statute, therefore, would be construed in favor of the state and the state employees held to be excluded. In the concurring opinion in that case it is said (164 Cal. 204, 128 Pac. 329, [Ann. Cas. 1914B, 886]):

"It is apparent that this statute raises a doubt whether or not it was contemplated by its framers that the state should be subject to its provisions. Under fundamental and familiar principles of construction of statutes such as this the existence of the doubt is the solution of the inquiry. Wherever such a doubt does exist the construction favors the sovereign. The sovereign is not brought within the scope of its own laws unless the intent that this should be done is made plainly to appear. This general rule of construction favoring the sovereign in case of doubt is applied to grants by the state, to statutes of limitation, to rights of action, and, indeed, to all laws and contracts concerning which it may be thought that the state is included or is a party. If, in truth, the state desires to subject itself to the law here in question it could and should do so in language of clear and unmistakable import."

[3] For the reasons given, it is our opinion that the act does not cover the plaintiff in this case, and the judgment of the lower court is therefore reversed and the case dismissed.

Reversed and dismissed.

ROONEY v. CITY OF OMAHA. (No. 21352.)

(Supreme Court of Nebraska. Dec. 23, 1920.)

181 Northwestern Reporter, 143.

(Syllabus by the Court.)

1. MASTER AND SERVANT—"REGULAR TERM OF OFFICE" IN WORKMEN'S COMPENSATION LAW DEFINED.

A regular term of office, as the term is applied to government employees in the workmen's compensation law (Rev. St. 1913, § 3656), means

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such term of office as has a fixed and definite duration and a date of termination known and fixed by law or other general regulation. Former opinion, 104 Neb. —, 177 N. W. 166, modified.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

2. MASTER AND SERVANT — POLICEMAN NOT WITHIN WORKMEN'S COMPENSATION LAW; "GAIN OR PROFIT."

A policeman, in the regular service of the Omaha police department, is not employed for the "gain or profit" of the city, as those terms are used in the workmen's compensation law, and is, therefore, not within the operation of the act.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

Rose, J., dissenting.

Appeal from District Court, Douglas County; Troup, Judge.
On rehearing. Former opinion modified, and rehearing denied.
For former opinion, see 104 Neb —, 177 N. W. 166.

Frank L. Weaver, W. C. Lambert, and H. L. Mossman, all of Omaha, for appel'ant.
Geo. H. Merten, of Omaha, for appellee.

FLANSBURG, J. The former opinion in this case is found in 104 Neb. —, 177 N. W. 166. The matter comes up on rehearing.

Plaintiff makes a claim for compensation under the workmen's compensation law, for the death of her husband, who was killed while performing his duties as a policeman for the city of Omaha. She recovered judgment and defendant, the city of Omaha, appeals.

The workmen's compensation law, aside from the exceptions hereinafter referred to, covers "every person in the service of the state or of any governmental agency created by it," but excludes from its operation any official in the service of the state "who shall have been elected or appointed for a regu'ar term of office, or to complete the unexpired portion of any regular term." Rev. St. 1913, § 3656, as amended by Laws 1917, c. 85, § 4.

We adhere to our former opinion that a member of the police department of the city of Omaha is an officer and in the service of a governmental agency of the state, and take up for consideration now the question, only, of whether or not such police officer holds for a "regular term of office."

The charter of the city of Omaha (Rev. St. 1913, § 5300) provides that no member of the police department shall be discharged for political reasons, nor except in case a complaint is filed against him, a hearing had, and opportunity given him to defend against the charges made. It is further provided (Rev. St. 1913, § 5301) that the city authorities "shall have power to discontinue any employment or abolish any office at any time when, in the judgment of the council, such employment or office is no longer necessary."

A police officer, then, hold indefinitely during good behavior and cannot be discharged for cause without a hearing and opportunity to defend. State v. City of Lincoln, 101 Neb. 57, 162 N. W. 138. But when, for reasons of economy or lack of public necessity for his services, the city authorities see fit to terminate his employment, he has no right to a statutory hearing upon the question of whether or not the public welfare requires a continuance of a full police force, or of whether or not the revenues available are adequate for the payment of his salary. Moores v. State, 54 Neb 486, 74 N. W. 823; State v. City of Seattle, 74 Wash. 199, note 4 A. L. R. 205.

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The fact, that the tenure of office may be interrupted by the discontinuance of the service or abolition of the office, does not directly bear upon the question of whether or not the period of incumbency, resulting from the appointment, is for "a regular term," but it is, however, a statutory recognition of the necessity, peculiar in employments of this kind, and of the right of the city, to reduce or increase the police force from time to time, and does, to that extent, indicate one element of uncertainty as to the actual period of tenure of office in the police department.

To this, however, we attach little importance, for the general right to abolish an office may be exercised at any time during the incumbency of that office, even though the term is of a fixed and definite duration, and regardless of whether or not the officer holds for a regular term.

[1] Whether or not a member of the police department holds for a "regular term of office" depends upon whether or not the period of time for which he is appointed shall be called a "regular term."

A police officer of the city of Omaha is appointed to serve during good behavior. That means an indefinite period. No two officers will hold for the same duration of time. The law has fixed no limitation on the tenure of office. One may hold for life or as long as he desires, unless, through his own misconduct, he is discharged for cause. With such irregularity of duration, the period of tenure can hardly be denominated a "regular term" of office, within the meaning of the statute.

The word "term implies a period of time with some definite termination. A "regular term" must contemplate that those terminations must come at regular intervals of time. The wording of the statute bears out this construction. It speaks of appointments "for a regular term of office, or to complete the unexpired portion of any regular term."

The regular term contemplated, therefore, was one of definite duration and one which might continue, though the incumbent does not serve out the entire period. In order that there ever exist an "unexpired portion of any regular term," that term must have some regularly fixed terminus in point of time.

This court, in the case of State v. Galusha, 74 Neb. 188, 199, 104 N. W. 197, 201, in the opinion said:

"Ordinarily, say the authorities, the word 'term' or 'term of office' when used in reference to the tenure of office, means a fixed and definite period of time. Crovatt v. Mason, 101 Ga. 246, 28 S. E. 891; State v. Breidenthal, 55 Kan. 308, 40 Pac. 651; State v. Tallman, 25 Wash. 295, 64 Pac. 759; People v. Brundage, 78 N. Y. 403; State v. Stonestreet, 99 Mo. 361, 12 S. W. 895."

The question of the meaning of the phrase "term of office" has frequently arisen where an appointment has been made, and the officer to hold at the pleasure of the appointing power. In those cases, since no definite fixed date for termination of the office can be ascertained in advance of its actual termination, it has been universally held that such an officer does not hold for a "term of office." State v. Gordon, 238 Mo. 168, 142 S. W. 315, Ann. Cas. 1913A, 312; State v. Oklahoma City, 38 Okl. 349, 134 Pac. 58; Somers v. State, 5 S. D. 321, 58 N. W. 804; City of Lexington v. Rennick, 105 Ky. 779, 49 S. W. 787, 50 S. W. 1106; State v. Boughner, 55 N. J. Law, 380, 26 Atl. 808.

In these cases, it is considered that the period of tenure does not constitute a term, since the continuance of the incumbency is uncertain and unfixed until, by the order of the appointing power, the service is terminated. An appointment, then, to hold, not for any specific duration of time, but during the pleasure of the incumbent, unless sooner removed for cause, can hardly be said to be more definite as to period of tenure than an appointment to hold during the pleasure of the appointing power.

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In Minnesota, the supreme court has passed upon the identical question under consideration here, in the case of State v. District Court,, 134 Minn. 26, 158 N. W. 790. The workmen's compensation act in that state, like our own, excepted from its operation a city official appointed for a "regular term of office." The court, holding that a member of the police department was not excluded from the operation of the act, said:

"Under the Duluth charter policemen receive their office by appointment under civil service rules. They hold office during good behavior. There is no term at all. Manifestly this is not an appointment for 'a regular term of office.' "

[2] The defendant has raised a further question, that a policeman in the city of Omaha is an employee of a governmental agency of the state and is employed in the governmental capacity of the state and not for the gain or profit of the employer, and that, under section 3656, Rev. St. 1913, he is expressly exempted from the operation of the compensation law. It is manifest that such a policeman, in the general service of the city as a policeman, is not employed for the pecuniary gain or profit of the city. This case is controlled by the decision, just rendered in this court, Ray v. School District of Lincoln (No. 21562) 181 N. W. 140, and, for the reasons therein set out, plaintiff is not entitled, as we view it, to a recoverv in this case.

The former opinion of this court is, therefore, modified to the extent above stated, and the motion for rehearing is

Overruled.

Day, J., not sitting.

ROSE, J. (dissenting). I adhere to the former opinion that a qualified and acting policeman of the city of Omaha is an officer appointed for a "regular term" within the meaning of the Workmen's Compensation Act. Rooney v. City of Omaha, 177 N. W. 166. The appointment of a policeman for the city of Omaha is an appointment for life or during good behavior. The term of office under such an appointment is for a regular term. A term of office for life or during good behavior has been understood generally from the foundation of the Republic to be a regular term of office. Judges of the supreme court of the United States have a "regular term of office," though appointed for life, and the reserved power of the people to put an end to their judicial tenure or to abolish their offices by constitutional amendment does not change the meaning of those words. There is no reason why the term of an officer appointed for life or during good behavior is not as regular a term as the term of another officer whose official tenure terminates by statute at a fixed period of two years. For the purposes of language in expressing the legislative will one term is as regular as the other. By the true test of regularity there is no room for distinction. The statute does not say that a "regular term" has "a fixed and definite duration." Those expression are not in the statute; nor are they proper definitions of words used or any part of any reasonable interpretation of a legislative enactment. The expression "fixed and definite duration" or the equivalent thereof would have been used had the lawmakers intended to make "a date of termination" a part of a regular term.

A city free from negligence is not pecuniarily liable for the death of a policeman killed in the performance of a governmental duty and can only be made so by the legislature under the present constitution. The power to create such a liability was not committed to the courts. In law courts are as powerless to create such a liability by interpretation as by direct legislation. Those who assert against a city not guilty of negligence claims for compensation on account of the death of a policeman

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killed in the line of his duty should find the city's liability in the written language of a statute. That liability of the city of Omaha is not in the Workmen's Compensation Act and I dissent from the opinion so holding.

CHRISTENSEN v. PROTECTOR SALES CO. (No. 21582.)

(Supreme Court of Nebraska. Dec. 23, 1920.)

181 Northwestern Reporter, 146.

(Syllabus by the Court.)

MASTER AND SERVANT — FINDINGS IN COMPENSATION CASE SUPPORTED BY SUFFICIENT EVIDENCE OR BY CONFLICTING EVIDENCE, CONCLUSIVE.

"On appeal from the district court to the Supreme Court in a workmen's compensation case, findings of fact supported by sufficient evidence and findings of fact on substantially conflicting evidence will not be reversed unless clearly wrong." American Smelting & Refining Co. v. Cassil, 104 Neb. —, 178 N. W. 639.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

Appeal from District Court, Douglas County; Sears, Judge.

Action by Myrtle E. Christensen against the Protector Sales Company to recover for the death of her husband under the Workmen's Compensation Act. Judgment for defendant, and plaintiff appeals. Affirmed.

B. N. Robertson, of Omaha, for appellant.

Brome & Ramsey and Jos. P. Uvick, all of Omaha, for appellee.

MORRISSEY, C. J. Plaintiff appeals from a judgment of the district court for Douglas county denying a recovery under the Workmen's Compensation Act (Rev. St. 1913, c. 35) for the death of her husband, Alex C. Christensen.

November 22, 1919, Alex C. Christensen entered into a verbal agreement defendant whereby he undertook to sell defendant's products to the retail trade on a commission basis. Under this agreement Christensen was assigned a territory, and November 24, 1919, he called at defendant's office and was given an advancement of $40. He was furnished with samples of the goods he was to sell and with advertising matter. He at once went into his territory and on the same day took two orders for merchandise. On the morning of the second day while traveling by automobile between two towns within his territory he was accidentally killed.

The issue involved is whether at the time Christensen met his death he was an employee of defendant within the contemplation of the Workmen's Compensation Act. The district court found that he was not such employee. In American Smelting & Refining Co. v. Cassil, 104 Neb. —, 178 N. W. 639, it is said:

"On appeal from the district court to the Supreme Court in a workmen's compensation case, findings of fact supported by sufficient evidence and findings of fact on substantially conflicting evidence will not be reversed unless clearly wrong."

In the instant case there is no conflict in the evidence. We have therefore to determine whether ther is sufficint evidence to support the finding of the trial court.

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It is admitted that the verbal contract was made, and that Christensen was in his territory selling goods on commission at the time he met with the accident that caused his death. Plaintiff, in order to prove that decedent was an employee of the defendant within the terms of the statute, shows that he entered into this agreement to sell defendant's products, to be compensated therefor by a commission of 10 per cent. on the total sales; that defendant had other salesmen working under a similar agreement, each assigned to a separate territory, and was endeavoring to engage other salesmen to take over other territory; that the company had advanced $40, which was charged against commission yet to be earned, and that this seemed to have been the practice, it being shown that a similar advance had been made to another salesman; that the deceased was engaged in no other line of work and was carrying samples of defendant's merchandise, and advertising matter furnished by defendant. There is also recited a telephone conversation between the undertaker at Genoa, where Christensen did, and the manager of defendant company. According to the testimony, the undertaker called the manager of the defendant company, informed him of Christensen's death, and was directed by defendant's manager to furnish a casket and prepare the body for shipment. The undertaker also testified that defendant manager said:

"We will see that you get your money. * * * Mr. Christensen just began to work for us. This is his second day out for us as he just started to work."

It is also pointed out that the contract was silent as to the length of time it should run; that there was no agreement as to any definite amount of work; that he was required to make daily reports of sales made by him; all orders were taken subject to the approval of the defendant, and defendant fixed the price at which the goods were to be sold as well as the terms of payment, and defendant's manager knew that Christensen was going into the territory assigned to him.

The foregoing is in substance the facts and circumstances on which plaintiff relies to show that Christensen was an employee of defendant within the meaning of the statute. It is argued that the contract is in law one of general employment, creating the relationship of master and servant, and that under its terms defendant retained the right to direct and control Christensen as to the time and manner of executing his work.

Generally, to determine whether the relationship of employer and employee exists, it is necessary to determine the right of the employer to control the manner and method in which the service shall be rendered. This ordinarily includes the right to determine the hours of service and to have the exclusive right to the time demanded. In the instant case Christensen was not required to render service any particular day or to travel at all. He might devote every day of the week to the sale of defendant's products or he might let days go by without doing any act whatever in relation to his contract. Nor was he reqired to render the service personally. He was paying his own expenses; he was not obligated to take orders for any specified quantity of defendant's goods. Defendant had no right to dictate to the salesman in relation to the method of transportation which he would employ. The relationship existing between these parties may be likened to that between insurance solicitors and their companies. When day dawns the agent is free to work or play. If he idles away the day, he does so at his own loss. The company has the right only to revoke the agency agreement. Christensen was free to make his sales by writing letters to the dealers within his territory; he might have called them by telephone, or he might have employed subagents. He was the master of his own acts, and his compensation depended solely upon the results obtained.

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Under the facts disclosed it cannot be said that the finding of the trial court is not supported by sufficient evidence, and the judgment is affirmed.

VENUTO v. CARTER LAKE CLUB ET AL. (No. 21766.)

(Supreme Court of Nebraska. Jan. 19, 1921.)

181 Northwestern Reporter, 377.

(Sy'labus by Editorial Staff.)

1. MASTER AND SERVANT — FURTHER INVESTIGATION AFTER REMAND OF COMPENSATION CASE HELD DISCRETIONARY.

After remand on an appeal in a workmen's compensation proceeding, it was largely within the discretion of the trial court whether defendant should be given time to investigate further, with a possible view of taking testimony in Italy on the issue of dependency of the claimant.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

2. MASTER AND SERVANT—DENIAL OF REHEARING AFTER REMAND IN COMPENSATION CASE HELD NO ABUSE OF DISCRETION.

After remand on an appeal in a workmen's compensation proceeding, the denial of a rehearing to give defendants an opportunity to investigate further with a possible view to taking testimony in Italy on the issue of dependency *held* not an abuse of discretion on the showing made.

(For other cases, see Master and Servant, Dec. Dig. § 412.)

Flansburg, J., dissenting.

Appeal from District Court, Douglas County; Wakeley, Judge.

Proceedings under the Workmen's Compensation Act by Antonio Venuto, substitute for Sofio Musco, administrator, for compensation for death, opposed by the Carter Lake Club and the Georgia Casualty Company. From a judgment and order in favor of the claimant, defendants appeal. Affirmed on condition that plaintiff file remittitur, and otherwise reversed and remanded, with directions.

Brome & Ramsey, of Omaha, for appellant Georgia Casualty Co.
Carl E. Herring, of Omaha, for appellant Carter Lake Club.
A. H. Bigelow, of Omaha, for appellee.

DAY, J. This case was before this court upon a former occasion, being reported in 178 N. W. 760, wherein the facts out of which the action arose may be found.

Upon the first trial in the district court, evidence was taken bearing upon the issues tendered, and the court found that under the evidence the claimant was not a dependent within the meaning of the compensation act (Laws 1913, c. 198), and reserved its decision upon the other issues. The plaintiff appealed from the finding and judgment. Upon a review of the record, this court held that the evidence was sufficient to sustain a holding that the mother is a dependent, and set aside the finding of the district court upon the issues of support and dependency. In the opinion the court anticipated the other issues in the case for the guid-

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ance of the trial court, and remanded the case for further proceedings. The plaintiff thereupon filed a motion for finding and judgment upon the pleadings, the evidence upon the former trial, and the rules of law governing the case as determined by the Supreme Court. The defendants also filed a motion for a rehearing of the entire case, and, among other things, asked that defendants be given an opportunity to take testimony in Italy showing that the claimant was not a dependent, and the extent, if any, of the contributions made to the claimant by the deceased. The trial court sustained the plaintiff's motion and overruled the defendants' motion.

[1, 2] The overruling of defendants' motion is the principal error now relied upon. We think the court did not err in its ruling. The decision of this court was decisive of the issues in the case. Whether the defendants should have been given time to investigate further, with the possible view of taking testimony in Italy upon the issue of the dependency of the claimant, was a matter largely resting within the discretion of the trial court. The showing made went only to the effect that the defendants desired to make an investigation of the condition of claimant, and take the testimony of the claimant, "and such other witnesses as may be able to furnish competent testimony material to the issues joined, and present the same to the court upon such rehearing." We are unable to say that there was an abuse of discretion in overruling the defendants' motion.

It is the policy of the law that cases arising under the provisions of the compensation act should be speedily determined. With that end in view, the usual time for making up the issues is not given. The law specially provides that such cases shall be advancel on the docket and determined as soon as possible. Under all the circumstances before us, as presented by the record, we are of the opinion that there was no error in the ruling of the court.

It now appears, however, that the trial court, through an oversight of counsel, computed the amount to be paid under the provisions of section 8, c. 85, Laws 1917, whereas it should have been computed under the provisions of section 3663, Rev. St. 1913, in force at the time the cause of action arose. By so doing the court made a weekly award in a greater sum than it should have done. If plaintiff files a remittitur of $2.50 a week in the judgment rendered, within ten days, the judgment and order of the district court will stand affirmed; otherwise, the case will be reversed and remanded, with directions to reduce the award $2.50 a week.

Reversed.

Flansburg, J., dissents.

CULHANE v. ECONOMICAL GARAGE, INC., ET AL.

(New York Supreme Court, Appellate Division, First Department. February 4, 1921.)

186 New York Supplement, 454.

1. MASTER AND SERVANT—REMEDY GIVEN BY COMPENSATION LAW EXCLUSIVE.

A complaint in a statutory action for an employee's death alleging injury arising out of his employment in a hazardous employment speci-

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fied in Workmen's Compensation Law, art. 1, § 2, group 41, does not state a cause of action unless it alleges that the employer failed to comply with the law with respect to insurance, since the remedy given by the law is exclusive provided the employer has complied therewith.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

2. MASTER AND SERVANT—ELECTION UNDER COMPENSATION LAW DEFENSE TO ACTION FOR DEATH.

The objection that plaintiff administratrix in a statutory action for death had barred her right to sue by electing to proceed under the Workmen's Compensation Law is a matter of defense which is not presented by demurrer to the complaint for want of facts.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

3. MASTER AND SERVANT — ELECTION ALLOWED BY COMPENSATION LAW.

If the administratrix of an employee killed in his employment has an election of remedies, it can only be for employer's failure to comply with the Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

4. MASTER AND SERVANT — COMPENSATION LAW IS CONSTITUTIONAL.

The Workmen's Compensation Law is constitutional.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

Appeal from Special Term, New York County.

Action by Nora Culhane, as administratrix, against the Economical Garage, Incorporated, impleaded, etc. From an order sustaining the demurrer of the named defendant to the complaint for insufficiency, and from a judgment of dismissal pursuant thereto, plaintiff appeals. Order modified, to provide that it is without prejudice to a motion to vacate the order and judgment, and serve an amended complaint, and, as modified, affirmed.

See, also, 188 App. Div. 1, 176 N. Y. Supp. 508.

Argued before Clarke, P. J., and Laughlin, Smith, Page, and Merrell, JJ.

Simpson & Simpson, of New York City (William G. Philippeau, of New York City, of counsel), for appellant.

Bertrand L. Pettigrew, of New York City (Walter L. Clenney, of New York City, of counsel), for respondent.

LAUGHLIN, J. This is a statutory action to recover for the death of plaintiff's intestate, who was employed by the defendant company to wash cars in its garage in the borough of Manhattan, New York. It is alleged that the defendant Mayer had a contract with the defendant company for the storage of his automobile at the garage; that one Rhine was the superintendent or manager of the garage, and the company also employed defendant Day as foreman; that both Rhine and Day were acting with and had superintendency over the decedent; that on the 18th day of October, 1918, a loaded Colt's automatic pistol was negligently left concealed by the defendant Mayer or his chauffeur in his car at the garage; that he owned it, but had no permit or license to have it; that on said day the defendant Mayer telephoned said Rhine to take the pistol from his car and unload it and keep it until he or his representative called for it; that Rhine thereupon ordered

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the defendant Day to obtain the pistol and to unload it in his presence, and that Day attempted so to do, but negligently and unlawfully and with reckless disregard for the safety of the decedent and others lawfully on the premises and in the garage failed to remove all of the loaded cartridges and negligently failed to safeguard the pistol and to put it away in a proper place of safety; that on said day decedent, while in the garage in the performance of his duties, was ordered and commanded by Day, who was his foreman acting with and having superintendence over him, to come into the office of the garage, and the decedent obeyed the command, and upon his arriving in the office Day, within the scope of his employment and authority, commanded the decedent to take the pistol and to deliver it to the defendant Mayer or to his representative when called for, and while in the act of so doing and commanding the decedent in regard to the return of the pistol, and while the pistol was in defendant Day's hand, and by reason of his negligent and unlawful conduct in handling and caring for it, without warning to the decedent, a bullet was discharged from the chamber of the pistol into his body, causing his death.

[1] The theory upon which the demurrer was interposed is that the complaint states a cause of action arising out of and in the course of the employment of the decedent in a hazardous employment enumerated in group 41 in section 2 of article 1 of the Workmen's Compensation Law (chapter 622, Laws of 1916 [Consol. Laws, c. 67]) for which a remedy is afforded by that law. In such case it is well settled that no action can be maintained unless it is alleged that the employer failed to comply with the statute with respect to insurance, and that, where the statute gives a remedy, it is exclusive provided the employer has complied therewith. Nulle v. Hardman, Peck & Co., 185 App. Div. 351, 173 N. Y. Supp. 236; Matter of Moore v. Lehigh Valley R. R. Co., 169 App. Div. 177, 154 N. Y. Supp. 620; Pierson v. Interborough Rapid Transit Co., 184 App. Div. 678, 172 N. Y. Supp. 492; Matter of Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344; Matter of Daly v. Bates & Roberts, 224 N. Y. 126, 120 N. E. 118. There is no allegation in the complaint that the garage company failed to comply with the Workmen's Compensation Law. The complaint, therefore, fails to state a cause of action.

Counsel for appellant states, and respondent concedes, that a claim was made under the Workmen's Compensation Law and allowed, but that the decision of the Commission was reversed, and the claim dismissed by the Appellate Division, and Culhane v. Economical Garage, 188 App. Div. 1, 176 N. Y. Supp. 508, is cited as showing the facts. It thereby appears that the evidence before the Commission showed that neither Day nor the decedent was at the time the pistol was discharged acting within the scope of his employment. The opinion of the Appellate Division shows that the foreman called the decedent into the office, not to take and deliver the revolver to the owner as here alleged, but to look at it as a matter of curiosity, and for that purpose took it from a drawer in which it had been placed to hold it for the owner, and that as Day was about to hand it to the decedent to examine it was discharged.

Counsel for the plaintiff says that his client is being driven from pillar to post without finding any remedy anywhere; but the difficulty is not with the law, but with the theory of the claimant and the proof offered before the Commission or with the allegations here made, which are diametrically opposed thereto. Before the Commission it was shown that the accident which resulted in the decedent's death did not arise out of and in the course of his employment, while here it is alleged that it did. If the facts are as alleged in the complaint, it is quite clear that there was a remedy under the Workmen's Com-

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pensation Law. If through inadvertence or excusable neglect plaintiff failed to show the material facts in presenting her claim to the Commission, doubtless the Appellate Division would, on a proper application, reconsider the dismissal of her claim and remit it to the Commission unless the Commission itself is authorized to reopen the hearing, as to which it is unnecessary for us to decide. We can only decide that on the facts here alleged plaintiff had a remedy under the statute which is exclusive, unless the garage company failed to comply with the statute, which is not alleged.

[2, 3] Counsel for respondent contends that this action is barred by plaintiff's election to seek a remedy under the statute, but that would be a matter of defense, and is not presented by the demurrer; and, moreover, if plaintiff had an election, that could only be for defendant's failure to comply with the statute, and that does not appear. Pavia v. Petroleum Iron Works Co., 178 App. Div. 345, 164 N. Y. Supp. 790; Crineri v. Gross. 184 App. Div. 817, 172 N. Y. Supp. 695.

[4] Counsel for the appellant further contends that the Workmen's Compensation Law is unconstitutional; but it has been sustained as constitutional (N. Y. C. H. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; Jensen v. Southern Pacific Co., 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A, 403, Ann. Cas. 1916B, 276; Walker v. Clyde Steamship Co., 215 N. Y. 529, 109 N. E. 604, Ann. Cas. 1916B, 87), and, this being a death claim for which there was no cause of action at common law, there can be no question with respect to the authority of the Legislature to take away the statutory remedy theretofor given and afford another or to withdraw the remedy altogether provided the statute operates alike on all similarly situated (see Shanahan v. Monarch Engineering Co., 219 N. Y. 469, 114 N. E. 795; Shinnick v. Clover Farms Co., 169 App. Div. 236, 154 N. Y. Supp. 423). Plaintiff, however, in the circumstances, should be afforded an opportunity to amend the complaint, if advised that the facts warrant the amendment, so as to state a cause of action not arising out of and in the course of decedent's employment or by alleging that the garage company failed to comply with the Workmen's Compensation Law, if that be the fact.

It follows that the order should be modified by providing that it is made without prejudice to a motion by the plaintiff to vacate the order and judgment and serve an amended complaint, if she shall be so advised, and, as thus modified, affirmed with costs. All concur.

KRUG v. CITY OF NEW YORK.

(New York Supreme Court, Appellate Division, Third Department. March 2, 1921.)

186 New York Supplement, 727.

1. MASTER AND SERVANT — CONSTITUTION EXCLUDES PUBLIC OFFICERS FROM COMPENSATION.

Const. art. 1, § 19, authorizing the Workmen's Compensation Law, and providing that the expense shall be held to be a charge on the cost of operating the employer's business, excludes all provisions for compensating those employed in the discharge of governmental functions, such as city firemen.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

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2. MASTER AND SERVANT — CITY FIREMAN HELD NOT AN "EMPLOYEE," NOR ENGAGED IN "SALVAGE OF BUILDING OR CONTENTS," WITH COMPENSATION ACT.

Injuries to a city fireman while extinguishing a fire are not compensable, under Workmen's Compensation Law, § 2, and section 3, subs. 4, 5, and section 2, group 43, on the theory that he is an "employee," nor the theory that a fireman, in performing a public service, is engaged in the "salvage of buildings or contents," within the meaning of the law.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

Appeal from State Industrial Commission.

Application by Margaret Krug, on behalf of herself and children, for an award under the Workmen's Compensation Law for the death of Oscar Krug, opposed by the City of New York, employer. From an award of the Industrial Commission, entered in its office July 16, 1920, the City appeals. Reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry, T. Kellogg, and Kiley, JJ.

John P. O'Brien, Corp. Counsel, of New York City (William A. Walling, of New York City, of counsel), for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. The claimant is the widow of Oscar Krug. The decedent was a uniformed fireman of the city of New York attached to engine No. 7 of the city fire department. On the 3d day of May, 1918, while engaged in helping to extinguish a fire, he wrenched his knee. He was treated for rheumatism, and worked on and off until the 4th of July, 1919, more than a year after the injury, when he was taken to a hospital and underwent an operation upon his knee. He developed pneumonia, presumably through the operation, and died on the 4th of August, 1919. His widow makes a claim for this death, and while the State Industrial Commission has found that she is not entitled to a present award, because of the fact that she is receiving $58.33 a month as a pension from the city fire department pension fund, there is a determination that, if this source fails, she is entitled to the compensation, on the theory that he was under group 42 of section 2 of the Workmen's Compensation Law (Consol. Laws, c. 67), engaged in the "salvage of buildings or contents," while fighting fire for the city of New York.

While the question thus presented upon this appeal may appear somewhat academic, we are in the process of defining and fixing the limitations of a new system, and precedents ought not to be established by the mere lapse of time which are in conflict with the spirit of the law. Section 2 of the Workmen's Compensation Law provides that the compensation provided for in this chapter "shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments," so that we are to find, first, that the decedent is an employee within the meaning of the statute, and that he was engaged in one of the "following hazardous employments," before this award can be sustained. An employee means "a person engaged in one of the occupations enumerated in section two or who is in the service of an employer whose principal business is that of

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carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer" (section 3, subd. 4) and " 'employment' includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain" (section 3, subd. 5).

Of course, assuming that the decedent was engaged in "salvage of buildings or contents," while engaged in the effort to extinguish a fire, he was not engaged in an employment "carried on by the employer for pecuniary gain." The city of New York was not carrying on this fire-extinguishing business for its own gain, but for the purpose of saving its inhabitants from loss, just as it maintains a police force, not for its own profit, but for the protection of those within its limits from the violence of lawless persons. Group 42 of section 2 of the Workmen's Compensation Law relates to business occupations carried on for pecuniary gain, and it is within this group that we find the provision including "salvage of buildings or contents," and then section 43 of the act continues:

"Any employment enumerated in the foregoing groups and carried on by the state or a municipal corporation or other subdivision thereof, notwithstanding the definition of the term 'employment' in subdivision five of section three of this chapter."

It is not entirely clear just what is meant by this forty-third group, which is clearly not a group at all, but an amplification to bring within the law the state and municipalities carrying on employments enumerated in the previous groups. It would have a legitimate use, if limited to such employments as the city carried on for its own purposes, as distinguished from those of its inhabitants. For instance, where the city owns and operates its water supply system, it is carrying on a business as distinguished from a governmental or charitable purpose, such as involved in the maintenance of a police or fire department or a public hospital, and it would be in a sense conducting the water plant for pecuniary gain; but it is an abuse of language to say that a fireman engaged in extinguishing a fire is employed in salvaging buildings or their contents. The service he is performing for the city is governmental in its character; it is for the general welfare —an exercise of the police power. The city, as such, has no interest in the property; whether much or little is saved, it concerns the individual owner and the insurance companies, not the city in its corporate capacity, and it is not within the spirit of the act to charge the municipality for the death, because there is no business of the employer which may be legitimately charged with the expense.

[1] The amendment of the Constitution upon which this class legislation depends expressly authorizes the enactment of the statute:

"Provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer." State Constitution, art. 1, § 19.

Where there is no business upon which the compensation can become a charge, where there is no opportunity to charge the accidents of the business to the product and thus distribute the burden over the field of consumption, there is no warrant for the legislation. The rule is well established that a proviso, such as is contained in the constitutional provision above quoted, is in deeds and statutes a limitation or exception to the grant made or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided. 23 Am. & Eng. Encyc. of Law, 292; Austin v. United States, 155 U. S. 417, 431, 15 Sup. Ct. 167, 39 L. Ed. 206, and authorities there cited. In Ives v. South Buffalo Railroad, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann.

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Cas. 1912B, 156, the original Workmen's Compensation Law was held void, as conflicting with the requirements of due process of law,, and the Constitution was amended as above to obviate the objection; but under well-established rules of interpretation it is not to be extended beyond its language and clearly expressed purposes, and these are confined to employees and employers in the ordinary sense of these words, and are limited by the proviso to those who are carrying on business of such a character that all moneys paid by an employer to his employees "shall be held to be a proper charge in the cost of operating the business of the employer," and this obviously excludes all provisions for compensating those who are employed in the discharge of governmental functions. The court in the Ives Case, supra, quotes from the report of the commission which created this act, to the effect that the evils supposed to exist can be "best avoided by compelling the employer to share the accident burden in intrinsically dangerous trades, since by fixing the price of his product the shock of the accident may be borne by the community." It was the industrial, the essentially dangerous, trades which were to be placed under the provisions of the law, and the Constitution was amended to permit of this, not to extend the operation to public officers.

[2] We are clearly of the opinion that the decedent was not an employee within the meaning of the statute. The word is defined by the Century Dictionary, cited with approval in Palmer v. Van Santvoord, 153 N. Y. 612, 614, 47 N. E. 915, 38 L. R. A. 402, as "one who works for an employer; a person working for salary or wages, applied to any one so working, but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a government or corporation or to domestic servants," and with all the agitation which preceded the enactment of this statute it cannot be presumed that the Legislature or the people in amending the Constitution used the words in any broader sense than that indicated. Nor can we subscribe to the theory that a fireman in performing a public service is engaged in salvaging buildings or their contents. He is performing a police service for the state, operating for the benefit of the owner of the property, and not in the carrying on of the business of salvaging buildings or property.

The award should be reversed, and the claim dismissed. All concur.

McGOEY v. TURIN GARAGE & SUPPLY CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. February 28, 1921.)

186 New York Supplement, 697.

1. MASTER AND SERVANT—INJURY HASTENING PROGRESS OF TUBERCULOSIS COMPENSABLE.

If an employee's injury contributed to, accelerated, activated, and gave velocity to the progress of the disease of tuberculosis, which caused his death, the death will be held to be covered by the contract of insurance, and the employer's workmen's compensation insurer cannot escape liability.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

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2. MASTER AND SERVANT—EVIDENCE SHOWING INJURIES ACCELERATED PROGRESS OF TUBERCULOSIS SUFFICIENT TO SUSTAIN AWARD.

In proceedings for death of a servant caused by tuberculosis, claimed to have been aggravated or accelerated by his injury in the employer's garage, when caught between two cars, in view of Workmen's Compensation Law, § 21, evidence that the injury accelerated the progress of the disease *held* sufficient to sustain award.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from State Industrial Commission.

In the matter of the claim for compensation under the Workmen's Compensation Law, made by Mary McGoey, widow, for herself and infant children, on account of the death of Bryan McGoey, the deceased employee, opposed by the Turin Garage & Supply Company, the employer, and the Zurich General Accident & Liability Insurance Company, Limited, the insurance carrier. From an award of the State Industrial Commission in favor of claimant, the employer and insurance carrier appeal. Award affirmed.

Argued before John M. Kellogg, P. J., and Woodward, Vankirk, Henry T. Kellogg, and Kiley, JJ.

Philip J. O'Brien, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, and Bernard L. Shientag and J. F. Connor, both of New York City, of counsel), for respondent.

KILEY, J. Claimant's intestate worked for his employer, appellant herein, as a car washer. On May 24, 1919, while so engaged, he met with an accident by being crushed between two cars in the garage in which he was working. The record shows that the injury was severe enough, so that his foreman sent him home as unfit for service on account of the injuries he received. A doctor was called, and he was kept in bed for about a week, and idle until June 7th or 11th, when he went back to work. He swears he was not feeling well any of the time after the accident. He continued to work for about two weeks, when he could no longer perform his duties, and we next, and comparatively soon, find him in the hospital suffering from tuberculosis. He lingered and grew worse for eight or nine months after the date of the accident, and finally died February 1, 1920.

The finding of the Commission is to the effect that the employee had dormant pulmonary tuberculosis at the time of the accident, and that the injuries aggravated and activated the disease, so that from dormant it became progressive, and by progression reached its advanced and final stage, resulting in and causing death. The appellant, carrier, argues that there is no evidence of causal relation between the injury and the disease. The Commission has determined, as a matter of fact, that there was such relation, and if there is evidence of probative force, even meager though it be, we cannot disturb the finding. Section 20 of the Workmen's Compensation Law (Consol. Laws, c. 67). To determine whether or not there was "a residuum of legal evidence" to sustain the finding of the Commission, resort must be had to what the evidence discloses, first as to facts, and then as to probabilities. That the Commission had a healthy subject, 41 years of age, immediately prior to May 24, 1919, the date of accident, appears beyond question from the evidence. That he was injured in the manner he claimed is

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not contradicted, except by inference; so that the first question is the extent of the injury. The evidence is not so clear as to the extent of the initial injury, as might be desired.

Just what occasioned the injury we have only in outline; however, practical common sense, with some knowledge of cars, their conformation and construction, will fill in the outlines. The claimant's intestate says he was crushed between two cars; that the contact with his body was at the groin region, the abdomen, and chest, or ribs. One of the cars had two tires on rims fastened to the running board near the forward door, or about where the door would open if the tires were not there. The injured man was caught first at the mud guard in front, and forced toward the rear by the other car, which must have struck him diagonally. His body followed the conformation of the mud guard, which pressed against his body higher up as he was forced along the mud guard, which finally had described a half circle on the body. His body then came in contact with the stationary tires, which made a contact still higher up on the body, and was easily against the chest wall or back, if he was rolled in the process. As he reached this point relief came, it is not clear how, and he sat on the running board, where his foreman found him injured.

[1] The record is very large for this kind of a case, due to medical expert testimony produced upon the one issue viz. the causal relation between the injury and cause of death. It appears beyond doubt that death was caused by tuberculosis; and the bone of contention is: Did the injury contribute to, accelerate, activate, and give velocity to the progress of the disease? If there is any evidence to sustain the affirmative of this proposition, it will be held to be covered by the contract of insurance, and appellant cannot escape liability. McCahill v. N. Y. Transportation Co., 201 N. Y. 221, 94 N. E. 616, 48 L. R. A. (N. S.) 131, Ann. Cas. 1912A, 961.

[2] No matter where the force of the contact was heaviest, either front or rear, if it injured the pelvic cavity, so as to set up area inflammation; that inflammation would transmit itself to any weak or weakened organ of the body without much delay. The evidence of the physicians is not satisfactory, and, except one, is of a negative goodness. They say it might contribute; none of them explain how this condition came about so soon after the injury, if the injury did not contribute to the condition. There was a sharp conflict between the physicians who had seen the injured man after the injury, in that some evidence was positive as to the absence of a contributing cause, and that which maintained that the injury was or might be a contributing cause. To aid the Commission, it called or had called its expert, who not only examined all of the evidence, but submitted to a severe and extended cross-examination. His opinion was in favor of claimant; that the injury was an activating agency, and contributed to, or quickened, the progress of the otherwise dormant tubercular condition. One of the physicians testified that—

"Any injury received by a man or woman having a tubercular lesion may actuate or aggravate the condition, and may show that such a lesion existed which might not have been revealed for many months or for many years."

I think, under the evidence, the case reached a position before the Commission where section 21 of the Workmen's Compensation Law was applicable. It seems that we have sustained awards on evidence no more potent than the evidence appearing here. Subdivision 7 of section 3 of the Workmen's Compensation Law defines "injury" and "personal injury"—"only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." The evidence may be

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held to show that the diseased condition naturally followed the injury and resulted therefrom. Schlenker v. Garford Motor Truck Co., 183 App. Div. 166, 170 N. Y. Supp. 439; Rist v. Larkin & Sangster, 171 App. Div. 71, 156 N. Y. Supp. 875; Van Gordon v. Hires C. Co. et al., 193 App. Div. 601, 184 N. Y. Supp. 402.

The form of the award is criticized. It is claimed to be in the alternative, and that it seeks to incorporate the opinion of a commissioner in the findings of fact. Either alternative points to a competent producing cause, and incorporating the facts as found in the opinion of the commissioner took from rather than added to the award. These findings in awards of the Commission have been repeatedly criticized, and information comes to us that the practice has ceased.

I am in favor of affirming the award. All concur.

STEIN v. WILLIAMS PRINTING CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. February 28, 1921.)

186 New York Supplement, 705.

MASTER AND SERVANT — EMPLOYEE, ASSAULTING ANOTHER AND INJURED BY HIM, NOT ENTITLED TO COMPENSATION.

Where an employee, angered at a playful act of another employee, made a vicious assault on him with a milk bottle and attempted to assault him with a cobblestone, whereupon the other employee knocked him against a radiator, he could not recover compensation for the injury, in view of Workmen's Compensation Law, § 10, providing compensation, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Joseph Stein for compensation for injuries, opposed by the Williams Printing Company, employer, and the American Mutual Liability Insurance Company, insurance carrier. Compensation was awarded, and the employer and insurer appeal. Reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Henry T. Kellogg, Kiley, and Van Kirk, JJ.

Jeremiah F. Connor, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. The State Industrial Commission, by a vote of three to two, has reached the conclusion of fact that Joseph Stein was employed as a porter by the Williams Printing Company in New York; that while engaged in his regular employment, on the 15th day

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of August, 1919, one Raymond Schults, a fellow employee, pushed the claimant in a playful manner, which angered the claimant, so as to cause him to attempt to strike the said Raymond Schults with a milk bottle.

"In protecting himself, the said Raymond Schults took hold of the arm of the claimant, and after grappling with him caused him to release the hold on the milk bottle, and the claimant thereafter tried, while in the grasp of the said Raymond Schults, to bite the latter or strike him with a cobblestone which was near at hand. The said Raymond Schults thereafter struck the claimant, causing him to be thrown against a radiator, thereby injuring the left hand and arm of the claimant, knocking out four of his teeth and bruising his thigh, and causing the claimant to be disabled with traumatic neurosis from August 15, 1919, to November 14, 1919, on which date he was still disabled."

In other words, a playful act on the part of Raymond Schults, a fellow employee, induced the claimant to make a vicious assault with a milk bottle. The claimant himself testifies that he threw a milk bottle at Schults; Schults says that—

"I grabbed his blouse, I believe, and just pulled it, and I stayed there, and he got sore, and he picked up a bottle and threw it. I ducked the bottle and grabbed him, and he tried to stoop, and he tried to bite my arm. I let him loose, and he picked up a cobblestone. I thought it was time to stop and I punched him."

It was from this blow that the claimant was forced against the radiator, producing the injuries from which he suffers. While it is probably true that technically Schults made the initial assault in this particular instance, it appears that these men had been in the habit of going through more or less of horseplay, and there is no claim that Schults had any intention of doing anything more than had been customary. There was no such insulting conduct as in the Matter of Verschleiser v. Stern & Son, 229 N. Y. 192, 128 N. E. 126, nor any apparent latent ill will, and no reason, so far as appears, why Schults should have anticipated any trouble on account of his playful grabbing of the claimant's blouse. The claimant, on his part, appears not only to have made a vicious assault upon Schults, by the throwing of the milk bottle, but to have followed it with an effort to get hold of a cobblestone, after trying to bite Schults. It was while he was in this last act, and when the safety of Schults was fairly menaced, that the claimant received the blow which resulted in his injuries.

The Workmen's Compensation Law (Consol. Laws, c. 67) provides for compensating injuries "arising out of and in the course of his employment, without regard to fault," on the part of the claimant, "except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another" (section 10), and the statute is to be read in connection with this exception. There can be no doubt that the claimant's injury resulted from his effort to injure Schults. He was not in any danger from Schults; no one suggests that the claimant had anything to fear from the horseplay of Schults, and it is not contended that this playful act was interfering with the discharge of any duty which the claimant owed to the employer. He appears to have suddenly changed his attitude of playfulness, and to have left the service of the employer for the purpose of injuring Schults, and he received his injuries while following out that purpose, rather than any purpose of the master. The case, it seems to us, comes within the principle of Stillwagon v. Callan Bros., Inc., 183 App. Div. 141, 170 N. Y. Supp. 677, affirmed on opinion below 224 N. Y. 714, 121 N. E. 893, and should follow the disposition made in that case.

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The award appealed from should be reversed. All concur, except John M. Kellogg, P. J., who dissents.

SVOLOS v. HARRY MARSCH & CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. March 2, 1921.)

186 New York Supplement, 689.

1. MASTER AND SERVANT—AGREEMENT SUBSEQUENT TO CONTRACT TO PROTECT CONTRACTOR BY COMPENSATION INSURANCE WILL NOT SUPPORT AWARD.

An agreement by one employing an independent contractor to protect him by compensation insurance will not support an award, when made subsequent to the signing and delivery of the contract, without any new consideration.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

2. MASTER AND SERVANT—FACT OF EMPLOYMENT IS JURISDICTIONAL IN COMPENSATION PROCEEDING, AND MUST BE PROVED BY SUFFICIENT COMMON-LAW EVIDENCE.

In a workman's compensation proceeding, the fact of employment is essential to the jurisdiction of the Industrial Commission in making an award, and, when put in issue, must be established by common-law evidence sufficient to support a verdict of a jury.

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

3. MASTER ANR SERVANT — CLAIM FOR COMPENSATION MUST BE DISMISSED, WHEN CONTRACT MAKES CLAIMANT INDEPENDENT CONTRACTOR.

The State Industrial Commission is not a court of equity, and when it appears that the parties to a compensation proceeding entered into a contract constituting the workman an independent contractor, it must dismiss the claim, and has no power to set aside the contract or ignore its terms and conditions.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

Appeal from State Industrial Commission.

Proceeding under the Workmen s Compensation Law (Consol. Laws, c. 67) by Christ Svolos for compensation for injuries, opposed by Harry Marsch & Co., alleged employer, and the Continental Casualty Company, insurance carrier. Compensation was awarded, and the alleged employer and insurer appeal. Reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry, T. Kellogg, and Kiley, JJ.

Jacobson & McCormick, of Buffalo (Karl A. McCormick, of Buffalo, of counsel), for appellants.

Charles D. Newton, Atty Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

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WOODWARD, J. Harry Marsch & Co. are painting contractors located in the city of Buffalo. On the 18th day of August, 1919, they entered into an executory contract in writing with Christ Svolos, who held himself out as a painting contractor, by the terms of which Svolos undertook to paint People's Storage Holder—

"according to specifications attached, the same forming a part of this contract, and to furnish all labor, ropes, brushes, and tools to complete the same; the work to be started at once. It is agreed and understood between Marsch & Co. and Christ Svolos there being any delay of more than eight hours on this work, except weather conditions, Marsch & Co. are at liberty to go on and complete same without any further notice, for the sum of one thousand ($1,000) dollars, payments to be made as follows: When one coat is on complete, to receive one-half of the amount, less 10 per cent.; when second coat is complete, balance to be paid in 15 days."

Svolos borrowed some ropes and scaffolding material of Marsch & Co., and entered upon the performance of the work, but before he became entitled to any part of the payments stipulated for a rope broke and he was seriously injured. He made a claim for compensation, and the State Industrial Commission has made an award. The employer and the insurance carrier appeal from such award.

[1] The learned Attorney General concedes that under the terms of the written contract the claimant was not an employee, but an independent contractor. It is suggested, however, that because the claimant testified as to some alleged agreement on the part of Marsch & Co. to protect him by compensation insurance the award of the Commission may be sustained. It is not claimed that any such agreement was made as an inducement for the acceptance of the contract; if anything was said at all, it was subsequent to the signing and delivery of the contract, and Marsch & Co. deny that anything of the kind was said at all, and there is no suggestion of any consideration for this alleged modifying agreement.

[2] This court has held repeatedly that the fact of employment was essential to the jurisdiction of the State Industrial Commission in making an award; that this fact, where it was put in issue, must be established by common-law evidence sufficient to support a verdict by a jury, and there is no evidence whatever in the present case to show that the contract was the result of fraud, or that it did not correctly define the relations of the parties.

[3] The State Industrial Commission is not a court of equity; it has no power to set aside the deliberate contracts of parties, or to close its eyes to the terms and conditions of such contracts. When it appears, as in the present case, that the parties have entered into a contract for the performance of work under circumstances which the courts have determined constituted the workman an independent contractor its powers are at an end, and it should dismiss the claim. The case of Matter of Litts v. Risley Lumber Co., 224 N. Y. 321, 120 N. E. 730, is sufficient authority for this proposition.

The award appealed from should be reversed. and the claim dismissed. All concur; John M. Kellogg, P. J., in result.

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QUICK v. FRED E. ILLSTON ICE CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. March 2. 1921.)

186 New York Supplement, 690.

1. MASTER AND SERVANT — FREEZING OF HANDS "ACCIDENT," WITHIN COMPENSATION ACT.

The freezing of one's hands while engaged in a hazardous employment is an "accident," within the meaning of the Workmen's Compensation Act (Consol. Laws, c. 67).

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental.)

2. MASTER AND SERVANT—INADEQUACY OF TIME TO PROCURE EVIDENCE ON COMPENSATION HEARING NOT AVAILABLE, WHEN NO OBJECTION OR REQUEST FOR ADJOURNMENT MADE.

In a workman's compensation proceeding, defendants cannot object that they were given inadequate time to procure evidence on a second hearing, where the insurer was represented at the hearing. and made no objection on that ground, and did not ask for an adjournment for the purpose of procuring evidence.

(For other cases, see Master and Servant, Dec. Dig. § 414.)

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Henry Quick for compensation for injuries. opposed by the Fred E. Illston Ice Company, employer. and the Ice Dealers' Mutual Insurance Company, insurance carrier. Compensation was awarded, and the employer and insurer appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley. JJ.

James W. Smith, of Troy, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen.. of counsel), for State Industrial Commission.

WOODWARD, J. [1] The claimant suffered injuries to both his hands while engaged in floating ice by the aid of a pike pole. on the 31st day of January. 1920. The thermometer at the time of the injury registered 14 degrees below zero, and the accident is found to have been due to the necessity of holding onto the pike pole in such a manner as to expose the claimant to an added hazard. His fingers were frozen, and the Commission has allowed an award for a period of $10^1/_2$ weeks. This court is committed to the proposition that the freezing of one's hands while engaged in a hazardous employment is an accident, within the meaning of the statute. Days v. Trimmer & Sons, Inc., 176 App. Div. 124, 162 N. Y. Supp. 603; Hernon v. Holahan, 182 App. Div. 126. 169 N. Y. Supp. 705; Campbell v. Clausen-Flanagan Brewery 183 App. Div. 499. 500. 171 N. Y. Supp. 522; Richardson v. Greenberg, 188 App. Div. 248, 252, 176 N. Y. Supp. 651.

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[2] The suggestion that the defendants were prejudiced by a notice, which gave them inadequate time to procure evidence, on a second hearing. need not be very seriously considered. The insurance carrier was represented at the hearing in question, and made no suggestion of the point now urged, or at least asked for no adjournment for the purpose of procuring evidence which, if produced, could change the result.

The award should be affirmed. All concur.

HERMANN ET AL. v. AMERICAN RAILWAY EXPRESS CO.

(New York Supreme Court, Appellate Division, Third Department. March 2, 1921.)

186 New York Supplement. 691.

1. MASTER AND SERVANT — DEPENDENCY, JUSTIFYING COMPENSATION. MUST EXIST AT DEATH OF EMPLOYEE.

The dependency of the father and mother of an employee, to entitle them to compensation under Workmen's Compensation Law, § 16, subd. 4, must exist at the time of the employee's death.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

2. MASTER AND SERVANT—EVIDENCE HELD NOT TO SHOW DEPENDENCY OF FATHER AND MOTHER. CLAIMING COMPENSATION.

In a proceeding under the Workmen's Compensation Law for the death of claimants' son, evidence that the son was paying $15 a week and receiving his board and lodging and some clothing, that his father, though lame. was earning $20 a week, and that his mother was making a profit of $40 a month from renting rooms, does not show dependency of the father and mother upon the deceased employee, since his contributions were only his equitable portion of the family expenses.

(For other cases. see Master and Servant, Dec. Dig. § 405[5].)

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Act by John G. Hermann and Augusta Hermann for compensation for the death of their son, Frederick J. Hermann, employee, opposed by the American Railway Express Company, employer and self-insurer. From an award of compensation by the State Industrial Commission, the employer and self-insurer appeals. Reversed, and claim dismissed.

Argued before John M. Kellogg, P. J.. and Woodward, Cochrane. Henry T. Kellogg, and Kiley, JJ.

Edward V. Conwell, of New York City, for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. [1] The appellant does not contest the question of the accidental cause of the death of Frederick S. Hermann, son of the alleged dependents, but does seriously urge that the father and mother were not dependent, within the meaning of the Workmen's

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Compensation Law (Consol. Laws. c. 67). The decedent left no dependent wife or children under the age of 18 years, and the question to be determined is whether there is any evidence to support the conclusion of fact that the father and mother of the decedent were dependent upon him at the time of the accident. for the statute permits of no other time. Section 16, subd. 4.

The evidence is that the father was earning from $18 to $25 per week at the time of the death of his son, though he appears to have not been working since that time. What he has done, or refrained from doing, since the death, is. of course, of no importance. and we are unable to see any relevancy in the alleged fact that the father is lame. The question is: What was the condition of the father at the time of the death? Was he then dependent upon the earnings of the son?

[2] The evidence indicates that he earned an average of more than $20 per week for the year prior to the death of the son, and that the family consisted of the father and mother and the son, and the latter contributed the sum of $15 per week, and was boarded and lodged, and at times had clothing bought for him. How can it be said that this father, earning above $20 per week was in any degree dependent upon the contribution of $15 per week on the part of the son, who was supported out of the family fund?

And the mother has likewise been held to be a dependent, though the evidence shows that the she rented 11 rooms for $55 per month and rented them out for $30 per week. and it is conceded that she netted about $40 per month out of this transaction, after the payment of the gas and coal bills. and the payment for sheets, pillowcases, blankets, etc. In other words, after paying all the heat and light bills for the family, and important items of supplies, there was a net profit of $40 per month to the mother, who had a right to support from her husband, who was earning more than $20 per week at the time of the death of the son. Twenty dollars per week, with rent, light, and heat paid for, and $40 per month in addition—or practically $25 per week—for food and clothing for two persons, is not dependency. in the absence of evidence showing the insufficiency of this sum.

Assuming the son to be living, and contributing $15 per week, and using one of the rooms, it will be seen that he would be paying only about his equitable portion of the family expenses, assuming it all to be used, and it must be clear that there is no foundation in the evidence for holding either the father or the mother to have been dependent upon the contribution of the decedent at the time of the accident. So long as the cases of Birmingham v. Westinghouse Electric & Manufacturing Co., 180 App. Div. 48, 167 N. Y. Supp. 520, Frey v. McLoughlin Bros., Inc., 187 App. Div. 824, 175 N. Y. Supp. 873, and Mulraney v. Brooklyn Rapid Transit Co., 190 App. Div. 774. 180 N. Y. Supp. 654, remain unreversed, this court is not in a position to sustain awards, where there is no evidence to establish dependency.

The award appealed from should be reversed. All concur.

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STASMOS v. STATE INDUSTRIAL COMMISSION ET AL.
(No. 11544.)

(Supreme Court of Oklahoma. Feb. 8, 1921.)
195 Pacific Reporter, 762.

(Syllabus by the Court.)

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION LAW LIBERALLY CONSTRUED.

The Workmen's Compensation Law should be construed fairly, in deed liberally, in favor of the employee.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

2. MASTER AND SERVANT—INJURY FROM ASSAULT BY FELLOW SERVANT WITHIN COMPENSATION LAW IS "ACCIDENTAL PERSONAL INJURY" "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Injury resulting from an assault by a workman upon a fellow workman while the latter is engaged in the work of the master is an "accidental personal injury arising out of and in the course of employment" within the meaning of the term as used in section 1 (article 2) of the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental; Course of Employment.)

3. MASTER AND SERVANT—TEST OF LIABILITY UNDER WORKMEN'S COMPENSATION LAW IS RELATION OF SERVICE TO INJURY.

The test of liability under the Workmen's Compensation Law for injuries arising out of and in the course of employment is, not the master's dereliction whether his own or that of his representatives acting within the scope of their authority, but is the relation of the service to the injury, of the employment to the risk.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

Error from the State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Adolf Stasmos, employee, opposed by Rock Island Coal Mining Company, employer. From refusal of compensation by the State Industrial Commission, the employee appeals. Reversed and remanded, with directions.

J. S. Arnote, of McAlester, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. E. Wood, Asst. Atty. Gen., for State Industrial Commission.

A. W. Harries, of McAlester, for Rock Island Coal Mining Co.

KANE, J. This is an appeal from the action of the State Industrial Commission in refusing to allow the petitioner compensation for personal injuries incurred while in the employ of the Rock Island Coal Mining Company as a miner. There is no controversy between the parties concerning the facts disclosed by the evidence, which may be briefly summarized as follows:

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At the time of the injury and for some time prior thereto, Stasmos, the petitioner, was in the employ of the Rock Island Coal Mining Company in the capacity of a coal miner. On the day of the injury he was at work in rooms 48 and 49. About 1 o'clock of that date the mine shut down, and word was sent to the miners and to the petitioner that the mine had stopped work and that it was necessary for the workmen to depart from their working places and proceed to the surface. Upon receiving these directions, the petitioner with other workmen left his working place and passed up through the entries and passageways of the mine to the bottom of the shaft for the purpose of taking the cage out of the mine. While waiting at the bottom of the shaft for the cage to arrive, the petitioner asked Tom Woods, an assistant mine foreman and a fellow employee of the petitioner who was present where the cage was, saying that he (the petitioner) wanted the cage to go out of the mine. Whereupon Woods becoming angry applied an ugly epithet to the petitioner, adding: "Why don't you go up the air shaft?" Upon the petitioner resenting the insult of Woods the latter picked up a 2x4 scantling and struck petitioner over the head, knocking him down and crushing and breaking his skull so severely that he remained unconscious for some time. The cage which was temporarily out of order, arriving shortly after the encounter, the petitioner was taken out of the mine and from the mine to his home, from which he was taken next day to the hospital at McAlester, where he remained ten days. As the result of this injury the petitioner was unable to work for a period of about six weeks, his mind being seriously affected for a period of one month. The claim for compensation filed by the petitioner before the State Industrial Commission was denied upon the ground that the disability of the petitioner was not the result of accidental personal injury arising out of and in the course of his employment. This ruling is assigned as error. In our opinion this ground for reversal is well taken.

The part of section 1, art. 2, c. 246, of the Session Laws of 1915. generally known as the Workmen's Compensation Act, necessary to notice provides as follows:

"Every employer subject to the provisions of this act shall pay or provide as required by this compensation according to the schedule of this article for the disability of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the willful intention of the injured employee to bring about injury of himself or of another.."

[1] A casual reading of this section makes it fairly obvious that the petitioner's right to recover depends upon an affirmative answer to two questions: (1) Were his disabilities the result of accidental personal injuries? (2) Did they arise out of and in the course of his employment? It seems clear to us, in view of the rule of construction many times announced by this and other courts, that the Workmen's Compensation Law should be construed fairly, indeed liberally, in favor of the injured workman, that both of these questions must be answered in the affirmative.

[2] It is now well settled in these workmen's compensation cases that the fact that an injury is the result of the willful or criminal assault of another does not prevent the injury from being accidental In re McNicol, 215 Mass 497, 102 N E 697, L. R. A. 1916A. 309 and notes; L. R. A. 1917D, 112; Western Idemnity Co. v. Pillsbury. 170 Cal. 686, 151 Pac. 398; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390; Re Heitz, 218 N. Y. 148, 112 N. E. 750;

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Re Von Ette, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D. 641; Willis v. Pilot Butte Mining Co. (Mont.) 190 Pac. 124; 1 C. J. 390. and cases cited.

The latter authority defines the word "accident" as follows: Accident in the legal signification is difficult to define. It is not a technical legal term with a clearly defined meaning and is used in more senses than one. The work denotes an event which proceeds from an unknown cause or is the unusual effect of a known cause and therefore unexpected. Chance, casualty, an event happening without any human agency or if happening through human agency, an event which under the circumstances is unusual or unexpected to the person to whom it happens. An event which under the circumstances is unusual and unexpected by the person to whom it happens. Under this definition we think the injury was "accidental" within the meaning of the statute. It was sudden and unlooked for, and the purpose of the act is to insure the workman at the expense of their employers against personal injury not expected or designed by the workman himself, provided such injuries arise out of and in the course of employment.

[3] It seems equally clear to us that the facts in this case show that petitioner's injury arose out of and in the course of his employment. As we have seen from the brief statement of the case hereinbefore set out, the petitioner was in the act of leaving the mine following the usual course of exit from his working place to the foot of the shaft for the purpose of taking the cage to the top. Tom Woods, the assistant foreman. was there directing the men, and while the test of liability under the statute is not the dereliction of the master, or that of his representative acting within the scope of his authority, it seems to us that it was entirely proper for the petitioner to complain to the mine foreman concerning the delay in the arrival of the cage.

Our statute, in so far as it provides for compensation for the "disability of an employee resulting from accidental personal injury sustained by the employee arising out of and in the course of his employment," is almost, if not, identical with the British statute upon this subject, and with the statutes of practically every state in the United States except Washington. which has a broader provision on the foregoing paragraph of our statute.

It is the decided weight of authority in Great Britain and the United States that an assault by a third party. or an assault of the employer arising out of and in the course of the employment, resulting in an injury and disability, is such an injury as comes within the Workmen's Compensation Law, L. R. A. 1917B. 112, notes. Willis v. State Industrial Commission, 78 Okl. 216, 190 Pac. 92; Willis v. Pilot Butte Mining Co. (Mont.) 190 Pac. 124, and many other cases.

The facts in the Willis Case, supra, are somewhat similar to the case at bar. The employee. with others, had left their work and gathered around a fire to warm and were not actually at work. A fellow employee came along and voluntarily and intentionally threw a piece of split dynamite in the fire. Those around the fire were warned of the act and all ran away except the one injured, and the dynamite exploded and injured him. The Supreme Court held that Willis was entitled to recover under the compensation law of this state.

Injuries sustained by an employee of a factory from being struck by an apple which one of his fellow employees. a boy. had thrown at another in sport ,and which nearly caused the loss of the entire sight of one eye, was held by the New York Court of Appeals to be an injury arising out of and in the course of his employment within the Workmen's Compensation Law, in Leonbruno v. Champlain Silk Mills, 229 N. Y. 470, 128 N. E. 711. The injured employee was at the time engaged in the performance of his duties and had no knowledge of the horseplay.

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Judge Cardozo, who wrote the opinion, reviewed and distinguished a number of cases which arose in New York. and in some of the other states as well, as cases arising under the English law. In conclusion he said:

"The risks of injury in the crowded contacts of the factory through the act of fellow workmen are not measured by the tendency of such acts to serve the master's business. Many things that have no such tendency are done by workmen every day. The test of liability under the statute is not the master's dereliction, whether his own or that of his representatives acting within the scope of their authority. The test of liability is the relation to the service to the injury or the employment to the risk."

If we apply this test to the case at bar, it is obvious that the State Industrial Commission erred in denying the petitioner compensation for his disabilities.

As was said in Verschleiser v. Joseph Stern Son et al., 229 N. Y. 192, 128 N. E. 126, another late New York case more directly in point:

"It may seem harsh and arbitrary to impose liability upon a master for an assault committed by a workman upon a coworkman, but the purpose and intent of the statute is to fix an arbitrary liability in the greater public interest involved. This legislation was to ameliorate a social condition, not to define a situation or fix a liability by an adherence to the old common law. Liability was imposed regardless of fault—vitally different from that under the common law. Injury by an employee, moved by some cause aside from his regular duties, may be considered an inevitable. however undesirable. result—a risk which is incident to the employment of many persons. It is a burden which industry may well bear under this legislation."

For the reasons stated, the judgment of the State Industrial Commission is reversed and the cause remanded, with directions to proceed in accordance with the views herein expressed.

All the Justices concur.

RORVIK v. NORTH PACIFIC LUMBER CO. ET AL.

(Supreme Court of Oregon. Jan. 25, 1921.)

195 Pacific Reporter, 163

10. MASTER AND SERVANT —UNDER CALIFORNIA COMPENSATION ACT CLAIMANT MAY SUE THIRD PERSON AND JOIN EMPLOYER AS DEFENDANT.

Under Workmen's Compensation Act Cal. § 31. providing that the making of a lawful claim shall operate as an assignment to the employer of any right of action against a third person, but that any amount collected by the employer in excess of the amount paid by him shall be held for the benefit of the claimant, assuming that such assignment will be enforced in Oregon, the case is one of an indivisible right of action owned by two persons, and under the rule now prevailing the employee may sue, and, in case of the employer's failure to join as plaintiff, make him a defendant.

(For other cases, see Master and Servant, Dec. Dig. § 400.)

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12. MASTER AND SERVANT—EMPLOYER RESISTING COMPENSATION CLAIM AND DENYING INTEREST IN RIGHT OF ACTION AGAINST WRONGDOER CANNOT SUE.

Where an employer against whom a claim for compensation was made under the Workmen's Compensation Act of California has contested the claim and persistently denied that it had any interest in the claimant's right of action against a third party and has attempted to transfer any interest it may have to the claimant. it cannot bring another action against such third party and recover a judgment for damages.

(For other cases. see Master and Servant, Dec. Dig. § 389.)

Appeal from Circuit Court, Multnomah County; Robert Tucker, Judge.

On rehearing. Former opinion adhered to, and judgment affirmed.

For former opinion, see 190 Pac. 331.

This appeal was originally presented to one department, but upon the petition of the defendants, receives, a rehearing was granted, and the appeal was heard by the court sitting en banc. The first hearing resulted in an affirmance of the judgment. The reader is referred to the original opinion, reported in 190 Pac. 331. for a statement of the facts.

The defendants contended in their petition for a rehearing, and they especially urged at the second oral argument that:

(1) "It was error to uphold the trial court in instructing the jury that the plaintiff could recover if the work in which defendants were engaged at the time of the injury to and the death of C. P. Rorvik involved a risk or danger to the public"; (2) "it was error to hold that A. Maude Rorvik could recover $5,000 from the Industrial Accident Commission of California and $12,500, from the defendants in this action"; and (3) "it was error to hold that the injury and death of Capt. C. P. Rorvik was a maritime tort."

S. C. Spencer, of Portland (Emmons & Webster and Wilbur, Spencer, Becket & Howell, all of Portland, on the brief), for appellants.

Homer D. Angell, of Portland (Ira S. Lillick. of San Francisco. Cal., and Angel & Fisher. of Portland, on the brief)' for respondent.

HARRIS, J. (after stating the facts as above), In the original opinion we said:

We deduce the rule that the Employers' Liability Act does not extend to the protection of the general public as such. but that it does extend its protection to employes of the particular person owning or operating dangerous machinery or engaged in hazardous employments, and to other persons or employees of other corporations whose lawful duties require them to be or work about such machinery, or expose themselves to the hazards of the machinery or appliances in use by the owner thereof."

"This," the defendants concede in their petition for a rehearing, "is a clear, concise. and correct statement of the law as we understand it," but the defendants insist. "This law was not followed in this case." According to the contention, of the defendants, "the complaint was drawn. and the case tried so far as plaintiff is concerned, and the jury was instructed upon the theory that the Employers' Liability Act of the state of Oregon extended to the protection of the general public as such."

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[1] We are unable to concur with the defendants. It is true that the trial court did repeatedly say to the jury in effect that the receivers of the lumber company were within the embrace of the Employers' Liability Act (Or. L. §§ 6605–6659) if the work carried on by them involved a risk or danger to the public; but it is also true that the court gave additional instructions which must be kept in mind, for when testing the correctness of the instructions to the jury, we must view the charge as a whole. In substance, the court told the jury that the plaintiff was entitled to prevail if the defendants were engaged in a work involving a risk or danger to the public, and if the decedent was a member of the public rightfully upon the premises where he was injured; and then by a subsequent instruction, as pointed out in the original opinion, the trial judge explained to the jury what he meant by the words "a member of the public" in the following language:

"In this connection, I instruct you that, if you find the decedent, at the time he received the alleged injuries, was upon the wharf of the North Pacific Lumber Company, defendant, and was in charge of the loading of the Steamship Klamath, either upon the express or implied invitation of the receiver, and that as captain of the said steamship his duties in respect thereto required that he be upon the wharf, that in that event he was a member of the public, and as such was entitled to whatever protection the law provides for the public Or if you find that the decedent was in charge of the loading of the vessel, and that the vessel was being loaded at the said wharf at the express or implied invitation of the receiver, that by reason thereof the decedent was entitled to go upon the wharf if it was reasonably necessary for him so to do in order to superintendend the loading of the vessel, and while upon the wharf under such conditions he was a member of the public, he was. as a matter of law, rightfully upon the wharf."

The uncontradicted evidence shows that at the time of the accident the decedent was engaged in the work of superintending the loading of the ship. Capt. Rorvik was not a loiterer, nor a trespasser, nor a mere idle member of the public; but he was engaged in work at the very moment of his hurt. He was in very truth a workingman at the time when and the place where he was hurt. The right of the plaintiff to recover was in the final analysis made to depend upon whether Capt. Rorvik was rightfully upon the wharf, and his right to be on the wharf was in turn made to depend upon whether he was there performing work upon the express or implied invitation of the defendants. The charge taken in its entirety is sufficiently clear, and it is not likely that the jury was or could have been misled to the extent of believing that the plaintiff was entitled to recover if the decedent was a mere member of the general public, regardless of whether or not he was engaged in the performance of work while lawfully on the premises. The charge, considered as a whole, required a jury to find. among other things, that the decedent at the time of the injury was lawfully and properly upon the wharf and engaged in the work of superintending the loading of the ship, before a verdict could be returned for the plaintiff; and hence the law as it is stated in the original opinion was applied by the trial jury.

[2, 3] At this stage of the discussion we may for the moment pass over the defendants' second point. and proceed with the investigation of the third point; and, after disposing of it, we shall return to the second point urged by the defendants. After further study of the record we are persuaded that we must conclude that it cannot be said as a matter of law that Capt. Rorvik's death resulted from a maritime tort. The theory has been advanced that the tort was a maritime tort, for the

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reason that Rorvik was engaged in a maritime contract. The test for determining whether a tort is a land or maritime tort is not the same as the test for determining whether a contract is a land or a maritime contract. The character of a tort is determined by the locality of the act; and consequently the fact that a person is injured while performing a maritime contract does not necessarily determine the character of the tort. Swayne & Hoyt v. Barsch, 226 Fed. 581, 590, 141 C. C. A. 337; Thomas v. Lane, Fed. Cas. No. 13,902, 2 Sum. 1. 9; Atlantic Transport Co. v. Imbrovek. 234 U. S. 52, 59, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157; Phila.. Wil. & Balt. R. Co. v. Phil & Havre de Grace Steam Towboat Co, 23 How. 215, 16 L. Ed. 433; The Plymouth, 3 Wall 20, 25 18 L. Ed. 125. According to the complaint. a portion of the lumber piled upon the wharf was suddenly shoved forward, striking Rorvik, "by reason of which he was knocked off the said wharf, receiving therefrom mortal injuries, from the effects of which he died." The first further and seperate defense found in defendants' answer is framed upon the theory that from some cause unknown to the defendants Rorvik fell from the wharf "on and against the said steamship Klamath. and from thence onto some logs and timbers in the Willamette river; that all of the injuries received by the said decedent were received either on the steamship Klamath while the same was in the Willamette river or were received on logs and timber floating in said river; that the said Willamette river was a navigable river." The allegations of this first further and separate defense are denied by the reply. The uncontradicted evidence is that some of the lumber in the pile, beside which Rorvik was standing, was suddenly shoved forward and struck him and knocked him off the wharf. The evidence further shows that Rorvik's back was broken. There was no attempt by the defendants to show that the broken back was the immediate result of striking the logs in the river, and not the immediate result of being struck by the lumber on the wharf. Notwithstanding the allegations of the first further and separate defense the defendants apparently abandoned any attempt to sustain those allegations by any evidence offered at the trial; and, moreover. the defendants did not attempt in their original brief to urge the first further and separate defense as a reason for defeating the claim of plaintiff. Furthermore, in their petition for a rehearing the defendants say:

"It is not a maritime tort; the captain received his injuries while on the land. * * * The matter was not discussed in any of the briefs, nor in the oral argument as to whether or not it was a maritime tort."

Thus it appears not only that we cannot say as a matter of law that the tort was a maritime rather than a land tort, but it also appears that the defendants themselves concede, and, indeed, insistently contend, that it was a land tort; and consequently we must agree with the contention of the defendants that we cannot say that the tort was a maritime tort. From this conclusion it follows as a natural sequence that there was nothing in the character and nature of the tort to prevent the Workmen's Compensation Act of California (St. 1913, p. 279) from operating. By the same token we must also conclude that there was nothing in the character or nature of the tort to prevent the plaintiff from invoking our Employers' Liability Act or to deprive the trial court of authority to award damages, unless some reason, other than the character of the tort, can be pointed out. See The Albion (D. C.) 123 Fed. 189; The Strabo, 98 Fed. 998, 39 C. C. A. 375. In short, the character of the tort does not render the California Compensation Act inoperative. nor does it prevent the enforcement of our Employers' Liability Act.

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The second point urged by the defendants involves the contention that the award made under the provisions of the Workmen's Compensation Insurance and Safety Act of California precludes the plaintiff from prosecuting or maintaining this action. It will be recalled that Capt. Rorvik, the husband of the plaintiff, was injured on August 3, 1916, and died five days afterwards, on August 8th. The plaintiff, on October 27, 1916, presented to the Industrial Accident Commission of California her claim for compensation under the Workmen's Compensation Act of that state. The Klamath Steamship Company, Rorvik's employer. answered and denied the claim made by plaintiff. Subsequently, on December 19, 1916, the steamship company amended its answer. Afterwards, on January 19, 1917, a hearing was had and an award of $5,000 was made to the plaintiff by the California Industrial Accident Commission. The steamship company was not satisfied with the award. and by writ of certiorari carried the controversy to the Supreme Court of California. where on March 19, 1918, the award was affirmed; and on April 17, 1918, a petition for a rehearing was denied. 177 Cal. 767, 177 Pac. 848. There is nothing in the record informing us of the date when the instant action was commenced, Although it does appear that the second amended complaint upon which the cause was tried was filed on January 7, 1918, and hence the California proceeding had not yet terminated when the Oregon action was begun. It does not appear from the rcord that there has ever been a remittitur from the Supreme Court of California. For aught that appears from the record the litigation may be still pending; and indeed, it is asserted by the plaintiff in her brief, in answer to the petition for a rehearing, that "the matter still pends in the appellate courts, a writ of certiorari to the Supreme Court of the United States having been applied for." At any rate it affirmatively appears from the uncontradicted testimony of the plaintiff that the California proceeding has been sufficiently stayed to prevent her from obtaining any money. No payments have been made to her. for thus far she has not been able to compel any payment; and, moreover, the defendants have made no attempt to show that tre award made by the California Industrial Accident Commission is final so that it is even now enforceable.

The defendants make two contentions in respect of the effect of the award. On the one hand, the defendants claim that they were entitled to an abatement of the Oregon action until the determination of the California proceeding; and. on the other hand, they argue that the California award at all times operated as an absolute bar to the subsequent Oregon action. The status of the California award, however, cannot effect the judgment rendered in the Oregon action, for in our view the result is the same whether we treat the record as a proceeding which is still pending or as an enforceable finality.

[4,5] We may assume for the purposes of this discussion that the proceeding begun before the California Industrial Accident Commission was "an action" within the meaning of that term as used in the law of abatement; and, notwithstanding the fact that all of the elements usually required to constitute "a prior action pending" were not present we may further assume that there was such an identity of parties, issues, causes of action. and relief sought and obtainable as fully come within the embrace of the rules governing the abatement of actions; and even then, after assuming the existence of all such required elements, it cannot be said that the trial court erred in refusing to suspend the domestic action until the final determination of the foreign proceeding. The pendency of the prior action in another state does not entitle a party as a mater of right to an abatement of the second or domestic action, although the court may in its discretion postpone the second action until after a decision of the first action. Beneke v. Tucker, 90 Or. 230,

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238 176 Pac. 183. Even though we were called upon to determine whether the trial court ruled properly, instead of being required, as we are, only to decide whether there was an abuse of legal discretion, our view would be that the trial court was justified in its refusal to suspend the domestic action and properly permitted the trial to proceed. Obviously the record furnishes no facts whatever upon which to base any claim that the trial judge abused his discretion in refusing to suspend the Oregon action. Although we have thus far assumed for the purposes of the discussion that all of the elements usually required to constitute an action pending were present. it is manifest that the relief sought and obtainable in the California proceeding is only partial while the relief sought and obtainable in the domestic action is full and complete. In the California proceeding $5.000 is the limit of recovery, but in the Oregon action there is no arbitrary limit fixed by statute. 1 C. J. 72.

Section 31 of the California Compensation Act in substance declares that the making of a lawful claim against an employer for compensation shall operate as an assignment of any right of action the employee may have against a third person, and the employer is subrogated to the right of the employee and the employer may enforce in his own name the legal liability of the third person; but the statute also provides that any amount collected by the employer in excess of the amount paid by the employer, or for which he is liable, shall be held by him for the benefit of the injured employee "or other person entitled." The defendants argue that, by force of the California statute. any right of action that Mrs. Rorvik may have had against the lumber company was automatically assigned to the steamship company, the employer of the decedent, when she filed her claim against the steamship company. The plaintiff counters by arguing that the right of action conferred upon her by our Employers' Liability Act would not survive her death, and hence is not assignable under the laws of this state. and, that, since a foreign statute conflicting with the policy of our laws will not be enforced here, the California statute did not effect an assignment.

[6-9] Survivorship is the test of assignability. Any claim which affects the estate of a party, although arising out of tort. may be assigned; but the rule is otherwise where it arises out of an injury to the person. An assignment of a mere litigious right is invalid, but an assignment of property is valid. although that property may be incapable of being recovered without litigation. Stated broadly. nothing is assignable which does not directly or indirectly involve the right of property except where otherwise provided by statute. Rights given by statute for the redress of personal wrongs are generally not assignable. Dahms v. Sears, 13 Or. 47, 58, 11 Pac. 891; Mitchell v. Taylor. 27 Or. 377, 384, 41 Pac. 119; Sperry v. Stennick, 64 Or. 98, 129 Pac. 130; Cooper v. Hillsboro Garden Tracts, 78 Or. 74. 86, 152 Pac. 488. Ann. Cas. 1917E, 840; Mumford v. Wright, 12 Colo. App. 214. 55 Pac. 744. Dawson v. Great Northern. etc.. R. Co., 1 K. B. 260. 271; Weller v. Jersey City, etc., St. R. Co., 68 N. J. Eq. 659, 61 Atl. 459, 6 Ann. Cas. 442; 5 C. J. 836; 4 Cyc. 26. It has already been determined in this jurisdiction that a right of action conferred upon a widow by our Employers' Liability Act is a personal right which dies with her; and hence, under the general rule, such a right is not assignable. Wilcox v. Warren Construction Co., 95 Or. 125, 143. 186 Pac. 13. It has been held in other jurisdictions that a cause of action for injuries resulting in death. under a statute conferring such right upon a particular beneficiary, is not assignable. Marsh v. Western New York, etc., R. Co., 204 Pa. 229. 53 Atl. 1001; Southern Parific Co. v. Winton, 27 Tex. Civ. App. 503, 66 S. W. 477; Texas, etc., R. Co. v. Showalter, 3 Wilson Civ. Cas Ct. App. § 69.

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[10] If there were no factors to be considered except the language of the California statute and the general rule with which in this state serves as the test of assignability. the plaintiff might well claim that the assignment declared by the California statute would not be enforced in this state, for the reason that it is contrary to the policy of our laws. However. there is another factor which must enter into the calculation. Our Workmen's Compensation Act contains a section which provides that, where an employee, or, in case of death, his dependent, elects to take under the Compensation Act for an injury done by "another not in the same employ," the cause of action "against such other shall be asigned to the state for the benefit of the accident fund." Section 6616, Or. L. Although there are material differences between section 6616 of our statute and section 31 of the California act, we may nevertheless assume. without deciding, that they are substantially the same; and we may further assume, without deciding, that because of the assignment required by section 6616 of our statute, it is the present policy of our law to enforce assignments made under foreign statues similar to ours. and that therefore the assignment effected by the California statute will be enforced in this jurisdiction, even though it be further assumed that the right of action exists only by force of our statute, and that there would be no right of action at all in the absence of our Employer' Liability Act We have made the numerous assumptions previously mentioned in order that the contentions made by the defendants may be considered in a light most favorable to them Although under the California act the employer is enabled to sue in his own name, nevertheless, assuming that the steamship company became an owner of the right of action against the lumber company, the steamship company became such owner only to the extent of $5,000; and the balance of such right, which has since been proved to be worth $7,500, in truth continued to be owned by Mrs Rorvik. It will be remembered that Mrs. Rorvik obtained a judgment for $12,500 against the defendants. She either owns all of that judgment or a part of it, and if she only owns a part of it, her part amounts to $7,500. It is true that the California statute provides that the employer may sue in his own name. but it is also true that the statute does not declare that the employee or his dependent cannot become a party. The right of action was an entirety and could not be divided, without the consent of the lumber company, so as to enable the steamship company to sue for its portion in one action, and Mrs. Rorvik to sue for the balance in another action. Since the right of action is an entirety, but is in truth owned by two persons and both persons are necessary parties, then under the rule which formerly prevailed in this jurisdiction both owners would be required to join as plaintiffs, with the result that, if one owner refuses to appear as a party plaintiff, the other owner would be powerless to proceed in an action at law. Home Mutual Ins. Co. v. Oregon R. & N. Co., 20 Or. 569, 26 Pac. 857, 23 Am. St. Rep. 151; State Ins. Co. v. Oregon R. & N. Co., 20 Or. 563, 26 Pac. 838. See, also. Fireman's Ins. Co. v. Oregon Ry. Co., 45 Or. 53, 76 Pac. 1075, 67 L. R. A. 161, 2 Ann. Cas. 360. The rule was subsequently changed, however, so that now in action at law as well as in suits in equity one owner desiring to sue may, in case of the refusal of the other to join as a plaintiff, make the other owner a party defendant, and thus enforce the single right owned by the two persons. Williams v. Pacific Surety Co., 66 Or. 151. 156, 127 Pac. 145. 131 Pac. 1021. 132 Pac. 959, and 133 Pac. 1186. See, also. Thomas v. Thruston, 87 Or. 650. 655, 171 Pac. 404; Northwest Door Co. v. Lewis Inv. Co., 92 Or. 186, 190, 193, 199. 180 Pac. 495.

[11] In the instant case it is clear that the steamship company was not the sole owner of the right of action, although it may have been and may still be the owner of a part of it. It is likewise clear that Mrs.

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Rorvik owned either the whole of the claim or the remaininig portion of it. and because of such ownership she had an enforceable interest. Overholt v. Dietz, 43 Or. 194, 199, 72 Pac. 695; Graham v. Light. 4 Cal. App. 400, 88 Pac. 373. There was a single claim owned by two persons. One of the owners brought this action on this single claim without making the other owner a party, although the defendants could, by proper objections, have compelled the plaintiff to make the steamship company a party to the litigation. The defendants did not object to the omission, notwithstanding they had ample opportunity to do so; and because the defendants did not object they waived the defect. Thompson v. Hibbs, 45 Or. 141, 147, 76 Pac. 778; Burggraf v. Brocha, 74 Or. 381, 385, 145 Pac. 639; Schultz v. Selberg, 80 Or. 668, 677, 157 Pac. 1114; Overholt v. Dietz, 43 Or. 194, 196, 72 Pac. 695.

[12] We may assume for the purposes of the discussion that the plaintiff cannot have two satisfactions, one in California and another in Oregon; and hence a satisfaction of the Oregon judgment would operate as a satisfaction of the California award. Thus far, however, neither the award nor the judgment has been satisfied. In effect, the steamship company has persistently denied that it owned any interest in the right of action against the lumber company, for the steamship company has from the very beginning contested the claim for compensation made by Mrs. Rorvik and thus denied that her claim was a lawful one. Moreover, the steamship company has by a formal written assignment at least attempted to transfer any interest it may have had to Mrs. Rorvik; and hence, even though it be assumed that this attempted assignment is without legal efficacy. it is plain that, in view of all the circumstances shown by the record, the steamship company cannot bring another action against the lumber company and prosecute it to a judgment for damages. Moreover the plaintiff testified as follows:

"I signed a paper saying that from what I won in this suit I would reimburse them (the steamship company) for any amount they might be paid. or that I might win in the courts there, which I haven't won so far."

We adhere to the conclusion reached in our original opinion; and it follows that the judgment from which the defendants have appealed must be affirmed

HUGHES v. AMERICAN INTERNATIONAL SHIPBUILDING CORPORATION ET AL.

(Supreme Court of Pennsylvania. Feb. 14. 1921.)

112 Atlantic Reporter, 433.

MASTER AND SERVANT — PETITION FOR REVIEW OF COMPENSATION AGREEMENT NOT TOO LATE.

Where, for a supposedly trivial injury, a compensation agreement for a small amount was approved by the Workmen's Compensation Board, and the last payment thereon was made in May, 1918, but, upon its subsequently developing that the injury was serious, the employee filed. in January, 1920, a petition for review of the compensation agreement and for an order to cover the actual injury, the petition, although filed more than one year after the last payment, was not too late, under Workmen's Compensation Law. § 315; for the provision thereof that.

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where payments of compensation have been made "in any case," "said limitations" shall not take effect until the expiration of one year from the time of the making of the last payment, refers to cases previously specified in the section, and operates, as to them, as an extension rather than further limitation of the time for making claim specified for such cases.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Appeal from Court of Common Pleas, Philadelphia County; Charles B. McMichael, Judge.

Proceeding under the Workmen's Compensation Act by John A. Hughes, employee, opposed by American International Shipbuilding Corporation, employer, and Employers' Liability Assurance Corporation, insurance carriers. From judgment for plaintiff on appeal from order of the Workmen's Compensation Board in his favor. the employer and insurance carrier appeal. Affirmed.

Argued before Moschzisker, C. J., and Frazer, Walling, Simpson, Kephart, Sadler, and Schaffer, JJ.

Claude C. Smith, of Philadelphia, for appellants.

Isaac M. Price and Francis H. Bohlen, both of Philadelphia, for appellee.

SIMPSON, J. John A. Hughes, an employee of the American International Shipbuilding Corporation. having received, in the course of his employment. an injury which was then supposed to be trivial, with the consent to the Workmen's Compensation Board entered into a compensation agreement with his employer, by which it agreed to pay to him in full for the injuries sustained, the sum of $10 per week for six weeks. Payments were made and receipted for up to May 13, 1918, at which time the ten weeks expired. It subsequently developed that the injury was serious, causing a total loss of the use of his left hand; whereupon on January 13, 1920, he filed a petition with the board asking a review of the compensation agreement, and that an order be made in his favor to cover the injury actually suffered An answer was filed, testimony taken, the petition sustained, the agreement set aside, and an appropriate order made in accordance with the facts found. Exceptions thereto, filed on appeal to the court below, were overruled by it, and judgment entered for plaintiff; whereupon the employer and its insurance carrier took this appeal.

The only question raised is whether the petition for review, which, as above shown, was filed more than one year after the last payment, was too late because of the limitation specified in the last sentence of section 315 of the Workmen's Compensation Law (P. L. 1915, p. 748) as follows:

"In cases of personal injury, all claims for compensation shall be forever barred, unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this article; or unless, within one year after the accident, one of the parties shall have filed a petition as provided in article four hereof. In cases of death all claims for compensation shall be forever barred, unless. within one year after the death, the parties shall have agreed upon the compensation under this article; or unless, within one year after the death, one of the parties shall have filed a petition as provided in article four hereof. Where, however, payments of compensation have been made in any case, said limitations shall not take effect until the expiration of one year from the time of the making of the last payment."

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It is admitted that, if the last sentence does not cover a different class of cases than those specified in the preceding sentences, the judgment of the court below should be affirmed.

Appellants' argument turns exclusively on the use of the words "in any case," and it may be admitted that, if this sentence stood alone, their contention would be sound. It does not stand alone, however, and we are of opinion that. taking the section in its entirety (noscitur a sociis), those words refer to the "cases" of personal injury and the "cases" of death specified in the preceding parts of the section. It will be noticed also that, when the Legislature clearly intended to limit the time within which proceedings must be taken, it always stated its purpose affirmatively, whereas the sentence relied on by appellants is negative in form, thereby showing a design not to express a further limitation, but an extension of the time referred to in the preceding sentences, if and when the circumstances detailed in the last sentence should be found to exist. This is made clear by the language used. The words "such limitations" in the sentence under consideration can only refer to the limitations theretofore specified, and it is "such limitations" which "shall not take effect" until the expiration of the time provided, and not new "limitations" which shall "take effect." It follows that the only point raised must be decided adversely to appellants.

The judgment of the court below is affirmed.

LUPFER v. BALDWIN LOCOMOTIVE WORKS.

(Supreme Court of Pennsylvania. Feb. 14, 1921.)

112 Atlantic Reporter, 458.

MASTER AND SERVANT—SUICIDE WHILE DELIRIOUS FROM INJURIES DID NOT DEPRIVE WIDOW OF RIGHT TO COMPENSATION.

Where the employee killed himself while possessed of an uncontrollable insane impulse, or while in delirium and frenzy, without rational knowledge of the physical consequences of his act. such insanity or delirium having been caused by pain resulting from diseased condition caused by electric shock which he received in the course of his employment, his widow was properly awarded compensation, on the theory that, while his death was self-inflicted, his act unintentional, on account of the delirium, and a result of the electric shock.

(For other cases, see Master and Servant, Dec. Dig. § 380.)

Appeal from Court of Common Pleas, Philadelphia County; Charles Y. Audenried, Judge.

Proceeding for compensation under the Workmen's Compensation Act by Edythe N. Lupfer. widow of Donald LeRoy Lupfer. the employee, against the Baldwin Locomotive Works, the employer. From affirmance of an award by the Compensation Board and by the court of common pleas, the employer appeals. Judgment affirmed.

Argued before Moschzisker, C. J.. and Frazer, Walling, Simpson, Kephart, Sadler, and Schaffer, JJ.

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Benjamin O. Frick, of Philadelphia, for appellant.

J. Morris Yeakle, of Philadelphia, for appellee.

PER CURIAM. This is an appeal from the affirmance of an award by Workmen's Compensation Board. and subsequently by the court below. The learned president judge of the latter tribunal correctly disposed of the case in the fallowing excerpts from his opinion:

"Donald Le Roy Lupfer died by his own hand. The referee awarded compensation to his widow, on the theory that, although Lupfer's death was self-inflicted, his act was not intentional, inasmuch as he was delirious at the time, and had become so as the result of a physical injury accidentally sustained while on duty in the service of the defendant. * * * On July 23, 1919. while * * * employed as an electrician, Lupfer accidentally received a shock, * * * which 'doubled up his arms and twisted him over.' He complained of pain in his side, but returned to his task. He worked on the next two days, and reported for work on Saturday, July 26. but quit very soon, as he was too ill to do anything. * * * Lupfer shot himself at his home * * * on Thursday, July 31, 1919, at 11 o'clock a. m., while his wife was temporarily absent from his room. * * * On July 30, Lupfer had been delirious. * * * The attending physician saw him last on the morning of the suicide; he was then worse than he had been, and was 'becoming irrational.' His temperature was 103. and he was suffering from pleurisy and pneumonia [the latter resulting from the former]. His physician thought that his mental condition was such that he feared he might jump out of the window. * * * The pain in Lupfer's right side was intense. he could not sleep or lie down. He said, on the morning on which he killed himself, 'My God! I cannot stand this much longer!' * * * His infection with pleurisy was probably the result of the lowering of Lupfer's vitality as the result of an electric shock, or the result of an irritation or injury to his chest. * * * Lupfer's tenth rib, on his right side, was broken, that rib was immediately over the lung attacked by pleurisy. * * * There is evidence on which a jury might have reached the conclusion that Lupfer killed himself while delirious from the poison in his system and frantic with the terrific pain with which he was suffering. It cannot be said that the findings of the referee were wholly without support. [Furthermore] Lupfer's death can fairly be said to have ensued from the 'resultant effects of the violence' sustained by the 'physical structure of his body' through the electrical shock that he received, whether that caused the fracture of his rib and the consequent injury to his chest, or merely so reduced his vitality as to render him liable to infection."

Although not couched in these precise words, the various statements of the referee, when read together, are tantamount to a finding that deceased killed himself while possessed of an uncontrollable insane impulse., or while in a delirium or frenzy, without rational knowledge of the physical consequences of his act. This, with the other findings, already indicated. is sufficient to sustain the award; for we agree with the court below that—

"It is possible to point out evidence (not perhaps the strongest or most persuasive, but still tangible evidence) to support every finding of the referee, approved by the board."

The assignments of error are overruled, and the judgment is affirmed.

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GALLOWAY ET AL. v. LUMBERMEN'S INDEMNITY EXCHANGE ET AL. (No. 618.)

(Court of Civil Appeals of Texas. Beaumont. Dec. 10, 1920. Rehearing Denied Jan. 5, 1921.)

227 Southwestern Reporter, 536.

MASTER AND SERVANT — MINOR ILLEGALLY EMPLOYED NOT AN "EMPLOYEE WITHIN COMPENSATION ACT.

A minor under 15 years, whose employment by a lumber company at its sawmill was illegal and made punishable by Acts 1917, c. 59 (Vernon's Ann. Pen. Code Supp. 1918, art. 1050e), was not an "employee" within the Workmen's Compensation Act (Acts 1917, c. 103) § 12i, (Vernon's Ann. Civ. St. Supp. 1918. art. 5246—30) to entitle his mother to compensation for his death.

(For other cases, see Master and Servant, Dec. Dig. § 366.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

Appeal from District Court. Orange County; E. L. Bruce, Special Judge.

Suit by the Lumbermen's Indemnity Exchange and another, insurance carriers, against Susie Galloway and another. to set aside ruling and award of the Industrial Accident Board awarding compensation for death of the named defendant's son, Ernest Hadnot, the employee. From judgment for plaintiffs, defendants appeal. Affirmed.

D. E. O'Fiel, of Beaumont, for appellants.

C. A. Lord, of Beaumont, for appellees.

HIGHTOWER, C. J. On February 7, 1918. Ernest Hadnot, a minor under the age of 15 years, was working for the Reese-Corriher Lumber Company at its sawmill in Orange county, Tex., and on said date said minor. while discharging the duties of his employment, as claimed by the appellants, received personal injuries which soon thereafter resulted in his death. At the time of the injury and death of Ernest Hadnot, the Reese-Corriher Lumber Company was carrying a policy of insurance on the employees at its said mill, issued by the Lumbermen's Indemnity Exchange in accordance with the Employers' Liability Act of this state (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h–5246 zzzz). Within due time after the injury and death of Ernest Hadnot, Susie Galloway, his mother, gave notice to the Reese-Corriher Lumber Company and to the Lumbermen's Indemnity Exchange, claiming compensation because of the death of her said son. and thereafter filed her claim with the Industrial Accident Board of this state for such compensation. After due notice by the Industrial Accident Board, a hearing on the claim was had before that board, which resulted in an award in favor of Susie Galloway and against the Lumbermen's Indemnity Exchange, of $5.19 per week for a period of 360 weeks, a portion of which award, however, was allowed to Susie Galloway's attorney. David E. O'Fiel.

After such ruling and award by the Industrial Accident Board and within due time, Lumbermen's Indemnity Exchange notified Susie Galloway's attorney, David E. O'Fiel, that it would not abide by the ruling and award of the Industrial Accident Board, but would contest the same, and thereafter, in due time, the Lumbermen's Indemnity Exchange and

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Consolidated Underwriters, the latter concern being a successor to the Lumbermen's Indmenity Exchange. filed suit in the district court of Orange county, where the injury to Ernest Hadnot occurred, to set aside the ruling and award of the Industrial Accident Board, as above shown. The defendants, Susie Galloway and David E. O'Fiel, her attorney. filed their answer, and also by way of cross-bill Susie Galloway sought to recover, in the trial de novo, compensation as the dependent mother of Ernest Hadnot.

The case was tried with a jury, and resulted in an instructed verdict in favor of the plaintiffs, Lumbermen's Indemnity Exchange and Consolidated Underwriters. After their motion for new trial had been duly made and overruled, the defendants, Susie Galloway and David E. O'Fiel, brought the case by appeal to this court.

The decision of one question of law will, in our opinion. dispose of all contentions made by appellants in this court. The record shows without dispute that at the time the minor, Ernest Hadnot, received the injuries which resulted in his death, he was under the age of 15 years, and that he was working in and about the sawmill of the Reese-Corriher Lumber Company in connection with and in the use of dangerous machinery, which was a part of said mill. At the time of the employment of said minor by Reese-Corriher Lumber Company, as well as at the time of his injury and death, the act of 1917 of the Legislature of this state, prohibiting the employment of minors under the age of 15 years around dangerous machinery, etc., was in effect. Section 1 of that act reads as follows:

"Any person, or any agent or employee of any person, firm or corporation, who shall hereafter employ any child under the age of fifteen (15) years, to labor in or about any factory. mill, workshop, laundry, theater or other place of amusement * * * shall be deemed guilty of a misdemeanor. and upon conviction in a court of competent jurisdiction, shall be punished by a fine of not less than twenty-five ($25.00) dollars, nor more than two hundred ($200.00) dollars, or by imprisonment in the county jail for not more than 60 days, or by both such fine and imprisonment." Acts 1917, p. 104 (Vernon's Ann. Pen. Code Supp. 1918, art. 1050e).

That portion of the Workmen's Compensation Act of this state which applies in this case contains this provision:

"If it be established that the injured employee was a minor when injured and that under normal condition his wages would be expected to increase, that fact may be considered in arriving at his average weekly wages and compensation may be fixed accordingly. *This section shall not be considered as authorizing the employment of a minor in any hazardous employment which is prohibited by any statute of this state.*" Section 12*i*, Acts 1917 p. 280; Vernon's Ann. Civ. St. Supp. 1918, art. 5246—30. (Italics ours.)

It is conceded by counsel that the trial judge in this case instructed the verdict in favor of plaintiffs upon the ground, substantially, that Ernest Hadnot, being a minor under the age of 15 years, and being employed at the time of his injury and death in violation of the criminal law of this state, he was not, in contemplation of the Workmen's Compensation Act of this state, such an employee of the Reese-Corriher Lumber Company as was covered by the policy of insurance issued to that company by the Lumbermen's Indemnity Exchange. In other words, the trial court's view was that the minor, who had not attained the age at which he may lawfully be employed at the work in which he was injured. cannot be regarded as an employee, within the provisions of the Workmen's Compensation Act of this state.

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After careful consideration of the question, we have concluded that the trial court's view on this point was correct. Corpus Juris seems to state the general rule thus:

"Where a child has not attained the age at which he may lawfully be employed in the occupation in which he is injured, he cannot be regarded as an employee within the provisions of a compensation act. The same rule applies where the minor is working without having obtained a permit. which, if obtained, would have rendered his employment lawful, and although there is no comparative connection between the illegality of the employment and the injury." Corpus Juris Advance Treatise of Workmen's Compensation Acts, p. 49.

In support of the text, the author cites, among other cases, Hetze v. Ring Co., 89 N. J. Law, 201, 98 Atl. 306, L. R. A. 1917D. 75.

The ruling of the trial court in this case was exactly in line with the holding in the Hetzel Case. In the case of Waterman Lumber Co. v. Beatty, 204 S. W. 448, the opinion by the Texarkana Court of Civil Appeals, the point here under consideration was involved and decided, and. among other things, it was there said;

"While the criminal law only punishes the 'agent' or 'employee' of a person or corporation for violation of the child labor law, the effect is to directly forbid persons or corporations employing children under 15 years of age in certain occupations. For the words 'agent' and 'employee' are of a representative relation. And the provisions of the Workmen's Compensation Act apply only, it is believed, to valid employment contracts."

It is true, the court. speaking through Justice Levy, further pointed out in the Beatty Case the fact that the policy there under consideration expressly provided that it should cover only employees of the employer legally employed. The court's decision, however, in that case did not rest upon such provision of the policy, but it is clear, from the language there used, that the court held that the Workmen's Compensation Act of this state does not cover one in the employment of another where such employment is in violation of the criminal statute of this state, and therefore such employment clearly illegal. We understand that the Supreme Court denied a writ of error in the Beatty Case, and therefore its action in that regard is equivalent to a holding by that court that a minor, whose employment is illegal in this state, is not covered by an insurance policy under the Workmen's Compensation Act of this state.

See, also, Roszek v. Bauerle, etc., Co.. 282 Ill. 557, 118 N. E. 991, L. R. A. 1918F, 207. This was an opinion by the Supreme Court of Illinois, and, among other things, the court, in disposing of the point there involved, said:

"A minor under the age of 14 years could not lawfully be employed to work in a manufacturing establishment, and if employed contrary to law, and injured while so employed, he could not be regarded as an employee within the provisions of the Workmen's Compensation Act."

Regarding the question as settled by the Supreme Court of this state, we see no reason for further discussion at our hands. We think it clear that a minor whose employment is admittedly illegal and made punishable by the criminal statute of this state cannot be said to be an "employee" under the Workmen's Compensation Act of this state.

The contention of appellant. to the effect that the Lumbermen's Indemnity Exchange stands in the shoes of the Reese-Corriher Lumber Company in this case, and should therefore be held to be estopped to set up the illegal employment of the boy, Ernest Hadnot, cannot be sustained, we think, since we fail to see any essential element of estoppel in this case. Therefore all assignments of error are overruled, and the judgment of the trial court is affirmed; and it will be so ordered.

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HOME LIFE & ACCIDENT CO. v. ORCHARD. (No. 619.)

(Court of Civil Appeals of Texas. Beaumont. Dec. 12, 1920. Rehearing Denied Jan. 12, 1921.)

227 Southwestern Reporter, 705.

1. MASTER AND SERVANT — COMPENSATION ACT AMENDMENT HELD TO GIVE EXTRATERRITORIAL EFFECT TO PRE-EXISTING INSURANCE POLICY.

Where a workmen's compensation insurer contracted to pay in the manner provided by the laws of such states as were in force at the time the policy took effect, or any subsequent amendments thereto, and while the policy was in force the Texas Workmen's Compensation Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h–5246zzzz) was amended (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91) to provide that, if an employee hired in Texas sustained an injury in the course of his employment, he should be entitled to compensation according to the law of Texas though the injury was received outside of the state, such amendment became part of the policy, and the insurer was liable for an award to an employee injured in Louisiana under Texas employment.

(For other cases, see Master and Servant, Dec. Dig. § 349.)

2. INSURANCE — EMPLOYEE OF PIPE LINE CONTRACTOR HELD A TEXAS EMPLOYEE WHEN INJURED AND UNDER PROTECTION OF POLICY.

Employee of pipe line contractor, hired in Texas. whose work took him into several states other than Texas. having been placed in charge of work in the Caddo oil field, including a part of Louisiana, and Marion and Panola counties, Tex., in view of such facts and others, *held* a Texas employee of the contractor when injured in Louisiana in his work of superintendence, and under the protection of the contractor's policy.

(For other cases, see Insurance, Dec. Dig. § 435.)

3. MASTER AND SERVANT—PROTECTION OF EMPLOYEE BY COMPENSATION POLICY NOT LOST BECAUSE EMPLOYER FAILED TO PAY PROPER PREMIUM.

If under the laws of Texas an employee was protected by the policy issued by his employer'se workmen's compensation insurer, such protection was not lost because the employer failed to pay the proper premium to the insurer.

(For other cases. see Master and Servant, Dec. Dig. § 383.)

4. MASTER AND SERVANT—COMPENSATION INSURER NOT AIDED BY PRESENTATION OF CLAIM TO OTHER INSURER.

Where the agents of an employer's workmen's compensation insurer of Texas employee's assumed that a liability was under the employer's other policy with another company covering Louisiana employees, and without request from the injured Texas employee or the employer presented claim to the other insurer, the fact does not aid the Texas insurer to escape liability to the injured Texas employee for the award, though subsequently the injured employee through his attorneys presented claim to the Louisiana insurer through local agents.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

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5. MASTER AND SERVANT — DELAY IN FILING CLAIM EXCUSED BY ASSURANCES TO INJURED EMPLOYEE BY AGENTS OF COMPENSATION INSURERS.

Where an injured employee, on account of assurances given him by persons claiming to be agents of one or the other of the employer's insurers that no proceedings would be necessary, delayed presentation of his claim to the proper insurer, but the same was presented and filed with the Industrial Accident Board within a year, while the board made its award in favor of the employee, thereby holding the delay in the case came within Workmen's Compensation Law, pt. 2, § 4a (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—43). the circumstances were sufficient to excuse the employee's delay in filing claim until after six months.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

6. MASTER AND SERVANT—NOTICE TO OR KNOWLEDGE OF INJURY BY EMPLOYER NOTICE TO COMPENSATION INSURER.

Where a workmen's compensation insurer stipulated in its policy that as between employee or defendants and the insurer, notice to or knowledge of injury on the part of the employer should be notice to or knowledge on the part of the insurer, while the Workmen's Compensation Act (Vernon's Sayles' Ann Civ. St. 1914, arts. 5246h–5246zzzz) was amended in 1917 (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91) to provide that notice to the employer was notice to the insurer, the insurer had notice of an injury on account of the notice or knowledge of the employer.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

7. MASTER AND SERVANT—INTEREST PROPERLY ALLOWED IN VIEW OF NOTICE TO COMPENSATION INSURER.

The trial court properly allowed interes to an injured employee against the employer's workmen's compensation insurer on the amount allowed the employee for medical and surgical attention and for the weekly payments from the due date of each item under the act, the insurer having had notice to the injury through the notice to or knowledge of the employer.

(For other cases, see Master and Servant, Dec. Dig. § 391¼, New, vol. 10A Key-No. Series.)

Appeal from District Court, Jefferson County; E. A. McDowell, Judge.

Action by the Home Life & Accident Company against W. W. Orchard to set aside an award of compensation to defendant by the Industrial Accident Board. From judgment sustaining the award, plaintiff appeals. Affirmed.

Andrews. Streetman, Logue & Mobley, of Houston, for appellant.
Sol E. Gordon and A. D. Lipscomb, both of Beaumont, for appellee.

WALKER, J. This is an appeal from a judgment of the district court of Jefferson county sustaining an award made by the Industrial Accident Board of Texas in cause No. C–10868. W. W. Orchard, Employee, v. B. H. Willis, Employer, and Home Life & Accident Insurance Company. On the 27th day of May, 1917, W. W. Orchard was injured in the state of Louisiana in the course of his employment by H. B. Willis. At that time Willis was operating both in Louisiana and in Texas. Under the Workmen's Compensation Act of Louisiana (Act No. 20 of 1914), he carried insurance with the Georgia Casualty Company, for the pro-

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tection of his Louisiana employees, and he also carried with appellant, under the Texas Workmen's Compensation Act (Laws 1913, c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]), protection for his Texas employees.

Appellant's first and second assignments of error present the following propositions:

[1] 1. At the time Orchard was injured, did the Texas Workmen's Compensation Act give extraterritorial effect to the policy issued by appellant to B. H. Willis?

On February 15, 1917, when this policy was written, the Workmen's Compensation Act of Texas contained no provision giving it extraterritorial effect. but by the terms of its policy appellant had contracted "to pay in the manner provided by the laws of such states or commonwealths of the United States as are in force at the time this policy takes effect. or any subsequent amendments thereto." Before Orchard was injured, this act was amended in the following words:

"If an employee who has been hired in this state, sustain injury in the course of his employment, he shall be entitled to compensation according to law of this state even though such injury was received outside of the state." Laws 1917, c. 103, pt. 1, § 19 (Vernon's Ann. Civ. St. Supp. 1918, art. 5246—38).

This amendment clearly gives the act extraterritorial effect, and at the time it went into effect appellant's policy was in force. On the 29th of March, Smelker & Maxon, appellant's local agents at Beaumont, wrote Mr. Willis as follows:

"The Workmen's Compensation Law of this state, heretofore set out as chapter 179, Acts of 1913, has been amended by the Thirty-Fifth Legislature. just adjourned. and the amended bill has now been signed by the Governor.

"We wish to advise you that your policy of insurance, delivered to you by us, protects you completely under the amended Law as heretofore, and should any change or indorsement be necessary later same will have our prompt attention."

At the time this letter was written. this amendment had gone into effect. As we construe appellant's policy, this amendment comes within the terms above quoted, and, if we are right in this conclusion, then it gave extraterritorial effect to the policy at the time Orchard was injured. This construction follows both from its terms as quoted above and from the letter of its local agents to Mr. Willis. To so hold does not amount "to an invasion of the right of contract," nor is it "an effort to give retroactive effect to a statute inconsistent with a pre-existing contract between the parties," as urged. Appellant had contracted in relation to future amendments, and, when these amendments took effect, they became as much a part of the policy as the provisions of the law at the time the policy was written.

[2] 2. At the time of his injury, was Orchard under the protection of appellant's policy with Willis, that is. was he one of Willis' Texas employees, or was he a Louisiana employee? Orchard entered the service of B. H. Willis in 1913, under a contract made in Beaumont, Texas. He remained in this employment until some time in 1919. During these years he worked for Mr. Willis wherever his duties called him, part of the time in Jefferson county, Tex., part of the time in Tyler county, Tex.. part of the time in Oklahoma and Louisiana, and again in Panola and Marion counties, Tex. Mr. Willis was a contractor, doing pipe line work and other work connected with the oil industry. In 1916, after Orchard had finished his Oklahoma work, Willis placed him in charge of his work in the Caddo oil field. This field included a part of Louisiana, and Marion and Panola counties. Tex. Orchard was made general foreman of this work, with full authority to employ and discharge the em-

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ployees working under him. Prior to his injury, he had had his home in Beaumont for many years, owned his home there, and kept most of his furniture there. His family lived there except when they were with him in one of Wil'is' jobs. When Willis sent him to the Caddo fields, he raised his salary to $125 per month and house rent. This rent was estimated at $25 per month. When he was placed in charge of the Caddo field operations, he carried his family with him, and they occupied a house belonging to Mr. Willis in Mooringsport, La. During this time Orchard maintained a field office in Louisiana and two field offices in Texas. The testimony does not show how much of his time was taken on work in Louisiana, nor how much in Texas; but it reasonably appears that he was going constantly from one headquarters to another. Sometimes the teams would work in both states the same day; then again they would work for three or four weeks at a time in Texas. He had not been in Texas for about a week at the time he was injured. No new contract was made by Willis with Orchard from the time Orchard entered his service in 1913 until he quit in 1919.

According to the undisputed testimony, during all the years of his emp'oyment by Willis, Orchard had his general headquarters in Beaumont, Jefferson county, Tex. From the general nature of his employment. as stated by us above, his absence from time to time from Beaumont in the service of Willis was only temporary. Even while on the Caddo oil field job, his home was in Texas and he maintained two field headquarters in Texas. While it is true that his family was in Mooringsport, La, they were there temporarily while he was doing that work.

Under these facts, at the time Orchard was injured. we believe he was a Texas employee of B. H. Willis, and was under the protection of appellant's policy.

[3] On this issue we do not agree with appellant. that the undisputed proof shows that Willis paid appellant no premium on Orchard's wages; but. as we regard a finding on this issue immaterial to the determination of any issue in this case, we will not quote the testimony. If, under the laws of Texas, Orchard was protected by appellant's policy, this protection was not lost on the ground that Willis failed to pay the proper premuim to appellant. If he owed the premium in 1917 and has not paid it, he still owes it, and appellant can collect it now, unless it is barred by the statute of limitation.

[4] Nor do we see how appellant can be aided by the fact that, after his injury. Orchard presented his claim to the Georgia Casualty Company. This mistake was first made by the agents of appellant. They assumed that the liability was under the Louisiana policy, and, without any request from Orchard or Willis, presented the claim to the Georgia Casualty Company. It is true that afterwards Orchard, through his attorneys, presented this claim to the Georgia Casualty Company. through Smelker & Maxon, local agents; but these facts do not create an estoppel in appellant's favor. It has paid nothing for a release against its liability under this policy, nor has Orchard done or said anything that has in any way hindered it in presenting its defense to this suit.

[5] The following is appellant's third assignment of error:

"The trial court erred, to the prejudice of the appellant, in rendering judgment in favor of the defendant for compensation under the Texas Workmen's Compensation Act, because of the failure of defendant to comply with the requisites of the law as to claiming compensation within the six months' period stipulated in the statute."

This case was tried by the court without a jury, and on request of appellant the trial court filed conclusions of law and fact. No assignment of error, challenging these conclusions, is brought forward in the brief. This third assignment is against the judgment of the court, and does not attack the conclusions of law and fact on which it was based. On this issue the trial court found:

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"Owing to the confusion arising in this way and to assurances given to Orchard by persons claiming to be agents of one or the other companies that no proceedings would be necessary. the presentation of the claim to the plaintiff company was delayed, but same was presented and duly filed with the Industrial Accident Board within a year and finding thereon in Orchard's favor by the Industrial Accident Board was made on August 30, 1918.

"The first question to be decided is whether or not the right of recovery was barred when the claim was presented to the Industrial Accident Board; the evidence is that the claim was presented to the Board some date between May 7th and June 15, 1918. That Board made its award in favor of Orchard in the month of August, 1918, and thereby hold that the delay in this case came within the following clause of section IV–A of the law, viz.:

"Provided that for good cause the Board may in meritorious cases waive the strict compliance with the foregoing limitations as to notice and the following of the claim before the Board.

"This discretion is vested in the Board and perhaps is not subject to review. If it is, the circumstances of this case are sufficient to exclude the delay in filing, the claim having been presented within the year and the delay reasonably explained; and there being no doubt about the nature and extent of the injury suffered nor as to its having been sustained in the course of employment, the case is clearly a meritorious one."

It seems to us that this conclusion by the court is sufficient to sustain the judgment. But if we are in error in our construction of appellant's assignment of error, it does not appear that the Industrial Accident Board, in waiving the limitations as to notice and filing of the claim, has abused the discretion vested in it by law.

If appellant was not bound by this judgment of the Industrial Accident Board, then we say it appears from the record in this case that this issue was tried de novo in the district court, and a finding was made against appellant's contention. We believe. on the assignment presented. the facts sustain the court's conclusion.

[6] In the district court judgment was rendered against appellant allowing Orchard a recovery for medical and hospital services in the sum of $198. Appellant stipulated in its policy:

"As between the employee or his dependents and the company, the notice to or knowledge of the occurrence of an injury on the part of the employer shall be the notice or knowledge as the case may be on the part of the company."

The amendment to this act in 1917 provided that notice to the employer was notice to the company. Hence, appellant's contention that it had no notice of the injury was not sound. Orchard recovered on this item under the 1917 amendment. If we were correct in our construction of this amendment in Home Life & Accident Co. v. Cobb, 220 S. W. 132, then no error is shown in this ruling.

[7] The trial court properly allowed interest on the amount allowed for medical and surgical attention, and for the weekly payments from the due date of each item under the statute. Appellant's objection to this interest allowance is that—

It "had no information that Orchard ever sustained any such accident and had no opportunity to discharge any such obligation and was under no legal obligation to do so, no claim ever having been filed until approximately a year later."

Our discussion of the other assignments disposes of this one.

Finding no error in this case, the judgment of the trial court is in all things affirmed.

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On Rehearing.

In our judgment, this case turns on the fact as to whether Orchard was one of Willis' Texas employees. If he was, then under the express terms of the policy and the 1917 amendment to the Workmen's Compensation Act he was protected. In his motion on rehearing, appellant asserts that this court did not "even mention the effect of the undisputed evidence that Willis deliberately divided his work, and that he undertook to cover the work in which Orchard was engaged by the Louisiana policy, and undertook to cover the remainder of his work, in so far as being conducted in Texas, under Home Life & Accident Company policy." We recognized this contention, and found as follows:

"Under the Workmen's Compensation Act of Louisiana, he (Willis) carried insurance with the Georgia Casualty Company for the protection of his Louisiana employees, and he also carried with appellant, under the Texas Workmen's Compensation Act, protection for his Texas employees."

We also stated that the Caddo fields covered the work in Louisiana, and also the work in Marion and Panola counties, Tex. At the time he was injured, unquestionably Orchard was engaged on the Caddo work, but this was not his permanent work. He was in the regular and permanent employ of Willis. He had been with Willis for many years. Willis sent him where he was needed. At this particular time, as we have said, he was temporarily in Louisiana—temporarily in charge of the Caddo work. He was not employed by Willis to do this work; but "in the course of his employment" by Willis—just an incident of his regular Texas employment—he was sent to the Caddo fields. The conclusion is irresistible that Willis had a right, under this contract, to recall Orchard from this work and place him on another job. Had Willis done so, Orchard's general employment would have continued. It is also true that Orchard hired his help in Louisiana, that is, Willis hired the help, acting through his agent, Orchard. These men so employed were Louisiana employees. They were hired for this special work, and for this work only. They were protected by the Georgia Casualty policy. It seems to us the 1917 amendment was enacted to cover just this character of employment. If Orchard had been employed for the purpose of managing the Caddo job, and his employment had ended with the completion of that work, we would have before us a different question.

We believe the other propositions advanced by appellant are fully covered in our original opinion.

The motion for rehearing is in all things overruled.

DOSCOLOS v. INDUSTRIAL COMMISSION OF UTAH ET AL.
(No. 3611.)

(Supreme Court of Utah. Feb. 2. 1921.)

195 Pacific Reporter, 638.

1. MASTER AND SERVANT — DETERMINATION OF COMPENSATION WITHOUT NOTICE HELD NOT TO INVALIDATE SUBSEQUENT DENIAL OF COMPENSATION.

Though an employee was entitled to a notice before an order for compensation was modified to his prejudice, the fact that he was not notified before an order was entered terminating the payment of compensa-

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tion does not require reversal of a subsequent order of the Commission denying further compensation, where the employee took no action against the former order but petitioned the Commission for an award of an additional compensation on which he was fully heard.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

2. MASTER AND SERVANT. — INDUSTRIAL COMMISSION'S FINDING SUPPORTED BY SUBSTANTIAL TESTIMONY CANNOT BE DISTURBED.

Finding by the Industrial Commission, if supported by substantial testimony, cannot be reviewed by the court.[1]

(For other cases, see Master and Servant. Dec. Dig. § 417[7].)

Proceedings under the Workmen's Compensation Act (Comp. Laws 1917, tit. 49, as amended by Laws 1919, c. 63), by George Doscolos. employee, against the Standard Coal Company, employer, and the State Insurance Fund, insurance carrier. From an order of the Industrial Commission refusing further compensation to the employee. the employee appeals. Order sustained.

Clawson & Elsmore, of Salt Lake City, for plaintiff.

James H. Wolfe. of Salt Lake City, for defendants.

CORFMAN, C. J. On October 24, 1918, the plaintiff, George Doscolos, sustained an injury in a mine explosion while an employee of and working in the coal mine of the defendant Standard Coal Company, at Standardville. Utah.

On February 4, 1919, the Industrial Commission of Utah, upon an application made and claim filed before it by the plaintiff against the coal company and its insurance carrier, the defendant State Insurance Fund, awarded the plaintiff compensation for a period from November 4, 1918, to March 8, 1919. May 5. 1919, upon a claim made by plaintiff for additional compensation for continuing injuries, a further hearing was had before the Commission, and June 3, 1919, it was adjudged that the plaintiff was suffering from gastric ulcers as a result of said accident on October 24, 1918, by reason of which he was partially disabled and incapacitated, and upon such showing being made the Commission on June 3, 1919, awarded the plaintiff additional compensation from March 8, 1919, "until such time as the Commission shall otherwise order, not to run, however, over a period of six years from the 4th day of November, 1918." On June 18, 1919, the defendant State Insurance Fund applied for a rehearing which was denied by the Commission. November 17, 1919, the Commission again rendered a decision that since the denial of a rehearing applied for on the part of the State Insurance Fund it had "re-examined the matter with the result that it had become persuaded that the award made by the decision of June 3, 1919, should be modified and under its own motion the Commission orders the award to be modified." Thereupon the Commission granted to plaintiff an award of $44.-10, "based on the difference in earning capacity; it appearing that but for the accident applicant could have earned $150 per month, and is actually earning $95 per month, working six days per week." Further payments to plaintiff after the award of $44.10, made November 17, 1919,

[1] Amalgamated Sugar Co. v. Industrial Commission, 189 Pac. 69; George A. Lowe Co. v. Industrial Commission, 190 Pac. 934; McVicar v. Industrial Commission, 191 Pac. 1089.

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were then discontinued, and on January 8, 1920, the Commission by its decision denied the plaintiff any further compensation. October 13, 1920, the plaintiff filed another application for compensation before the Commission stating as grounds therefor:

"That your petitioner is now suffering from said injury and is unable to pursue his occupation as a coal miner; that his physical condition is changed and is worse than it was when your Honorable Body made its decision in January, 1920; that your petitioner is suffering from a stricture in the throat and is also subject to vomiting spells—all resulting from said injury."

October 26, 1920, the last-mentioned petition came on for hearing, and the Commission after receiving further evidence decided, December 2, 1920, as follows:

"The case has been previously heard by the Commission, and from the evidence submitted at the hearing, the Commission finds the usual variance in medical testimony, but no new facts developed that tend to prove that the applicant is now or has at any time since the last decision of this Commission, January 8, 1920, suffered disability as a result of injuries received October 24, 1918."

January 3, 1921, the plaintiff prosecuted his appeal to this court in the usual way by writ of review and contends:

"(1) There is no substantial evidence in the record to sustain the decision of the Industrial Commission in refusing compensation. (2) The Industrial Commission acted in excess of its powers when it rendered its decision of November 17, 1919, terminating its award to the appellant of June 3, 1919."

[1] We have pointed out in detail all the proceedings had before the Commission up to and including the order made December 2, 1920, denying plaintiff compensation after a hearing had upon plaintiff's petition therefor The plaintiff states plainly that it is from this order an appeal is taken or the case brought before us for review. It is true plaintiff complains, and his counsel contend, that the Commission exceeded its powers when it terminated its award made on June 3, 1919, without notice and without affording him any opportunity to be heard. We think it may well be conceded that plaintiff was entitled to notice. Nevertheless, he must have thereafter known of the action of the Commission in terminating the award at that time for he subsequently received no compensation. Moreover, he did not move to vacate the order on the ground that he had no notice or opportunity to be heard, nor did he take any appeal therefrom.

At the hearing had before the Commission upon which its order of December 2, 1920, was based, and from which the appeal is taken, it appears that the Commission went into the question not only of the present disability of the plaintiff but reviewed the case from its inception, before it finally denied additional compensation as applied for by him.

[2] After carefully reviewing the evidence adduced before the Commission, we find substantial testimony in support of its finding and order appealed from of December 2, 1920. That being true, under the former rulings of this court we have no further power to review. Amalgamated Sugar Co. v. Industrial Commission, 189 Pac. 69; George A. Lowe Co. v. Industrial Commission, 190 Pac. 934; McVicar v. Industrial Commission, 191 Pac. 1089.

The order appealed from denying plaintiff further compensation is sustained.

Weber, Gideon, Thurman, and Frick, JJ., concur.

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O'BOYLE ET AL. v. PARKER-YOUNG CO. (No. 268.)

(Supreme Court of Vermont. Caledonia. Feb. 5, 1921.)

112 Atlantic Reporter, 385.

1. MASTER AND SERVANT—TEST OF "EMPLOYMENT" WITHIN TERMS "EMPLOYER" AND "EMPLOYMENT" IN COMPENSATION ACT STATED.

Under the Workmen's Compensation Act (G. L. 5758, subds. 1, 5), defining "employer" and "employment," the true test of employment is whether the work being done pertains to the business. trade, or occupation of the claimed employer carried on by it for pecuniary gain; and, if so, the fact the work is being done through the medium of an independent contractor does not relieve the employer from liability.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

(For other definitions. see Words and Phrases, First and Second Series. Employment.)

3. MASTER AND SERVANT—MANUFACTURER OWNING LUMBER HAULED BY CONTRACTOR'S DRIVER INJURED ON HIGHWAY HELD LIABLE FOR COMPENSATION AS EMPLOYER.

Manufacturer, owning lumber to be shipped to its factory *held* virtually the proprietor of the business of hauling lumber, being carried on at the time of accident on a bridge to the driver of a wagon, within the meaning of Workmen's Compensation Act (G. L. 5758, subds. 1. 2, 5), defining employer, as distinguished from the wagon driver's immediate employer under contract to haul the lumber and load it on cars at a specified price per thousand.

(For other cases, see Master and Servant, Dec. Dig. § 367.)

5. MASTER AND SERVANT—APPEAL FROM COMPENSATION COMMISSIONER TO SUPREME COURT GOOD, THOUGH FILED WITHIN TIME ALLOWED FOR APPEAL TO COUNTY COURT.

Though under Workmen's Compensation Act (G. L. 5807, 5808) neither party can prosecute an appeal to the Supreme Court from the Commissioner of Industries if the other party takes an appeal to the county court within 10 days, etc., the fact that motion for appeal to the Supreme Court is filed within such 10 days does not invalidate the appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[1].)

6. MASTER AND SERVANT—SUPREME COURT MAY REMAND CAUSE TO COMMISSIONER OF INDUSTRIES APART FROM STATUTE TO AVOID INJUSTICE.

Regardless of the Workmen's Compensation Act (G. L. 5808), authorizing remand for further findings. the Supreme Court may remand a cause for new trial. to the end that no injustice be done.

(For other cases, see Master and Servant, Dec. Dig. § 417[9].)

7. MASTER AND SERVANT — PAPERS, NO PART OF RECORD IN COMPENSATION CASE, WILL NOT BE EXAMINED.

Transcript of proceedings before the Commissioner of Industries, furnished by claimants under the Workmen's Compensation Act, is no

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part of the record and will not be examined; papers and documents, whatever their character, unless made part of the record. cannot be considered, and should not be mingled with other papers properly before the court.

(For other cases, see Master and Servant, Dec. Dig. § 417[4¼].)

Appeal from Order of Robert W. Simonds, Commissioner of Industries.

Claim for compensation under the Workmen's Compensation Act by Idella Lowell O'Boyle and others, opposed by the Parker-Young Company, employer. From order of the Commissioner of industries disallowing their claim. complainants appeal. Order affirmed as to the named claimant, as to the others reversed pro forma, and cause remanded to the Commissioner for further proceedings.

Argued before Watson, C. J., and Powers, Taylor, Miles, and Slack, JJ.

Amey & Cameron, of Island Pond, for appellants.

Searles & Graves, of St. Johnsbury, for appellee.

SLACK, J. From an order of the Commissioner of Industries disallowing their claim for compensation under the Workmen's Compensation Act (G. L. 5752–5831), the claimants bring this appeal. The only question certified to this court by the Commissioner. is whether on the facts found by him the claimants, or any of them, are entitled to compensation. The facts are these, in substance: The defendant, a corporation, is extensively engaged in manufacturing sounding boards, house finish, boxes. etc., at factories located, respectively, at Orleans, Vt., and Lisbon, N. H. In October, 1915. it owned a quantity of lumber stacked in piles on the Ed. Chandler farm, so-called, located in this state, a few miles from East Barnet, which it contracted, in writing, with one C. B. Joy to haul to East Barnet and there load onto cars ready for shipment. He was to "draw all of the lumber in the first setting in this coming winter and to finish the job by April 1, 1917." He was to order in the cars necessary for shipping the lumber, and bill them out when loaded, load lumber of different kinds and thickness in separate cars as ordered, and keep the "yard picked up in good shape." For this work he was to receive $2 per thousand for the soft lumber, and $2.40 for the hard lumber, to be paid the first of each month for all tallies received at the Lisbon office at that time.

At the time this contract was made. Joy had in his employ, as a farm hand and teamster, a man named Lowell, who was the former husband of the claimant Idella Lowell O'Boyle, and father of the other claimants. Lowell, under orders from Joy, commenced hauling the lumber from the Chandler farm to East Barnet, and while so engaged, on November 2, 1915, a bridge over which he was passing broke down, and he received injuries from which he died February 25 following. The defendants had no control over the way or manner in which Joy or Lowell performed this contract beyond what is above stated. Neither was it the owner or lessee of the land where the injury occurred or the land where the lumber was stacked, at least the commissioner so found. It is found that the injuries from which Lowell died arose out of and in the course of his employment. The contract is silent as to where the lumber was to be shipped from East Barnet, but the lumber which Lowell was hauling at the time he was injured was to be shipped to the defendant's factory at Lisbon.

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The defendant insists that the order of the Commissioner dismissing the claimants' application for compensation should be affirmed, because it does not appear: (1) That Lowell was an employee of the defendant; (2) that the defendant was hauling lumber for pecuniary gain; (3) that it was the proprietor or operator of the business carried on at the place of the accident; and (4) that Lowell's employment was not for the purpose of the defendant's trade or business.

While it appears that Lowell was in the employ of Joy, and entirely under his control. at the time of the accident, such facts are not determinative against the claimants' rights. G. L. 5758 provides how certain words and phrases in the statute shall be construed when used in the Workmen's Compensation Act; and subdivision 1 reads as follows:

" 'Employer' to include any body of persons, corporate or unincorporated, public or private, and the legal representative of a deceased employer, and to include the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workmen there employed."

Subdivision 5 of the same section provides:

" 'Employment,' in the case of private employers, to include employment only in a trade or occupation which is carried on by the employer for the sake of pecuniary gain."

[1] It was the evident intention of the Legislature to make the person or persons, company or corporation. that for practical purposes was the proprietor or operator of the business being carried on the employer, as the word is used in the statute, though not actually the employer of the workmen by reason, among others. of there being an independent contractor who was the direct employer. Under the provisions of the statute quoted, the true test is, Did the work being done pertain to the business, trade, or occupation of the defendant, carried on by it for pecuniary gain? If so, the fact that it was being done through the medium of an independent contractor would not relieve the defendant from liability. Packett v. Moretown Creamery Co. et al., 91 Vt. 97, 99 Atl. 638, L. R. A. 1918F, 173. The cases relied upon by the defendant as supporting a different view on this point turn on the construction of statutes unlike ours.

[2] No question is made but that the defendant carried on the business of manufacturing sounding boards. etc., for pecuniary gain. It is a matter of common knowledge that these articles are manufactured from lumber; and if the defendant manufactured the lumber it used for that purpose that would clearly constitute an occupation, either in and of itself, or as a part of the main project of manufacturing sounding boards. etc. This would be true, too, of the work of moving the lumber from the place where it was manufactured to the factory where it was used, whether the distance be several miles or only a few rods.

[3] We think that the defendant was virtually the proprietor of the business being carried on at the place of the accident, within the meaning of the statute first above quoted, as distinguished from Joy, who may properly be said to have been the operator, and that Lowell was a workman employed for the purpose of carrying on the defendant's business, within the meaning of G. L. 5758, subdivisions 1 and 2.

The record does not show, however, that the employment in which Lowell was engaged at the time of the accident was for the purpose of the defendant's occupation or business of manufacturing soundings boards, etc., or, if not, that it was an occupation carried on by the defendant for the sake of pecuniary gain. We cannot infer that, because the particular lumber which Lowell was hauling at the time of the acci-

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dent was to be shipped to the place where the defendant had a factory for the manufacture of sounding boards. etc., it was to be used in that business or occupation.

Because of this shortage in the record, the order must be affirmed, unless the case be remanded for further proceedings. The claimants have filed a motion, asking that this be done. This motion is opposed by the defendant on the grounds that this court is without jurisdiction of the case, and because, as it claims, the statute permitting this court to "remand the cause to said commissioner for further findings" (G. L. 5808) applies only to cases where error is found, and it is consequently necessary to remand for further findings, that the error may be corrected.

Its claim that this court is without jurisdiction rests on the fact that the motion for this appeal was filed within the time allowed by statute for either party to appeal to county court. G. L. 5807, 5808. The final order of the commissioner was entered February 21, 1918, and the motion for appeal was filed February 28. In support of its claim, the defendant calls attention to cases where this court has dismissed appeals in chancery, and exceptions in actions at law, when not filed within the time fixed by statute. But these cases are not in point. Neither is Abbott v. Sanders et ux.. 83 Vt. 165, 74 Atl. 1058, where the appeal was filed before final decree had been entered. See, also, 3 C. J. 1075, where cases on this subject are collected.

[4, 5] Aside from the provisions of G. L. 5831 that "In constructing the provisions of this chapter, the rule of law that statutes in derogation of the common law are to be strictly construed shall not be applied," the general rule is that statutes giving the right of appeal are to be liberally construed in the furtherance of justice. Sutherland on Statutory Construction, par. 440. We think that the appeal should be sustained. While neither party can prosecute an appeal to this court if the other party takes an appeal to the county court within the ten days. etc., we do not think that the fact that the motion for appeal to this court is filed within the ten days invalidates the appeal. Such motion, of course, would be inoperative until the expiration of the ten days within which the other party might appeal to the county court, but no reason is apparent why it should not then have the same force, if the other party has not exercised his right to appeal to the county court, as though filed after the expiration of the ten days.

[6] We do not agree with the defendant as to the scope of G. L. 5808, authorizing a remand for further findings. but, regardless of this statute, we may, under our practice, remand a cause for a new trial, to the end that no injustice be done. Rice et al. v. Bennington County Savings Bank, 93 Vt. 493, 108 Atl. 708; Hebard v. Cutler, 91 Vt. 218, 99 Atl. 879; La Point v. Sage, 90 Vt. 560, 99 Atl. 233. Enough appears in the record to satisfy us that the claimants may have a meritorious case if the facts are properly presented, and we think that they should have an opportunity to have this done.

[7] The transcript of the proceedings before the commissioner was furnished by the claimants, but it is no part of the record, and therefore has not been examined. Papers and documents. whatever their character. unless made part of the record, cannot be considered, and should not be mingled with other papers that are properly before the court.

It is admitted that the claimant Idella is not entitled to compensation for reasons not necessary to state.

The order of the commissioner is affirmed as to Idella Lowel' O'Boyle, and as to the other claimants the order is reversed pro forma, and cause remanded to the Commissioner of Industries for further proceedings.

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MANGUS v. PROCTOR-EAGLE COAL CO. (No. 4164.)

(Supreme Court of Appeals of West Virginia. Feb. 15, 1921.)

105 Southeastern Reporter, 909.

(Syllabus by the Court.)

1. MASTER AND SERVANT—INFANT WORKING ON INCLINE OUTSIDE EXCAVATION HELD UNLAWFULLY EMPLOYED IN "MINE."

By virtue of the interpretation provision of chapter 15H of the Code, as amended by chapter 10 of the Acts of 1915, it being section 36e (4) of said chapter of the Code of 1918 and section 85 of said chapter of the Acts of 1915, the word "mine" in section 26 of chapter 15H, Code, inhibiting the employment of boys under 14 years of age in any coal mine, extends to and includes an incline plane on which coal cars from the mining excavation or underground mining operations. are drawn up to the tipple; wherefore the employment of a boy under said age in work on such incline plane is unlawful.

(For other cases, see Master and Servant, Dec. Dig. § 95.)

(For other definitions. see Words and Phrases, First and Second Series. Mine.)

2. MASTER AND SERVANT—COMPENSATION ACT INAPPLICABLE TO INJURY TO MINOR ILLEGALLY EMPLOYED IN MINE.

In such case neither the employer nor the employee can have the benefit of the Workmen's Compensation Act (chapter 15P, Code).

(For other cases, see Master and Servant. Dec. Dig. § 366.)

3. MASTER AND SERVANT—INJURY TO MINOR ILLEGALLY EMPLOYED IN MINE PRIMA FACIE EVIDENCE OF NEGLIGENCE.

Injury of the employee in the course of his employment in such case makes out a prima facie case of injury to him by negligence on the part of the employer.

(For other cases, see Master and Servant, Dec. Dig. § 95.)

Error to Circuit Court, Logan County.

Action by Herbert Mangus against the Proctor-Eagle Coal Company to recover for personal injuries. Verdict for plaintiff, and from an order setting the verdict aside, he brings error. Reversed and rendered.

D. B. Daugherty, of Huntington, and Lilly & Shrewsbury. of Logan, for plaintiff in error.

E. L. Hogsett, of Huntington, and Chafin & Estep, of Logan, for defendant in error.

POFFENBARGER, J. This writ of error brings here for review an order setting aside a verdict for $3,000 returned in an action for a personal injury, based upon the theory of an unlawful employment of the plaintiff, an infant under 14 years of age, and consequent denial of the benefit of the Workmen's Compensation Act to the defendant, a coal mining corporation and a subscriber and contributor to the workmen's compensation fund at the time of the employment and injury.

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The injury consisted of a fracture of one of the plaintiff's legs below the knee, and it occurred outside of the mine, if the term "mine" is is limited to the excavation from which the coal is taken. including the entries, rooms, haulways, etc. The plaintiff had been employed as a water carrier for the men working on and about the tipple and as a sort of "jim hand." He was hurt while engaged in the hooking of loaded coal cars to a rope or cable by which they were drawn upon the tipple. The cars were drawn from the mine by an electric motor and thrown on the track leading up the incline to the tipple by means of a "flying switch." While the plaintiff was attaching cars on the incline, others were thrown onto the track behind them, and they pushed the standing cars forward, with the result that his leg was caught by the wheels and broken as aforesaid.

Evidence of the plaintiff to the effect that he had "trapped" inside of the mine for a day or two. a few days before he was hurt was excluded by the court. Exclusion thereof was made the ground of an exception, but it is not relied upon in argument nor made the basis of an assignment of error. As we have it now, the controversy turns upon the legal question whether the plaintiff was, at the time of his injury unlawfully employed in a coal mine, within the meaning of the statute inhibiting employment of any boy "under 14 years of age * * * in any coal mine." Code, c. 15H, § 26. Being of the opinion that he was not and that his rights and remedies in the premises were given. prescribed, and governed exclusively by the Workmen's Compensation Act, the court set aside the verdict.

[1] In a very carefully considered decision the statute has been construed as not inhibiting employment of boys to do work for a mine operator on the outside of his excavations, such as the carrying of water, drying of sand, and labor on a fill or on a bone table. Daniels v. Fuel Co., 79 W. Va. 255, 90 S. E. 840, following the rule of strict construction applied in Rhodes v. J. B. Coal Co., 79 W. Va. 71, 90 S. E. 796. Since the cause of action involved in that case arose, however, chapter 15H of the Code has been amended in a way that may change the meaning of the phrase "in coal mine." By chapter 10 of the Acts of 1915, said chapter of the Code was completely revised, amended, and re-enacted. and the new matter incorporated in it includes a definition of the word "mine" reading as fol'ows:

"In this act the term 'mine' includes the shafts, slopes, drifts, or incline planes connected with excavations penetrating coal stratum or strata, which excavations are ventilated by one general air current, or divisions thereof, and connected by one general system of mine rai'roads over which coal may be delivered to one or more points outside the mine, when such is operated by one operator." Acts 1915. c. 10, § 85; Code 1918, c. 15H. § 36e(4).

The word "act" in the portion of said section just quoted means chapter 10 of the Acts of 1915, now chapter 15H of the Code of 1918, because said chapter 10, completely revising. amending, and re-enacting said chapter of the Code, contains said section, and it had never been previously used in that chapter or in any other act pertaining to labor and mining. Hence the legislative definition necessarily applies to the word "mine" wherever, it is found in the chapter. It says in this act, anywhere in the act, the term "mine" shall have a certain meaning. It cannot be limited to certain provisions thereof, without departure from, or contradiction of, the terms used. If it had been previously incorporated in some act limited to certain subjects. which, by the act of 1915, was consolidated with another separate act inhibiting employment of boys under 14 years of age in coal mines, it might be possible to say it was not intended for application to the word "mine" in such other act, nor to it wherever found in the chapter formed by consolidation. As to this we

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make no inquiry; for there was no such limited use of the definition nor consolidation of acts. As the definition was put into the revising and enlarging act, dealing with chapter 15H. there is nothing in the definition or the chapter by which legislative intention to make it applicable to some provisions and not to others is indicated. There is no rule of interpretation known to us that warrants a construction variant from plain terms of a statute, in the absence of something in the nature of the subject-matter or the context, upon which a presumption of legislative intention to limit or restrain such terms can reasonably be founded; and the basis of such a presumption must be firm and sure in reason and purpose.

It is not perceived that limitation of the terms can be predicated on the relative unimportance of the subject-matter of section 26 of the chapter. That argues nothing against intention to include it. If it could be so excluded, many others could be excepted upon the same ground, and in that way a large portion of the chapter could be withdrawn, and for no reason other than relative unimportance. That is not a difference in nature of subject-matter, and no manifest difference of purpose is perceptible. Presumptively boys are excluded from mines on account of the danger incident to the employment. For the same reason the employment of men in coal mines is peculiarly regulated by statute. As regulatory measures of employment of others extend to the limits of the definition, consistency requires, or at least does not forbid, coextensive regulation of the employment of boys.

In scope, the statutory definition of "mine" clearly includes the incline on which the plaintiff was working when hurt. In express terms it embraces the "drifts or incline planes connected with excavations." Drift and incline plane are used in the same general sense. Each is the way provided for bringing the coal from the mouth of the mine to the tipple. The cars may drift by gravity or they may be drawn up an incline plane, or they may reach the tipple partly by drift and partly by draft. Ordinarily the cars go down grade from the mouth of the mine to the tipple.

[2] This interpretation of the statute results in the conclusion that the ground upon which the court set aside the verdict is untenable As the employment of the plaintiff was unlawful, the defendant's subscription to the workmen's compensation fund afforded it no immunity from liability for injury to him by its negligence. In the case of an unlawful employment, neither party to the contract is protected by the Workmen's Compensation Act. Code. c. 15P, § 9 (sec. 665); Barnett v. Coal & Coke Ry. Co., 81 W. Va. 251, 94 S. E. 150.

[3] The unlawfulness of the employment and injury of the employee in the course thereof make out a prima facie case of injury by negligence of the employer. Norman v. Virginia-Pocahontas Coal Co., 68 W. Va. 405, 69 S. E. 857, 31 L. R. A. (N. S.) 504. There is no claim in argument that such case was overcome or repelled by proof, and we perceive nothing in the evidence that precludes right of recovery on the ground of such negligence.

Upon these principles and conclusions, the judgment complained of will be reversed, the verdict reinstated, and judgment for the plaintiff rendered thereon.

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MILWAUKEE BASKET CO. ET AL. v. INDUSTRIAL COMMISSION ET AL.

(Supreme Court of Wisconsin. Feb. 8, 1921.)

181 Northwestern Reporter, 308.

1. MASTER AND SERVANT — PARENTS NOT PRESUMED DEPENDENT ON MINOR CHILD WITHIN COMPENSATION ACT.

There is no presumption from the mere fact of the family relationship that parents are partially dependent on an unmarried son 19 years old within the meaning of the Workmen's Compensation Act. and they have the burden of showing such dependency to a reasonable certainty by competent evidence.

(For other cases, see Master and Servant, Dec. Dig. § 403.)

2. MASTER AND SERVANT—FINDING OF SUPPORT ENTITLING PARENTS TO COMPENSATION FOR DEATH OF MINOR SON CONTRIBUTING TO PAYMENT ON HOME HELD JUSTIFIED.

Where members of a family consisting of the parents and six children contributed amounts aggregatinig $3,022, to the family earnings. of which deceased, an unmarried son 19 years old, contributed $824, being $432 in excess of the amount used for his support, the Industrial Commission was warranted in finding that such son contributed to his parents' "support" so as to entitle them to benefits allowable to partial dependents under Workmen's Compensation Act, St. 1919, § 2394—9 (4) (c). based on his contribution, though part of it went into the family savings amounting to $900 paid on an indebtedness on the family home.

(For other cases. see Master and Servant, Dec. Dig. § 388.)

3. MASTER AND SERVANT — QUESTION IN COMPENSATION PROCEEDINGS DECIDED ON APPEAL, THOUGH NOT NECESSARY TO DISPOSITION OF CASE.

On review of a judgment in an action brought to review an award of the Industrial Commission, the question whether, in determining the amount contributed to the support of his parents by an unmarried son contributing his entire earnings to the family purse, the amount actually used or needed for his individual support should be deducted may be determined on suggestion of the Assistant Attorney General, though not necessary for a disposition of the case.

(For other cases, see Master and Servant. Dec. Dig. § 418[5].)

4. MASTER AND SERVANT — MINOR'S SUPPORT DEDUCTED IN DETERMINING HIS CONTRIBUTIONS TO SUPPORT OF DEPENDENTS WITHIN COMPENSATION ACT.

Where a minor contributes his earnings to his family. with whom he resides, so much thereof as is actually needed and necessarily used for his individual care and support from the general family purse should be deducted from his earnings in determining the amount of his contributions to the support of his dependents, under Workmen's Compensation Act, St. 1919, § 2394—9 (4) (c), notwithstanding the parent's legal duty to support him.

(For other cases. see Master and Servant, Dec. Dig. § 388.)

Vinje and Jones, JJ., dissenting.

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Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Application by Francisca and August Wiecki, parents of John Wiecki, for an award under the Workmen's Compensation Act for the latter's death, opposed by the Milwaukee Basket Company, employer, and Employers' Mutual Liability Insurance Company. The Industria' Commission made an award. and the employer and the insurer brought an action for review. From a judgment affirming the award, the plaintiffs appeal. Affirmed.

One John Wiecki received an injury resulting in his death while in the employ of the Milwaukee Basket Company. His parents, Francisca and August Wiecki, made application for compensation under the Workmen's Compensation Act.

Deceased was 19 years of age and unmarried at the time of the accident January 15, 1919. The Commission found that the deceased and five other children had been living as members of the family during the year preceding the accident. The two youngest, aged 13 and 6, attended school. Four of the children and the father were working.

The earnings during the preceding year were as follows:

August Wiecki, the father	$1,081 45
John, deceased	824 33
Max	570 07
Frances	341 60
Anna	791 76
	$3,609 21
The famil'y also received as rent from a son-in-law for a portion of the homestead in which they lived	36 00
	$3,645 21

It is conceded that it was error on the part of the Commission to assume that the entire amount of Anna's earnings were contributed to the family, as it appears from the undisputed evidence that she in reality contributed but $169. Such difference, however, does not materially affect the question here to be decided.

A little more than a year before the death of John the family had undertaken to purchase the home in which they lived. During the year they had paid on the indebtedness for this home the sum of $1,300. $400 of which had been borrowed from the son-in-law, leaving $900, which had been taken out of the earnings of the family.

The Commission determined that after deducting the $900 from the total earnings of the family the balance was the sum necessarily used for the support of the family. Assuming that the support of the two children at schoo' together would be equal to the support of one wage-earner. an amount was then arrived at as the actual cost of the support of each member of the family, fixing such at about $400. Such an amount was deducted from the earnings contributed by the son John, and the balance then left of $432 held by the Commission to be the amount contributed by John for the support of the family, and the basis for the computation under section 2394—9 (4) (e), and, multiplied by 4, gave the amount of $1,728, fixed as the death benefit.

The appellants, the employer and insurer, brought an action for review in the circuit court for Dane county on the ground that the finding of the Commission upon the question of dependency is not supported by the evidence. From the judgment of the circuit court affirming the award of the Commission the plaintiffs have appealed.

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Brown, Pradt & Genrich. of Wausau, for appellants.

J. J. Blaine, Atty. Gen., W. W. Gilman. Ast. Atty. Gen., and Schoetz, Williams & Anderson, of Milwaukee, for respondents.

ESCHWEILER, J. (after stating the facts as above). The amount contributed by the deceased minor son John to his family, with whom he lived during the year preceding his death, even without having deducted therefrom the amount that was necessary for the actual cost of his support, was less than the $900 taken out of the family earnings and paid therefrom on the purchase of the home.

Section 2394—9 (4) (c) Wis. Stats., being the section upon which the findings of the Commission rests, reads, so far as here material, as follows:

"(c) In case the deceased employee leaves no one wholly dependent upon him for support, but one or more persons partially dependent therefor, the death benefit shall not exceed four times the amount devoted by deceased. during the year immediately preceding his death to the support of such dependents and shall be apportioned accordinig to the percentage that the amount devoted by the deceased to the support of such person or persons, for the year immediately prior to the accident, bears to the average annual earnings of the deceased. * * * "

The appellants contend that the undisputed facts that from the contributions made to the general family purse by all the working members of the family there was taken out and used $900 for the specific purpose of paying for a home, and which sum was more than the total earnings of the deceased, conclusively negative the finding by the Commission of partial dependency of the parents upon the deceased son under any reasonable construction to be given to the section above quoted; that where, as here, had there been no contributions by the deceased son to the family durinig the year preceding the death there would have been nevertheless a surplus (disregarding the $900) over and above the amount that would have been actually expended for the care and support of the family, it must be held as a matter of law that such sum of $900, being in excess of the earnings of the deceased, was neither used nor needed for the support of the family, and therefore there was not a case of partial dependency; that the surviving parents are not losers by reason of the son's death in respect to any dependency for support by them upon him.

[1] The claimants have the burden of showing to a reasonable certainty from competent evidence that there was, at the time of the death, a partial dependency by them upon such deceased; there being no presumption in that regard in their favor from the mere fact of the family relationship. Wisconsin Drainage Co. v. Ind. Comm., 161 Wis. 42, 45, 152 N. W. 460.

[2] Under present day conditions there cannot be any question but that payments, to a reasonable extent at least, for the purpose of maintaining the roof which shelters the family, either in the shape of rent if it be not their own, or interest upon existing indebtedness on such home if it be theirs, and for repairs, insurance, or such like items, should be considered a part of the necessary support of the family within the meaning of the statute. It is so frankly conceded by appellant's counsel.

In this case, instead of renting, the family elected to purchase a home. By what must undoubtedly have been rigid economy, as is demonstrated by a momentary comparison between the number maintained and the amount from which such maintenance had to be taken, they set aside a very substantial part of such joint earnings for the purpose of thus securing a home.

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It cannot well be questioned but that as to some at least of the $900 taken out of the joint family earnings there was a very proper basis for holding that there was a situation of partial dependency of the parents for their support upon the earnings of this son. The Commission were therefore justified in so finding. and such finding as affirmed by the circuit court certainly cannot be disturbed.

The Commission, having this situation before it. arrived at its conclusion that the amount devoted by the deceased to the support of his parents during the year prior to the accident was the whole amount of his earnings paid over to his family. less the amount actually needed to pay for his care and support. We cannot say, in view of all the circumstances presented in this record. that such conclusion was unwarranted. Similar holdings have been sustained in other courts. Fleckenstein Brew. Co. v. Dist. Ct., 134 Minn. 324, 159 N. W. 755; Day v. Sioux Falls Fruit Co. (S. D.) 177 N. W. 816.

We find nothing inconsistent with the result here reached in the cases relied upon by appellants. Dazy v. Apponaug Co., 36 R. I., 81, 89 Atl. 160, and R. I. B. & Iron Wrks. v. Ind. Com., 287 Ill. 648, 122 N. E. 830.

[3, 4] It is suggested in respondent's brief by the Assistant Attorney General that it is desirable to have the question now decided whether or not the Industrial Commission, in determining matters of dependency such as here involved, should deduct from the total contributions to the family by the injured person an amount of money equal to that which was actually used or needed for his individual support during the year in question before it fixes the amount that should be held to have been contributed to the support of the dependents; it being contended that, where the injured employee was. as in this case, a minor and living with his parents, there was the corresponding relative duty of support of such minor by the parent regardless of whether or not the parent exercised his legal right to receive the wages of such minor, therefore there is no warrant for deducting such sum, as the parent would have had to pay just as much. the son not earning or contributing, as when earning and contributing. Although the question as presented is not necessary for a disposition of this case, nevertheless we feel that our views upon it may be stated now. We are of the opinion that where, as here. a minor contributes his earnings to his family with whom he resides, so much thereof as is actually needed and necessarily used for his individual care and support from the general family purse is to be treated as a sum used for his individual support, rather than as a contribution by him of the same amount to the support of his dependents under the statute above quoted.

We think the rule and the reason are well stated in the case of Moll v. City Bakery. 199 Mich. 670, 165 N. W. 649.

Judgment affirmed.

VINJE, J. (dissenting). I am unable to concur in the view that that part of contributions to the family fund that go into savings or investment can be said to be for support. In this case the whole family earned during the test year $3,022.45, placing Anna's contribution at $169, which it is conceded it should be. Out of this sum $900 were saved and invested, leaving $2.122.45 used for family support for the year. The deceased contributed $432 net to the family fund, exclusive of his own support. It should be held that a proportionate part of his contribution went into savings or investment. Such proportionate part would be $128.06, and this sum should have been deducted from his net contribution to the family fund, and the balance only held to have been for support.

Under the principle announced by the court, a father who earns $3.000 for the test year, spends $2,000 for the support of his family, and in-

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vests $1,000, is held to be dependent upon a son who contributes $400 to the family fund for the year. I cannot believe that it was the Legislative intent that a father should be permitted to swell his investment account at the expense of an employer of his son, or at the public expense, if it, instead of the employer, ultimately bears the burden. Neither in popular nor in technical language does the word "support" connote a meaning common to either "investment" or "savings," and judicial construction should not change its meaning.

I am authorized to state that Mr. Justice Jones concurs in this dissent.

WISCONSIN-MINNESOTA LIGHT & POWER CO. v. INDUSTRIAL COMMISSION OF WISCONSIN ET AL.

(Supreme Court of Wisconsin. Feb. 8. 1921.)

181 Northwestern Reporter, 311.

MASTER AND SERVANT — PARENTS HELD NOT ENTITLED TO COMPENSATION FOR DEATH OF ADULT SON PAYING BOARD AND CONTRIBUTING TO PAYMENT ON FAMILY HOME.

Where an adult son lived with his parents, paying them his board and lodging and contributing nothing else to the family purse excepting presents, made payments amounting to $445 upon a home to the family, as he had agreed to do if his father would purchase one. his parents are not entitled. under the Workmen's Compensation Act, St. 1919, § 2394—9 (4) (c) to an award for his death.

(For other cases, see Master and Servant. Dec. Dig. § 388.)

Appeal from Circuit Court, Dane County; E. Ray Stevens. Judge.

Application by John Johnson for an award under the Workmen's Compensation Act for the death of his son, Henry Johnson, servant.. Opposed by the Wisconsin-Minnesota Light & Power Company, employer. The Industrial Commission made an award, which was set aside upon appeal to the circuit court, from which judgment the claimant appeals. Affirmed.

One Henry Johnson was killed April 23, 1919, while in the employment of the respondent. Claim for compensation was made by John Johnson, his father. The Industrial Commission held that there was a case of partitl dependency, and allowed a death benefit in favor of the father of four times the amount found to have been contributed by the son. Henry was 25 years of age at the time of the accident, and for more than a year preceding his death had lived at home with his father, mother, and a married sister with her two children. Henry paid $25 a month for his board. Under claimant's testimony that was just about the cost of his board.

Within the year preceding his death and on the suggestion of Henry and upon his stating that he would pay for it. the father disposed of the old house in which they had been theretofore living and purchased a new home The son then drew $200 from the savings bank in which he kept his funds. and gave a check for that amount to his mother, and it was applied directly on the first payment for the house. Subsequently. and during the same year, he in the same manner advanced another $200. He

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also bought and paid for furniture in the amount of $45, which was placed in the house. He also gave his mother two items of $10 each, but one was in the nature of a Christmas present and the other to enable her to visit another member of the family, and both of these items were disregarded in the findings of the Industrial Commission. The father was able out of his earnings to make small payments upon the house.

Upon appeal to the circuit court the award was set aside. From the judgment so directing, the claimant has appealed.

J. J. Blaine, Atty. Gen., W. W. Gilman, Asst. Atty. Gen., and A. C. Larson, of Eau Claire, for appellant.

Linderman & Ramsdell, of Eau Claire, for respondent.

ESCHWEILER, J. (after stating the facts as above). In this case an son, living with his parents and paying them for his board and lodging a regular amount fairly equivalent to its costs, contributed nothing in excess of such amount to the family purse. The father had no legal control over the wages of the son. Two contributions of $200 each were made by the son for the avowed and designated purpose of the purchase of a home. Neither of such payments ever became a part of the general family fund, nor were they intended to be used for any other purpose than the particular one to which they were in fact applied.

We feel compelled to hold that under the facts in this case the $445 paid by the son was not paid by him for the support of his parents within the meaning of section 2394—9 (4) (c), Stats., under which the claim is made. The facts here are so manifestly different from those appearing in the case of Milwaukee Basket Co. et al. v. Industrial Commission, decided herewith, 181 N. W. —, that extended discussion is unnecessary.

It follows that the judgment of the circuit court should be affirmed.

Judgment affirmed.

PORTER v. INDUSTRIAL COMMISSION OF WISCONSIN ET AL.

WISCONSIN STATE REGISTER CO. v. SAME.

(Supreme Court of Wisconsin. Feb. 8, 1921.)

181 Northwestern Reporter, 317.

1. MASTER AND SERVANT — INDUSTRIAL COMMISSION'S FINDING THAT COMPENSATION CLAIMANT WAS NOT EMPLOYEE HELD CONCLUSIVE.

A finding by the Industrial Commission that claimant was not an employee within the Workmen's Compensation Act (St. 1919, § 2394—7), is a finding of "fact," and cannot be disturbed by the court, where the evidentiary facts, though not conflicting, permitted different inferences, the term "fact" denoting the inferences drawn by the trior from ascertained facts (citing Words and Phrases, Fact).

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

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2. MASTER AND SERVANT—RIGHTS UNDER COMPENSATION ACT CANNOT BE ENLARGED BY INSURANCE CONTRACT.

The rights established by the Workmen's Compensation Act cannot be enlarged, restricted, or modified. in respect to claims and liabilities within its scope, by the insurance contract.

(For other cases, see Master and Servant. Dec. Dig. § 348.)

3. MASTER AND SERVANT—INDUSTRIAL COMMISSION'S JURISDICTION LIMITED BY COMPENSATION ACT TO ADJUDICATION OF STATUTORY RIGHT TO COMPENSATION.

The jurisdiction of the Industrial Commission is limited by Workmen's Compensation Act (St. 1919, § 2394—15) to the determination of disputes concerning compensation. and. on findig that a claimant was not a emp'oyee of the insured employer, the commission has no jurisdiction to adjudicate questions between the employer and the insurer as to their contract rights or liabilities predicated on estoppel on the part of the insurer to deny liability on its policy.

(For other cases, see Master and Servant. Dec. Dig. § 396.)

4. MASTER AND SERVANT — COMPLAINT HELD NOT TO SHOW AWARD DENYING COMPENSATION WAS OBTAINED BY FRAUD.

In actions by a claimant under the Workmen's Compensation Act and by the insured employer against the insurance carrier to review the Industrial Commission's order denying compensation, based on a finding that claimant was not an employee, allegations that the insurer led plaintiffs to believe that the contract of insurance recognized c'aimant as an employee, and that employer in good faith acted on such representation and accepted the policy on the ground that it included him as an employee. do not show right to relief on the ground that the award was obtained by fraud.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Actions by A. A. Porter and Wisconsin State Register Company, respectively. against the Industrial Commission and Travelers' Insurance Company. Judgment for plaintiffs, and defendants Industrial Commission and insurer appeal. Reversed and remanded, with directions.

These actions, which are presented together, arose from the application of the defendant A. A. Porter for an award of compensation. In one case A. A. Porter is plaintiff, in the other the Wisconsin State Register Company is plaintiff.

A. A. Porter, president and chief stockholder of the Wisconsin State Register Company, suffered a severe injury to one of his eyes while waiting on a customer in the stock room of the Wisconsin State Register Company. He made c'aim for compensation before the Industrial Commission, and the Traveler's Insurance Company contested his claim. The Industrial Commission filed an award finding certain facts, and concluded he was not an "employee." For this reason the commission denied him compensation under the Workmen's Compensation Act.

Porter and the Register Company thereupon each brought a separate action in the circuit court for Dane county for a review of the commission's order denying compensation. The Register Company also claims damages under the terms of the insurance policy.

The trial court decided that the undisputed evidence disclosed that Porter was an employee of the Register Company within the meaning and terms of the Workman's Compensation Act at the time he was in-

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jured. and remanded the case to the commission for further proceedings. From this decision the Industrial Commission and the insurance company appeal to this court.

The complaint in the Register Company's action is the same as that in the Porter case, except that it alleges that for many months following the a'leged injury Porter was wholly incapacitated from working, and during that time the Register Company paid to him his wages in an amount equal to, or in excess of, the compensation provided by the Workman's Compensation Act. The company asks that it be reimbursed to the amount paid by it to Porter during the time he was incapacitated, and alleges that it is entitled to an award therefor against the defendant insurance company.

John J. Blaine. Atty. Gen.. and W. W. Gilman, Asst. Atty. Gen., for appellant Industrial Commission.

Olin, Butler, Stebbins & Stroud, of Madison, for appellant Travelers' Ins. Co.

E. S. Baker. of Portage, for respondent Wisconsin State Register Co.

Stroud & Stroud. of Portage, for respondent Porter.

SIEBECKER, C. J. (after stating the facts as above). [1] The fundamental issue in these actions presents the inquiry: Did the Industrial Commission correctly find that the plaintiff, Porter. at the time he sustained the injury to his eye, in November, 1916, was not an employee of the Wisconsin State Register Company within the contemp'ation of the Workman's Compensation Act. The trial court held that the undisputed facts permit of but one inference, namely, that he was an employee of the company when he suffered the injury to his eye. Section 2394—7, Statutes, defines the term "employee," as used in the Workman's Compensation Act; "(4) Every person in the service of another under any contract of hire, express or implied, oral or written." This act also provides that: "The findings of fact made by the commission acting within its power shall, in the absence of fraud, be conclusive;" and that the order or award of the commission may be reviewed by action in court in the manner prescribed in the act. Among the grounds upon which the order or award may be set aside are: "(1) That the commission acted without or in excess of its powers; (3) that the findings of fact by the commission do not support the award." In the case of Northwestern Iron Co. v. Industrial Commission, 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A, 366, Ann. Cas. 1915B, 877, it is declared that the commission's "findings of fact as recognized by this court mean findings of ultimate rather than evidentiary, facts. * * * It is only when the facts are undisputed, and no conflicting inference respecting the ultimate facts can be drawn therefrom, that the question becomes one of law." Citing In Milwaukee Western Fuel Co. v. Industrial Commission, 159 Wis. 635, 150 N. W. 998, the court said; "In the field of inferences from the evidentiary facts their action is final and controlling under the authority conferred upon them by law, unless it appears that there is no reasonable basis for their conclusions under the facts and circumstances before them, and thus rendering their action without or in excess of their powers." In passing judgment on the commission's award to ascertain whether or not it is supported by the evidence before them, it must be borne in mind that there are two kinds of facts, evidentiary facts and inferential facts. The word "fact," as employed in the legal sense, includes "those conclusions reached by the trior from sifting testimony, weighing evidence, and passing on the credit of the witnesses, and it does not denote those inferences drawn by the trial court from the facts ascertained and settled by it." 3 Words and Phrases, 2638; Ripon

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Hardware Co. v. Haas, 163 Wis. 592, 158 N. W. 330. It is well established that, if there is any evidence to support findings, this court cannot disturb the commission's order. True, as the trial court declared, the evidentiary facts before the commission are not conflicting; but it is clear that the question presented to the commission was to ascertain whether or not Mr. Porter was an employee within the contemplation of the Workman's Compensation Act. The conclusion was to be ascertained from the evidence before it. An examination of the evidentiary facts adduced before the commission clearly permitted of the different inferences: Was he or was he not an employee of the Register Company? Under this state of the evidence, their determination of that fact cannot be disturbed by the courts, and must stand as the final conclusion in this case. This result in itself is decisive of this case. We have, however, examined the evidence of the record, and it satisfies us that the commission, as trior of fact, arrived at the correct conclusion in finding as a fact that the evidence shows that Porter was not an employee of the Register Company when he received the injury to his eye, and hence his injury was not a compensable one, under the provisions of the Workmen's Compensation Act.

[2] The rights of the parties established by the provisions of the compensation laws cannot be enlarged, restricted, or modified in respect to claims and liabilities within their scope. Whatever they did in attempting to provide insurance for the liabilities arising under the Compensation Act may effectively aid in determining the nature of the insurance contract, but such contract cannot create any right or destroy a liability governed by the act.

[3] The claim made that the insurance company estopped itself by its conduct to assert a denial of liability under its policy has no relevance to the inquiry whether or not Porter was an employee of the Register Company at the time in question under the Compensation Act. Under these circumstances the commission has no jurisdiction to adjudicate questions between the Register Company as to their respective contract rights or liabilities, aside from requiring payment of the compensation by the insurer in case an award for compensation is made. The question of estoppel and any rights predicated thereon drop out of the case as a necessary result from the finding of fact that Porter's injury is not a compensable one. This follows from the fact that the Industrial Commission is an administrative body, and can only dispose of questions respecting disputes and controversies concerning compensation. Section 2394—15, stats.; Noer v. G. W. Jones Lumber Co., 170 Wis. 419, 175 N. W. 784.

The allegations that the award was procured by fraud do not present this issue. The allegations on this subject, are, in substance, that the insurance company led plaintiff to believe that the contract of insurance recognized him as an employee of the Register Company, and that the Register Company in good faith acted on such representation and accepted the policy on the ground that it included and insured him as an employee.

[4] We do not perceive how this in any sense constitutes a fraud in procuring the order of the commission denying compensation. It is manifest that the allegations of fraud are barren of any facts showing that the commission's order was based on or procured by fraud. It is considered that the allegations of fraud are wholly insufficient, and do not constitute a ground for relief on this ground. It must be held that the circuit court erred in reversing the award of the Industrial Commission. The action of the Wisconsin State Register Company against the commission and the insurance company, in the light of the fact that Porter's injury is not compensable, is also without merit and must be dismissed.

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The judgment in the action of Porter v. Industrial Commission and the insurance company is reversed, and the cause remanded, with direction to award judgment affirming the order of the Industrial Commission, and the judgment in the action of the Wisconsin State Register Company v. Industrial Commission and the insurance company is reversed with direction to enter a judgment to dismiss the comp'aint.

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MOORE SHIPBUILDING CORPORATION ET AL. v. INDUSTRIAL ACCIDENT COMMISSION ET AL. (S. F. 9542.)

(Supreme Court of California. Feb. 25, 1921. Rehearing Denied March 24, 1921.)

196 Pacific Reporter, 257

1. MASTER AND SERVANT—COMPENSATION ALLOWANCE TO DEPENDENTS VALID.

Const. art. 20, § 21, authorizing the Legislature to enact laws to compensate employees for injuries in the course of employment irrespective of the fault of either party, empowers the Legislature to extend compensation to a workman's dependents deprived of support by his death, whether their maintenance has been voluntarily and gratuitously assumed in good faith legally imposed; and the legislative discretion to determine what dependents shall become distributees of the indemnity is not measured by the analogies of the common law or the limitations of compensation acts in force at the time this consitutional provision was adopted.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

2. MASTER AND SERVANT—COMPENSATION BY COMMISSION'S FINDINGS OF DEPENDENCY CONCLUSIVE.

Under the provisions of the Workmen's Compensation Act, the commission's findings of total dependency, and that the relationship of the dependent child to decedent's household existed in good faith, must be accepted as established.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

3. MASTER AND SERVANT—CHILD OF UNDIVORCED WIFE, LIVING IN ADULTERY WITH UNMARRIED MAN, HELD A "DEPENDENT" MEMBER OF HIS "FAMILY" OR "HOUSEHOLD" WITHIN COMPENSATION ACT.

Where deceased servant, an unmarried man, was living in adultery with an undivorced wife, whose three year old daughter he was also supporting, the three constituted a family or household, and though the relationship between him and the woman was not in good faith, bad faith could not be imputed to the child, and she was entitled to death benefits as a "dependent" member of his "family" or "household" in good faith within Workmen's Compensation Act. § 9, subd. 11(1) and (2), and section 14, subds. (a), (b), (c).

(For other cases, see Master and Servant, Dec. Dig. § 388.)

(For other definitions, see Words and Phrases, First and Second Series, Dependent; Family; Household.)

Wilbur and Shaw, JJ., dissenting.

In Bank.

Proceeding by Horace Guitard, as guardian of Ida Miller, a minor, for compensation under the Workmen's Compensation Act for the death of Albert Bauer, opposed by the Moore Shipbuilding Corporation employer, and the Aetna Life Insurance Company, insurer. The Industrial Accident Commission made an award in favor of said minor, and the employer and insurer petition for certiorari. Petition denied.

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E. L. Stockwell and Redman & Alexander all of San Francisco; for petitioners.

A. E. Graupner, of San Francisco (Warren Pillsbury, of San Franciso, of counsel), for respondents.

SLOANE, J. This is a proceeding to review the action of the Industrial Accident Commission in awarding a death benefit of $3,400 to one Ida Miller for total dependency as a dependent of Albert Bauer, an employee accidently killed in the service of the plaintiff Moore Shipbuilding Corporation.

The only question in dispute is the status of Ida Miller as a dependent member of the "family or household" of the decedent. The admitted facts disclose that for a year or more preceding his death decedent Albert Bauer was living in adulterous cohabitation with Lola Miller the undivorced wife of one Samuel Miller. Ida Miller, who at the time of Bauer's death was three years of age, is the daughter of Lola and Samuel Miller. Miller deserted his wife just prior to the birth of the child, and has not been heard from since. Bauer, an unmarried man, appeared on the scene as a friend of Mrs. Miller and the child soon after the latter's birth. He contributed to the support of the mother and daughter for a year or more before he and the mother began living together, and frequently sent them by mail remittances of money addressed to the little girl. Later, at Bauer's solicitation, Mrs. Miller, with her little daughter, came to live with him. Thereafter, the couple lived together ostensibly as man and wife with Ida as their putative daughter, and Bauer, until his death, supported both the mother and child, and by his conduct and declaration indicated his purpose to rear and care for Ida as if she was his own daughter. The evidence would justify the conclusion that it was his intention that the relation should be permanent.

The claims of the mother as a dependent of the deceased were disposed of before the Industrial Accident Commission by stipulation between the parties to this proceeding, and the only relevancy on this appeal of the relations between her and Bauer is as to the effect of their unlawful cohabitation upon the status of the child as being a member in good faith of decedent's household.

[1] The first point to be considered in its logical relation to the case is the objections raised to the power of the Legislature under the Constitution of California to enact into the workmen's compensation law (Laws 1917, p. 831) provision for an allowance to dependents of a deceased employee not connected with him by either legal or natural ties. The contstitutional authority for the enactment of a workmen's compensation law in this state is provided by section 21 of article 20 of the Constitution, and so far as pertinent to the matter before us is comprised in the words:

"The Legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment, irrespective of the fault of either party."

That this provision must be construed to empower the Legislature to extend compensation in the event of death of such employee to certain dependents is not questioned by petitioners, but they contend that such allowance must be limited to dependents having a legal or moral claim to support from the employee in his lifetime.

The basis for a construction upholding allowances to surviving dependents is that in authorizing a workmen's compensation act the constitutional provision is presumed to have been adopted to cover the whole scope and purpose of the workmen's compensation laws as commonly

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enacted and in force at the time of its adpotion. That under the general scheme of such laws death benefits to dependents are commonly recognized is conceded.

This construction of section 21 of article 20 of the California Constitution is fully upheld in Western Metal Supply Co. v. Pillsbury, 172 Cal 407, 156 Pac. 491, Ann. Cas. 1917E, 390. In the carefully considered opinion in that case by Mr. Justice Sloss, concurred in by a majority of the court and with concurring opinions by Chief Justice Angellotti and Mr. Justice Shaw it is declared that—

"The constitutional amendment, as is perfectly apparent from its terms, was designed to establish the authority of the Legislature to pass laws making the relation of employer and employee subject to a system of rights and liabilities different from those prevailing at common law. That system was one which had already been adopted in many jurisdictions. The statutes putting it into force were commonly known as workmen's compensation laws. In every one of those laws, provision was made not only for compensation or indemnity to an employee who survived his injury, but for payment to the heirs or dependents of an employee who had received a fatal injury. * * * The two kinds of payment have always been regarded as component parts of a single scheme of rights and liabilities arising out of a given relation."

The power of the Legislature to provide for dependents being established, the question that follows is as to the legislative discretion in determining what classes of dependents shall come within the law.

If we are to be governed in this respect by the common-law rules of kinship, inheritance, and liability for maintenance and support, it will at once appear that the claimant here is outside the pale of legislative recognition, but, as is said in Western Metal Supply Co. v. Pillsbury supra, the workmen's compensation system "was designated to establish the authority of the Legislature to pass laws, making the relation of employer and employee subject to a system of rights and liabilities different from those prevailing at common law"; and again that "the analogies of the common law cannot be applied too closely to this new scheme which undertakes to supersede the common law altogether and to create a different standard of rights and obligations." The Supreme Court of Connecticut, in holding an illegitimate child entitled to the benefits of the act, thus defines the scope and purposes of the new system of relation between employer and employee;

"Compensation is not awarded either as the price of fault or as a measure of duty owed to the injured employee. * * * The underlying principle of this kind of legislation is that the ends of justice and equity will best be subserved, and the general good promoted, by lifting from the shoulders of the unfortunate victims of industrial mishaps and of their dependents some measure of the resulting burden, and casting it upon the industry which occasioned it, and through that industry upon society at large. * * * In its final distribution society bears it. These children and all other children similarly circumstanced, * * * must be supported. If their means of support is withdrawn, society is compelled to supply it. Why may it not as well and fairly supply it in the method provided by the workmen's compensation legislation as in any other." Piceinim v. Connecticut L. & P. Co., 93 Conn. 423, 106 Atl. 330.

In Temescal Rock Co. v. Industrial Acc. Comn., 180 Cal. 637, 182 Pac. 447, this court has upheld an award under the precise provisions of the Workmen's Compensation Act that is involved here, to a woman who was living with the decedent as his wife, without having been married to him. It is true that they thought they were married and had sustained this relation in good faith. But their honest intentions in the matter did not

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remove the fact that their relations were illegal and wholly without the sanction of the law. The decision holds that the claimant could not take as the wife of the deceased employee, but that she was entitled to an allowance as a member in good faith of his family and household. The Court says:

"If the applicant is a member of the family or household of such employee in good faith, compensation may be awarded, although he or she may not bear any relation by adoption, blood, or marriage to the employee."

In Maryland Casualty Co. v. Industrial Acc. Comn. (S. F. No. 9218,) no opinion involving liability under a state of facts substantially like those existing in this case, this court denied a petition for writ of review, which circumstance is, of course, not conclusve as to the point under discussion because, as suggested by counsel for petitioners here, we have consented to review the proceedings in this matter,. We see no reason, however, for arriving at a different conclusion from the one implied in the denial of a writ under that petition. The need of relief from the deprivation caused by the death of the employee and the questions of public policy involved rest upon the fact that the employee has in good faith taken into his home and assumed the support of one without other means of subsistence. The hardship to the individual dependent, and the incidental burden to the insurer or to society from the death of a breadwinner are no different whether the maintenance of the dependent has been voluntarily and gartuitously assumed or legally imposed.

As has been pointed out, the benefits of this law are not provided as an indemnity for negligent acts committed or a compensation for legal damages sustained, but is an economic insurance measure to prevent a sudden break in the contribution of the worker to society by his accidental death in the course of his employment. From this economic standpoint it makes no difference whether the workman's earnings are being distributed to those whose support he has voluntarily assumed, or to those who are legally entitled to such support. In either case they are the reliance of dependent members of society. The only difficulty is that where there is no legal dependence it is harder to determine that the contribution of support has been made so as to contstitute the recipient a dependent in good faith

The power of the Legislature to extend the benefits of industrial accident insurance beyond the wage-earner himself being recognized, it is left to reasonable legislative discretion in the light of the general purposes of these laws to determine what dependents shall become the distributees of the indemnity assessed against the industry, and we do not think we are compelled to look to analogies of the common law, or to the limitations of compensation acts in force at the time our constitutional provision was adopted, to fix the measure of the legislative power thus conferred.

[2, 3] It only remains to determine whether Ida Miller, the claimant here, comes within the terms of the California statute. Section 9, subdivison 11 (1) and (2) of the Workmen's Compensation Act provides that "in case a deceased employee leaves a person or persons wholly dependent upon him for support" such dependents shall be allowed certain indemnity benefits. Section 14 (a) provides that the wife and children under certain conditions are conclusively presumed to be wholly dependent. Section 14 (b) provides that in all other cases the questions of entire or partial dependency and questions as to who constitute dependents, and the extent of their dependency, shall be determined in accordance with the fact, "as the fact may be at the time of the injury to the employee"; 14 (c) provides, that "no person shall be considered a dependent of such employee unless in good faith a member of the family

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or household of such employee, or unless such person bears to such employee the relation of husband or wife, posthumous child, adopted child or stepchild, father or mother, father-in-law or mother-in-law, grandfather or grandmother, brother or sister, uncle or aunt, brother-in-law or sister-in-law, nephew or niece."

The two classifications here, one of persons who are in good faith members of the employee's family or household, and the other of persons having specific relations of kinship, are clearly used in the alternative, and are to be separately considered. Temescal Rock Co. v. Industrial Acc. Comn., supra. As Ida Miller belongs to none of these degrees of relationship, either by birth, marriage, or adoption, we are only concerned with the first division.

There are three vital conditions required to establish dependency in this case under the Compensation Act; First, was Ida Miller actually dependent upon the decedent for her support; second, was she a member of his family or household; third, was the relation or connection sustained in good faith.

The Industrial Accident Commission has found on these points as follows: That "Ida Miller, a minor, was, at the time of the injury of Albert Bauer, referred to in said findings, totally dependent in fact upon him, and was a member of his family and household within the meaning of section 14 of the Workmen's Compensation Insurance and Safety Act of 1917." Under the provision of the act making the findings of fact of the commission conclusive on this court, the fact of total dependency, and that the relation of the child to decedent's household existed in good faith, must be accepted as established.

The only question open to discussion is whether as a matter of law the relation shown by the undisputed evidence constitutes bona fide membership in a "family or household" on the part of the claimant. There is little to be gained by reviewing the numerous definitions given by the courts and lexicographers of the words "family" and "household." They mean different things under different circumstances. The family, for instance, may be an entire group of people of the same ancestry, whether living together or widely separated; or it may be a particular group of people related by blood or marriage, or not related at all, who are living together in the intimate and mutual interdependence of a single home or household. Again, the word "household" is variously used to designate people, generally, who live together in the same house, including the family, servants, and boarders or it may be used as including only members of the family relation. It is probable that the two terms are coupled together in this statute to indicate that they are used synonymously, the "family" to include only those of the household who are thus intimately associated, the "household" to exclude those of the family not living in the home. There can be no doubt that Bauer, Mrs. Miller, and the little girl constituted a family or household. They were living together in all the interdependency and intimacy of man and wife and their legitimate offspring. The only thing to exclude Mrs. Miller from the benefit of this relationship was lack of good faith. She and Bauer were living together in open and conscious defiance of law. In Temescal Rock Co. v. Ind. Acc. Comn., supra, a similar state of facts existed as to the unlawful relation, but the court there held the man and woman to constitute a "family or household," and that they were such in good faith because they were cohabiting under the belief that they were married. In this case Bauer and Mrs. Miller were not in good faith because they knew their relations were unlawful. We cannot, however, agree with counsel for petitioners that the bad faith of the mother must be imputed to the child. It is true that for many purposes the status of the parent fixes that of their minor children. It may be conceded that such is the law in the matter of domicile, but,

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as we have seen, so far as her domicile is concerned, Mrs. Miller was also a member of Bauer's household. But the bad faith of Bauer and Mrs. Miller in their relations with each other cannot rebut entire good faith in the act of Bauer in assuming the maintenance and support of the child and accepting her as a member of his family. He might have adopted her, and thus made her a legal dependent, but the meretricious relations between him and Mrs. Miller would have remained the same. This suggestion answers the claim made by petitioners that there could be no family relation to include the child while the mother was living in adultery with Bauer, for the reason that the law would take the child from them and make her a ward of the juvenile court. So it could, if there has been a legal adoption, or if Bauer, was the father of the child. It may be plausibly urged that if the evidence showed that Bauer was only maintaing the daughter in furtherance of his illegal relations with the mother, it would follow that he was making her a member of his household in bad faith, but the commission has found, and we think the facts justify the conclusion, that Bauer had in good faith assumed the support of Ida Miller and made her a member of his household for her own sake and because of personal care for her. It is true the child was too young to entertain either good or bad faith, but if that is a legal obstacle it would apply as well if she had been taken into the household as a homeless and abandoned waif. We think that Ida Miller was a member in good faith of Bauer's household. The courts should not be called upon to visit the iniquities of the parents upon the children, beyond the penalties inherent under natural law.

The petition is denied.

We concur; Angellotti, C. J.; Lennon,; Lawlor, J.

OLNEY, J. I concur in what Judge Sloane has said, and would add merely a word. It seems to me that in view of the finding of the commission that Bauer had assumed the relation of father toward the child, the character of his relations with the child's mother is a false quantity in the case. The final question was, Did Bauer stand in loco parentis toward the child, had he genuinely assumed toward the child the relation of father? If he had (and the commission finds he had and the finding is supported by the evidence), it makes no difference how or why he had. The relation was there, and by virtue of it the chilld was a member of his household in good faith, and that is enough. If an unmarried man should pick up some waif, become attached to it, have it live with him, support it and look after it, assume toward it in every way the character of a father, could any one seriously doubt that it was a dependent member of his household? If it would be a dependent member of his household under those circumstances, how is the relation changed or affected by the fact that it originated in an unlawful relation with the child's mother? That fact might have some weight in determining whether he had genuinely assumed the relation of father toward the child, but if it appeared that he had, the reasons why he had done so become wholly unimportant.

WILBUR, J. I dissent. In the case of Temescal Rock Co. v. Industrial Accident Commission, 180 Cal. 637, 182 Pac. 447, the parties believed in good faith that the procurement of a marriage license constituted them husband and wife, and in good faith entered upon that relation. Under the common law, and in this state prior to 1895, such acts would constitute them husband and wife. Only a mistake of law prevented such conduct constituting a valid marriage. There was no moral turpitude in the conduct of the parties, and they did not discover the inva-

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lidity of the marriage before the putative husband was killed in such case there was no injustice in giving validity to the actual bona fide intention and relationship of the parties.

In the case of Maryland Casulty Co. v. Industrial Acc. Comn., the commission had allowed compensation to two minor children whose mother had married the decedent and who he apparently believed to be his wife. The children were being supported by the deceased as members of his family. After his death it was discovered that the mother of the children had married decedent the day before an interlocutory decree of divorce had been entered in an action for divorce against the husband and father of the children. The mother claimed that she entered into the relationship in good faith, although the commission found otherwise. The petition for a hearing in this court was denied. Whatever force that denial may have as a precedent it does not cover a case where the employee deliberately enters upon an adulterous cohabitation with the wife of another man. Such a relationship violates the law of God and Man. Deut. v:18; Matt. v:27, 28; Pen. Code, 269a. The woman and child were the family of another man. How can it be said that a family altar had been erected in good faith. It is one thing to hold that parties may establish a family in good faith where both are acting under a mistake of law, and quite another to hold that a family may be established where both the man and woman deliberately assume the family relationship in conscious violation of the criminal law and and where such conduct is malum in se. Indeed, the commission found that such relationship was not in good faith, and consequently disallowed compensation to the woman, except $500, as stipulated. The question, then, is whether the infancy of the child can justify an allowance to it where the two adult parties to the relationship were not acting in good faith in establishing the relationship. In other words can the good faith of the child, or rather its lack of bad faith, characterize the family as one existing in "good faith" sufficiently to cover the bad faith of the mother and of the employee? To so hold would, in effect, strike out the words "good" faith" from the statute. For assuredly the intent of the minor child could not be determinative of the case. The support of the child was, no doubt, a mere incident to the meretricious relationship, and we may well assume one of the considerations moving from the man to the woman for her continuance of the relationship.

To assume that the Legislature, in the enactment of the Workmen's Compensation Act, intended to reward parties to a relationship entered into in definance of the penal laws of the state and against good morals is to violate the most fundamental canons of statutory construction. It should be said, however, that the commission, found that the husband of Mrs. Lola Miller died before she began to cohabit with the deceased. Presumably this finding is the result of the application of the presumption of innocence, but is in opposition to her statement that they intended to get a divorce.

Whatever may be said as to the rights of a child taken into the home with a bona fide intent to continue its support, coupled with actual support for a long time, it seems clear that where the consent of the child's mother to a criminal relationship is an essential element in such conduct, such a family or household is not established in good faith, and the child is not a member of decedent's family in good faith. Our previous decisions in favor of those who ignorantly violate statute law have, I think, gone to the utmost limit in liberality in favor of the employee's family and against the employer.

Shaw, J. I concur with Justice Wilbur.

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CARROLL ET AL. V. INDUSTRIAL COMMISSION OF COLORADO ET AL. (No. 9731.)

(Supreme Court of Colorado. Dec. 6, 1920. On Motion for Rehearing, March 7, 1921.)

195 Pacific Reporter, 1097

1. MASTER AND SERVANT—DUST-LADEN AIR HELD PROXIMATE CAUSE OF WORKMAN'S DEATH.

Where an employee had organic heart trouble, and the strenuous work of pitching alfalfa hay in an inclosed building, combined with breathing dust-laden air, brought on an attack of heart trouble causing instant death, the condition of the air or the fact that it was dust-laden was the proximate cause of the death.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

2. MASTER AND SERVANT—DEATH FROM HEART TROUBLE DUE TO DUST-LADEN CONDITION OF AIR HELD "INJURY PROXIMATELY CAUSED BY ACCIDENT" WITHIN COMPENSATION ACT.

Where the dust-laden condition of the air in which an employee was working brought on an attack of heart trouble resulting in death, the result was unexpected and unintended, and therefore an "accident" and the death resulted from an injury proximately caused by accident within the Workmen's Compensation Act.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental.)

3. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT INCLUDES INJURY WHICH IS ITSELF AN ACCIDENT; "BY;" INJURY BY ACCIDENT;" "INJURY CAUSED BY ACCIDENT."

The Workmen's Compensation Act, providing compensation for personal injury or death accidentally sustained and for injury proximately caused by accident, includes not only an injury the means or cause of which is an accident, but also an injury which is itself an accident, as "by" means through the means, act, or instrumentality of, and "injury by accident" and "injury caused by accident" are interchangeable terms.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

(For other definitions, see Words and Phrases, First and Second Series, By.)

4. MASTER AND SERVANT—ORDER DENYING COMPENSATION ON PETITION FOR REHEARING HELD REVIEWABLE WITHOUT FURTHER PETITION.

Where the Industrial Commission denied compensation under the Workmen's Compensation Act, and a petition for rehearing was filed after which the Commission vacated its previous order and heard further testimony and made another order denying compensation a second petition for rehearing was unnecessary before bringing an action in the district court to review the proceedings of the Commission.

(For other cases, see Master and Servant, Dec. Dig. § 417[1].)

Burke and Denison, JJ., dissenting.

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En Banc.

Error to District Court, City and County of Denver; Francis E. Bouck, Judge.

Action by Bessie Carroll and others against the Industrial Commission of Colorado and others to set aside an order of the Commission denying compensation under the Workmen's Compensation Act for the death of Joseph Carroll. The order of the Commission was affirmed by the district court, and plaintiffs bring error. Reversed and remanded, with directions.

Chas. H. Sherrick, of Denver, for plaintiffs in error.

Victor E. Keyes, Atty. Gen., John S. Fine, Asst. Atty. Gen. (H. E. Curran, of Denver of counsel), for defendant in error Industrial Commission.

Dana, Blount & Silverstein, of Denver, for other defendants in error.

ALLEN, J. The plaintiffs in error, as widow and minor children of Joseph Carroll, filed a claim for compensation with the Industrial Commission under the Workmen's Compensation Act. Laws 1919, c. 210 Joseph Carroll died while an employee and working as such. The plaintiffs in error filed their claim as his dependents. After a hearing, the Commission found, as a conclusion based upon the facts, that the death of Joseph Carroll "was not the proximate result of an accident sustained" by him.

The claimants filed an action in the District Court to set aside the order denying compensation. That court affirmed the order of the Commission, and claimants now bring the case to this court for review.

One of the questions presented by the record is whether the Commission's finding, which in the instant case is one of law, can be sustained.

The following facts are not disputed: Joseph Carroll was employed in an alfalfa meal mill. On November 1, 1917, he was found dead, his body lying in the hay shed of the mill, where he had been pitching alfalfa hay. His work was hard physical labor. His place of employment was in an inclosed building. The air therein was dust-laden as the result of handling hay, alfalfa meal, and machinery. The decedent had organic heart trouble. The evidence shows that the strenuous work of pitching alfalfa hay in an inclosed building, combined with breathing dust laden air brought on an attack of heart trouble, causing instant death, and that, if Joseph Carroll had been doing his work in the open air, the work would not have brought on a heart attack.

[1-3] The proximate cause of the death of Joseph Carroll was the condition of the air in his place of employment, or the fact that it was dust-laden. The question to be determined now takes this form: Under the foregoing facts, must it be held, as a matter of law, that the death was "accidentally sustained" or resulted from an "injury proximately caused by accident"?

The dust-laden condition of the air was the "proximate cause" of the death because had it not been for such condition the death would not have occurred at the time. Such condition of the air which decedent was required to breathe brought on an attack of heart trouble, resulting in death. The dust-laden condition of the air was the cause, and the fatal attack of heart failure was the result. The result was unexpected and unintended, and therefore an "accident." The term "accident," is often used "to denote any unintended and unexpected loss or hurt apart from its cause." 1 C. J. 395.

Our statute uses the expressions "personal injury or death accidentally sustained" and "injury proximately caused by accident" in pro-

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viding for what injuries or deaths compensation shall be allowed. By the term "injury' is meant, not only an injury the means or cause of which is an accident, but also an injury which is itself an accident. The expressions above quoted are the equivalent of "injury by accident," which is frequently used in the decisions. The word "by" may mean "through the means, act, or instrumentality of." 9 C. J. 1109. Therefore "injury by accident" and "injury caused by accident" are terms or expressions which can be used interchangeably. In a discussion of the former it is said in 25 Harvard Law Review, 340:

"Since the case of Fenton v. Thorley, nothing more is required than that the harm that the plaintiff has sustained shall be unexpected. * * * It is enough that the causes, themselves known and usual, should produce a result which on particular occasion is neither designed nor expected. The test as to whether an injury is unexpected, and so, if received on a single occasion, occurs 'by accident,' is that the sufferer did not intend or expect that injury would on that particular occasion result from what he was doing."

This is the rule followed in Fidelity, etc., Co. v. Industrial Accident Commission of California, 177 Cal. 614, 171 Pac. 429, L. R. A. 1918F, 856. It was there stated that the current of authority is that "unforeseen, unexpected, and unintended injuries to employees have been classed as 'accidents' and held sufficient to justify awards."

For the reasons above indicated, we are of the opinion that the record shows that the death of Joseph Carroll resulted from an "injury proximately caused by accident," and that therefore his dependents are entitled to compensation.

[4] It is contended by the defendants in error that the district court had no jurisdiction to review the proceedings of the Commission, because no petition for a rehearing was filed by the claimants after the Commission last announced its denial of compensation. The facts which give rise to the controversy in this matter are as follows: On June 13, 1918, the Commission, after a hearing, made an order denying compensation to the claimants. A petition for rehearing was then filed. Thereafter, and on July 3, 1918, the Commission vacated its previous order, and set the cause down "for the purpose of taking further medical testimony as to the cause of death of the said Joseph Carroll and for no further purpose." Further evidence was taken on August 7, 1918. This evidence was cumulative only. On February 17, 1918, the Commission made an order, as if an original one, denying compensation. This order was, in effect, a reinstatement of the first order. No award in favor of the claimants had ever been made in the meantime. The petition for rehearing which was filed accomplished all that the statute contemplates with reference to such petitions. A second petition for a rehearing by the same party, filed after the Commission makes an order exactly the same as a previous order, would serve no purpose other than to further delay the termination of the proceedings.

The district court did not dismiss the proceeding, but took jurisdiction, and affirmed the award of the Commission.

Under the circumstances, above stated, we are of the opinion that the claimants should be deemed to have substantially complied with the statute as to filing a petition for rehearing.

The judgment of the district court is reversed, and the cause remanded, with direction to the district court to remand the case to the Industrial Commission, with directions to enter an award allowing compensation to the claimants.

Reversed.

Burke and Denison, JJ., dissent.

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On Motion for Rehearing.

PER CURIUM. [5] The brief of defendants in error in support of their petition for rehearing is so discourteous that the Attorney General and his associates made haste to deny in writing all responsibility therefor. It is hereby ordered stricken from the files.

Reluctant to hold litigants responsible for such breaches of professional ethics, the court grants to defendants 15 days from this date in which to file herein a proper brief in support of their petition for rehearing.

Allen, J., not participating.

DAVIS v. INDUSTRIAL COMMISSION ET AL. (TWO CASES.) (Nos. 13700, 13701.)

(Supreme Court of Illinois. Feb. 15, 1921. Rehearing Denied April 8, 1921.)

130 Northeastern Reporter, 333

1. MASTER AND SERVANT—PRINCIPAL AND AGENT—WORKMEN'S COMPENSATION; EVIDENCE HELD TO WARRANT INFERENCE FATHER'S ACT IN HIRING CONTRACTOR WITHIN SCOPE OF AUTHORITY FROM SON, CLAIMED EMPLOYER.

Evidence *held* to warrant inference that the father of the employer, in hiring the contractor, who employed the injured claimants, was within the scope of his authority, to bind the employer.

(For other cases, see Master and Servant, Dec. Dig. §§ 405[2]; also see Principal and Agent, Dec. Dig. § 123[8].)

3. MASTER AND SERVANT—EMPLOYER OF EMPLOYEE INJURED IN HAZARDOUS WORK CANNOT ESCAPE LIABILITY FOR COMPENSATION ON CLAIM HE WAS NOT ENGAGED IN SUCH BUSINESS.

Where dangerous and extrahazardous work, bringing the employer within the Workmen's Compensation Act without election, was being done for him in maintaining his building, when his contractor's employees were injured, he cannot escape liability for compensation, under the Workmen's Compensation Act, § 31, on the claim he was engaged in the business of a hardware and paint merchant, and was not engaged in the extrahazardous business of maintaining the building.

(For other cases see Master and Servant, Dec. Dig. § 361.)

Error to Circuit Court, Cook County; Oscar M. Torrison, Judge.

Proceedings for compensation under the Workmen's Compensation Act by James Nichols and by Jacob Miller, employees, opposed by Iddell E. Davis, employer. Compensation was awarded by the Industrial Commission, the award confirmed by the circuit court, and the employer brings error. Judgment affirmed.

Zimmerman, Mack & Garrett, of Chicago, (Bernstein, Zolla & Bernsetin, of Chicago, of counsel), for plaintiff in error.

John G. Riordan, of Chicago, for defendant in error Miller.

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FARMER, J. This is a writ of error to review a judgment of the circuit court of Cook County, affiriming an award under the Workmen's Compensation Act in favor of defendants in error respectively, in separate claims prosecuted by them individually. Jacob Miller and James Nichols were employed by William Greenough, who was engaged in the business of cleaning the outside walls of buildings. While engaged in cleaning parts of the outside walls of a three-story apartment building belonging to plaintiff in error, Iddell E. Davis, the scaffold on which Miller and Nichols were working fell with them about 25 feet and they were both injured. Greenough was insolvent. He had no insurance for his men, and they each claimed compensation from plaintiff in error. They were each awarded compensation by an arbitrator, which was confirmed by the Industrial Commission and by the circuit court. A writ of error was allowed in both cases, and as both claims are dependent on the same facts, the two cases were consolidated in this court for hearing and will be disposed of in one opinion.

Plaintiff in error denied he ever employed Greenough or the men working for him. The facts disclosed by the testimony on this question are, in substance, that plaintiff in error and his father, Nathan Davis, owned and operated a paint and hardware business in a store on Halsted street under a corporate organization. The building where the accident occurred belonged to plaintiff in error and was located at Forty-Ninth street and Forestville avenue. It was a three-story building, 45 feet high, and contained 15 apartments. Nathan Davis lived in one of them. Greenough testified he was employed by Nathan Davis to clean the building; that he did not know who owned the building; that Davis came to the place where he was working on another building, and employed him to clean the building where the accident occurred. Greenough testified Davis saw him twice about it, and the first time he asked him to look the building over and tell him what it would cost. He did look at the building, and later told Davis he would do it for $86. Subsequently Davis directed Greenough to do the work. Davis admitted talking to Greenough about doing the work, and asking him to state what it would cost. He claimed Greenough was to submit a proposition in writing but never did so, and that there was never any employment by him. Plaintiff in error testified his father had no authority to employ Greenough, but admitted his father who lived in the building, had authority to "do small matters" in repairing and maintaining the building. The witness said he himself was a busy man and owned other buildings, and that his father had authority to handle small matters, because the witness did not wish to be bothered with them; that the witness never drew any particular line as to what should be considered small matters, and that whether his father had authority to hire the building cleaned would depend upon whether it was considered a small matter.

[1, 2] It cannot be said that the evidence did not reasonably warrant the inference that Nathan Davis' act in hiring Greenough was within the scope of his authority and binding on plaintiff in error. Lumbermen's Ins. Co. v. Bell, 166 Ill. 400, 45 N. E. 130, 57 Am. St. Rep. 140; Mechem on Agency (2d Ed.) 296. It is not material that Greenough was not informed as to who the principal was at the time he was employed. Barker v. Garvey, 83 Ill. 184. While the evidence on the subject of agency was somewhat conflicting, the testimony of Greenough was positive as to his employment by Nathan Davis, and it is undeniable that the testimony on the question of his agency for the plaintiff in error warranted the conclusion that in making the employment he was acting within the scope of his authority.

[3] It is also contended by plaintiff in error that he is not liable under section 31 of the Workmen's Compensation Act (Hurd's Rev. St. 1919, c. 48, § 152d). His argument is he was engaged in the business of a hard-

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ware and paint merchant, and while he owned the building in question and some others, which he maintained and rented for income, he was not engaged in the business of maintaing the building and the business in which he was engaged was not embraced in the Workmen's Compensation Act. His own testimony shows that he owned the bulding in question and some others, which he rented for income, and that he kept them in condition and repair for that purpose. We do not understand that it is required by the Workmen's Compensation Act that one shall be exclusively engaged in one of the hazardous occupations enumerated to make him liable to compensation. This court has held that a man may engage in two kinds of business—one not extrahazardous, or within the Workmen's Compensation Act, unless the party so elects; and the other may be within the act, without election, because it is extrahazardous. Vaughan's Seed Store v. Simonini, 275 Ill. 477, 114 N. E. 163, Ann. Cas. 1918B, 713. The work being done at the time the accident happened was done in maintaining the buildng. It was, in fact, dangerous and extrahazardous. Chicago Cleaning Co. v. Industrial Board, 283 Ill. 177, 118 N. E. 989. If it was being done for plaintiff in error in maintaining his building, we do not see how it could reasonably be said that Greenough, as the employer of defendants in error, was bound by the Compensation Act; but if he was insolvent, and had no insurance, the owner of the buildng, his employer, would not be bound by the act. Other cases more or less pertinent, in which this question has been discussed, are Johnson v. Choate, 284 Ill. 214, 119 N. E. 972, Seggebruch v. Industrial Com. 288 Ill. 163, 123 N. E. 276 and Storrs v. Industrial Com. 285 Ill. 595, 121 N. E. 267. The liability under section 31 has been sustained in American Steel Foundries v. Industrial Board, 284 Ill. 99, 119 N. E. 902, and Butler Street Foundry Co. v. Industrial Board, 277 Ill. 70, 115 N. E. 122.

No question of the constitutionality of the Workmen's Compensation Act, or any provision of it, was raised in the circuit court, and it cannot be raised in this court for the first time. Savoy Hotel Co. v. Industrial Board, 279 Ill. 329, 116 N. E. 712.

The judgment is affirmed.

Judgment affirmed.

PANTHER CREEK MINES v. INDUSTRIAL COMMISSION ET AL. (No. 13682.)

(Supreme Court of Illinois. Feb. 15, 1921. Rehearing Denied April 7, 1921.)

130 Northeastern Reporter, 321

1. DIVORCE—MASTER AND SERVANT—PARENT'S OBLIGATION TO SUPPORT DEPENDENT CHILD NOT AFFECTED BY DIVORCE.

A divorce decree finding a waiver of alimony and awarding the custody of minor children to the mother does not affect the father's legal liability to support a minor son, and an award of benefits to the son under the Workmen's Compensation Act for father's death is proper, in the absence of proof of the son's ability to support himself and of his emancipation, though he attains his majority pending the proceedings.

(For other cases, see Divorce, § 324; also Master and Servant, Dec. Dig. § 388.)

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Error to Circuit Court, Sangamon County; E. S. Smith, Judge.

Proceeding under the Workmen's Compensation Act, by J. J. Pierce, administrator of Edward Smith, deceased, for an award for decedent's death, opposed by the Panther Creek Mines, employer. An award was granted by the Industrial Commission for support of Harry Smith, decedent's minor son, and affirmed by the circuit court, and the employer brings error. Affirmed.

T. W. Quinlan, of Springfield, for plaintiff in error.

Kerr, MacDonald & Murphy, of Chicago, for defendant in error.

STONE, J. Edward Smith, while employed by plaintiff in error on the 29th day of March, 1919, received an injury which resulted in his death. The injury arose out of and in the course of his employment. Both he and his employer were under the Workmen's Compensation Act (Laws 1913, p. 335). His wages were stipulated to have been $24 per week. The deceased was survived by his daughter, Margaret Alphemie Smith, born November 7, 1900, and his son, Harry Smith, born August 13, 1898, who were his only heirs at law. Margaret Smith, the wife of the deceased, had secured a divorce from him in 1919; the decree finding that there had been a property settlement and waiver of claim of alimony on the part of the complainant. By the divorce decree the custody of the children was awarded to the complainant. At the time of the death of Smith the daughter was 18 years of age and the son was 20 years of age. On March 11, 1920, the Industrial Commission on review found the deceased left him surviving as the only person whom he was under legal obligation to support, his son, Harry Smith, who was then a minor, but who during the pendency of the proceedings in this cause attained his majority, and awarded him the sum of $12 per week for a period of 291 weeks and the sum of $8 for one week.

[1] The only question involved in this case is whether or not the deceased left any one whom he was under legal obligation to support. It was not contended that he was under legal obligation to support the daughter, who had arrived at the age of 18 prior to the injury of the deceased. Plaintiff in error contends that the effect of the divorce decree, in which no alimony was awarded, was to release the deceased from all obligation to support the son. This contention cannot be sustained It has been held in this state that in cases where a divorce has been granted with custody of the children to the mother and a gross sum had been allowed her as alimony such a situation does not release the father from his legal liability to provide the necesary support for his minor children. Plaster v. Plaster, 47 Ill. 290; Cowls v. Cowls, 3 Gilman, 435, 44 Am. Dec. 708. The divorce decree did not affect the legal liability of the deceased to support the son.

It is also urged that this son was 20 years of age and attained his majority during the pendency of these proceedings that as a matter of fact he was able to support himself; and that even admitting that otherwise the deceased would be liable for the support of this son, he had been released from such liability by reason of the ability of the son to support himself. This argument appears not to have impressed itself upon counsel for plaintiff in error on the hearing before the Industrial Commission, as the record is absolutely silent on the question as to whether or not the son was supporting himself. There is not one word in the record to show that he was even able to contribute toward his own support, and, without going further into what the record does not show it is sufficient to say that it shows absolutely nothing on that question.

[2] It has long been the rule in this state that where a son is supporting himself, controlling his own income, and is without the control

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of his parents he is emancipated, and the obligation to support such child ceases. Iroquois Iron Co. v. Industrial Com., 294 Ill. 106, 128 N. E. 289; Scott v. White, 71 Ill. 287; Hunt v. Thompson, 3 Scam. 179, 36 Am. Dec. 538. It is equally well settled, however, that in the absence of such emancipation the father is bound to support his minor children where he is able to do so. Bedford v. Bedford, 136 Ill. 354, 26 N. E. 662; McMillen v. Lee, 78 Ill. 443; 29 Cyc. 1606; Plaster v. Plaster, supra. This duty, as we have seen, ceases upon the child becoming emancipated or attaining his majority, unless it be shown that he has become unable to support himself, when the parent is required, under the Pauper Act, to contribute to his support. Until there is proof that the son is emancipated, such liability continues until the son reaches the age of 21 years. Plaintiff in error had the opportunity to make such proof if such there was but did not do so. Under this state of the record, therefore, the judgment of the circuit court confirming the award of the Industrial Commission must be affirmed.

Judgment affirmed.

AUBURN & ALTON COAL CO. v. INDUSTRIAL COMMISSION ET AL. (No. 13683.)

(Supreme Court of Illinois. Feb. 15, 1921. Rehearing denied April 7, 1921.)

130 Northeastern Reporter, 322

MASTER AND SERVANT — DEATH OF PARENT LEAVING MINOR SON HELD COMPENSABLE.

An award is properly made under Workmen's Compensation Act, § 7, par. (a), for the benefit of deceased employee's minor son, 20 years old, who has lived in a distant state for 6 or 8 years, where there is no proof of emancipation, which may be established by proof that he had supported himself and that his father had not contributed to his support.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Error to Circuit Court, Sangamon County; E. S. Smith, Judge.

Proceeding under the Workmen's Compensation Act by Hugh Pierce, administrator of John P. Motley, deceased for an award for decedent's death, opposed by the Auburn & Alton Coal Company, employer. An award was made by the Industrial Commission and confirmed by the circuit court, and the employer brings error. Affirmed.

T. W. Qinlan, of Springfield, for plaintiff in error.

Kerr, MacDonald & Murphy, of Chicago, for defendant in error.

THOMPSON, J. July 3, 1918, John P. Motley, an employee of plaintiff in error, died from injuries arising out of and in the course of his employment. He was a widower and left surviving him was his only heirs at law two sons—Dixon, 22 years of age, and John, 20 years of age. John had resided in the state of Montana for 6 or 8 years, during which time deceased was a resident of and employed in the state of Illinois. The Industrial Commission found that the deceased was under legal obligation to support his minor son John, and pursuant to the provision of paragraph (a) of section 7 of the Workmen's Compensation Act (Laws 1913, p. 341) awarded to the administrator the sum of $3,500. This

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award was confirmed by the judgment of the circuit court of Sangamon county, and this writ of error is prosecuted to review that judgment.

The only question presented by this record is whether the mere fact of minority of a child imposes a legal obligation upon his parent to support him. So far as this record shows, this question is raised for the first time in this court. Two witnesses were examined before the arbitrator—Walter D. Hoyt, deputy clerk of the probate court of Sangamon county, who produced the record showing proper administration of the estate of deceased, and Hugh Pierce, administrator of the estate of deceased, who testified that he was an uncle of deceased and who gave all the nformation in the record regarding the family of deceased. He was not asked and he did not say whether this minor son John was supporting himself or whether deceased was contributing to his support, or in what part of Montana he was living or why he was living there. For all that appears from the record he may have been an invalid and may have been living there at the direction and expense of deceased. There is not a word of testimony in this record from which it can be determined that this minor son was emancipated. Where, as in this case, it appears that a boy 20 years of age has lived in a distant state for 6 or 8 years, proof that he had been supporting himself and that his father had not been contributing to his support would be sufficient to show that the son was emancipated and that the father was not under legal obligation to support him. Until the employer produces some evidence from which the Industrial Commission can reasonably find emancipation, it must be held, under our Workmen's Compensation Act, that a parent is under legal obligation to support his minor children.

Under authority of our holding in Panther Creek Mines v. Industrial Com. (No. 13682) 130 N. E. 321, the judgment of the circuit court is affirmed.

Judgment affirmed.

FORT BRANCH COAL MINING CO. v. FARLEY. (No. 10903.)

(Appellate Court of Indiana Division No. 2. March 9, 1921.)

130 Northeastern Reporter, 132

1. MASTER AND SERVANT—COMPENSATION PERIOD FOR TOTAL DISABILITY NOT TERMINATED BY EMPLOYEE'S RECEIPT RECITING CESSATION OF DISABILITY.

Injured employee's receipt reciting that total disability had ceased did not preclude him from recovering compensation under Workmen's Compensation Act for total disability subsequent thereto.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

2 MASTER AND SERVANT—INDUSTRIAL BOARD'S DETERMINATION OF CESSATION OF TOTAL DISABILITY NOT CONCLUSIVE.

Industrial Board's determination that the employee's total disability had ceased will not prevent recovery of further compensation on recurrence of total disability.

(For other cases see Master and Servant, Dec. Dig. § 419.)

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3. MASTER AND SERVANT — EMPLOYEE ON RECURRENCE OF TOTAL DISABILITY NOT REQUIRED TO APPLY FOR REINSTATEMENT WITHIN YEAR.

Under Workmen's Compensation Act. § 45, injured employee is not required, on recurrence of total disability after apparent cessation thereof, to apply for reinstatement within a year after the total disability had prima facie ceased.

(For other cases see Master and Servant, Dec. Dig. § 419.)

Appeal from Industrial Board.

Proceedings under the Workmen's Compensation Act for compensation for injuries by William B. Farley opposed by the Fort Branch Coal Mining Company, employer. Award for claimant by the Industrial Board, and employer appeals. Affirmed.

Chas. E. Henderson and James L. Murray, both of Indianapolis, for appellant.

Claude A. Smith and T. Morton McDonald, both of Princeton, for appellee.

DAUSMAN, P. J. On December 11, 1919, the appellee filed what purports to be an original application for compensation. The appellant filed a pleading which is denominated "special answer." This document is somewhat in the nature of a demurrer, in which it is alleged that the application shows on its face that it was not filed until more than two years after the date of the injury, and that the right to compensation is therefore barred. Thereupon the appellant moved to dismiss the proceeding. The motion was overruled and the appellee was granted leave to amend his application so as to ask a review on account of a change in condition, which was done. The usual hearing and review resulted in the following finding of facts:

"That on the 4th day of September, 1917, plaintiff was in the employment of the defendant at an average weekly wage of $18.90; that on said date the plaintiff received a personal injury by an accident arising out of and in the course of his employment, of which the defendant had actual knowledge at the time; that said injury resulted in the plaintiff's temporary total disability to work beginning on the date of his injury and continuing until and including October 15, 1917 that on the 19th day of September, 1917, plaintiff and defendant entered into a compensation agreement whereby the defendant agreed to pay to the plaintiff compensation at the rate of $10.40 per week during his total disability to work, as a result of his injury, not exceeding 500 weeks, said compensation to begin on the 11th day of September, 1917 that said agreement was approved by the Industrial Board on the 28th day of September, 1917; that under said agreement the defendant paid to the plaintiff compensation until and including October 15, 1917, on which date the plaintiff signed a final receipt reciting that his disability ceased on October 15, 1917, and that he had a total disability of forty-one days resulting from the injury; that on said date plaintiff's temporary total disability to work had ceased temporarily; that as a result of his injury the plaintiff has been wholly disabled for work intermittently since the 15th day of October, 1917; that for short periods of time he has been able to work and earn wages and during the other periods of time he has been wholly disabled and has been unable to earn any wages; that as a result of his injury the plaintiff was totally disabled for work and did not work and did not earn any wages for 64 weeks between the 15th day of

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October, 1917, and the date of the original hearing, which was heard on March 10, 1920; that at said time the plaintiff was wholly disabled for work."

On the foregoing facts the Board made the following award:

"It is therefore considered and ordered by the full Industrial Board that the defendant be and is hereby ordered to pay to the plaintiff 64 weeks' compensation at the rate of $10.40 per week, for the plaintiff's total disability between October 15, 1917, and March 10, 1920, as provided for in the agreement of September 19, 1917, and to pay to the plaintiff compensation at said weekly rate for the disability subsequent to March 10, 1920, resulting from the injury, as provided in the agreement of September 19, 1917."

The appellant presents the following specific contentions;

(1) That the finding shows that the workman was injured September 4, 1917; that on October 15, 1917, he signed a receipt for the compensation for total disability; that he did not file with the Board any claim for further compensation until December 11, 1919, being more than two years after injury and more than two years after the execution of the receipt; and that therefore the Board was wihout jurisdiction.

(2) That there is absolutely no evidence to sustain the finding that at the time of the first hearing, viz., March 10, 1920, the appellee was wholly disabled for work.

[1] 1. The decisive question is; When, if at any time, did the compensation period stated in the original award terminate? The maximum compensation period for total disability is fixed definitely by the law; but the actual compensation period for total disability may terminate at any time before the maximum limit has been reached—depending upon the condition of the injured workman. His complete or partial recovery, or his death, within the maximum period, would bring to an end the actual compensation period for total disability. Under the facts of this case the actual compensation period could not be definitely stated in the award. It was impossible for any one to know in advance when the period of total disability would come to an end; and therefore the most that could be written into the award was that compensation should be paid during total disability, not exceeding 500 weeks" (the maximum period fixed by statute). In this respect, precision was not attainable. The beginning of the compensation period was, of course, definitely fixed in the award, but the end can come only when total disability shall have actually ceased or when the maximum time shall have expired. The question is one of fact. Now, by whom and by what methods is the fact to be determined?

We conceive that the fact might be evidenced by the agreement of the parties. But suppose that an employer, by fraud or duress, induced or compelled the employee to sign a final receipt or statement to the effect that his total disabilityy had ceased. In that event, would any one contend that thereby the fact had been established? Suppose the parties, fairly and honestly, should enter into an agreement to the effect that the workman's total disability had ceased, would that establish the fact irrevocably? They may have been mistaken. On returning to his labor the workman may discover his error; and actual trial may prove that he is wholly unable to work in any capacity; and in that case it would not do to say that the agreement, which rests on a mutual mistake of fact, marks the termination of the compensation period stated in the award.

[2] It would seem that the employer, being of the opinion that the workman's total disability had ended and that he ought to be relieved from further payments, might petition the Board to determine the fact and make it a matter of record. But even the determination by the Board might not be permanent. The cessation of the workman's total

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disability might have been only apparent or temporary. If his total disability should recur, it would become the duty of the Board to order further payments of compensation at the rate fixed for total disability. By the inherent nature of the plan on which the compensation act rests, it must be so; and one of the objects of the Board's continuing jurisdiction is to accomplish that very purpose. In cases like the one at bar the compensation period stated in the original award can terminate in one of two ways only: (1) By the lapse of the maximum time fixed by statute; or (2) by the actual (not apparent) permanent (not temporary) cessation of the total disability.

[3] It may be argued with much plausiblity that where a prima facie showing has been made by the filing of a receipt or otherwise, that total disability has ceased, there is then such a termination of the compensation period as will set the statute of limitation running; and that if the workman believes himself entitled to further compensation he must apply for reinstatement within a year thereafter. The conclusive answer to that argument is that the statute does not so provide. Section 45, Workmen's Compensation Act (Acts 1919, p. 167).

There is no finding that the compensation period has terminated. On the contrary, the facts found are to the effect that at the time the receipt was signed the workman's total disability had ceased temporarily only; that his total disability was of an intermittent type; and that at the time of the hearing herein he was totally disabled. On these facts the Board was right in holding that the "compensation period" had not terminated. It will be observed that the relief granted is not an original award nor an award based on changed conditions but is merely an order that payments under the first award be resumed and made to cover those periods during which total disability actually existed. In this feature the Board has acted consistently.

2. The second contention may be answered by saying that there is an abundance of evidence to sustain the finding.

The award is affirmed.

DULAC v. DUMBARTON WOOLEN MILLS ET AL.

(Supreme Judicial Court of Maine. March 10, 1921.)

112 Atlantic Reporter, 710.

1. MASTER AND SERVANT—USE OF FREIGHT ELEVATOR HELD NOT "WILFUL" WITHIN COMPENSATION ACT.

Use by a female employee of a freight elevator in leaving her place of work to go home *held* not "willful" within the meaning of Workmen's Compensation Act, § 8.

(For other cases, see Master and Servant, Dec. Dig, § 380.)

(For other definitions, see Words and Phrases, First and Second Series, Willful— Willfully.)

3. MASTER AND SERVANT—COMMON-LAW RIGHTS MAY BE CHANGED AS PRESCRIBED BY COMPENSATION ACT.

The common-law relations of master and servant are allowed to be changed by the consent of the parties, and by formal written notice they are authorized but not compelled to modify their rights and remedy as prescribed by the common law under Workmen's Compensation Act, §§ 6, 7.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

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4. MASTER AND SERVANT—BURDEN OF PROOF ON COMPENSATION CLAIMANT.

An employee's agreement under the Workmen's Compensation Act that his right to recover for personal injuries shall occur from an accident "arising out of or in the course of his employment" is a contractual right and the burden of proof is on him to establish these facts.

(For other caases, see Master and Servant, Dec. Dig. § 403.)

5. MASTER AND SERVANT — INJURY WHILE LEAVING ON FREIGHT ELEVATOR HELD NOT TO "ARISE OUT OF EMPLOYMENT" WITHIN COMPENSATION ACT.

Where female employee used a freight elevator in leaving the building to go home, an injury received by her *held* not to arise out of her employment under the Workmen's Compensation Act; it not being a custom for employees to use such elevator, and she having no reason for using the elevator.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words an Phrases, First and Second Series, Course of Employment.)

Appeal from Supreme Judicial Court, Penobscot County, at Law.

Proceeding by Lizzie Dulac under the Workmen's Compensation Act to obtain compensation for personal injuries opposed by the Dumbarton Woolen Mills, the employer, and the Aetna Life Insurance company, insurance carrier. Compensation awarded, and the insurance company appeals. Appeal sustained, decree reversed, and petition dismissed.

Argued before Spear, Hanson, Pilbrook, Morrill, and Wilson, JJ.

Andrews & Nelson of Augusta, and W. T. Gardiner of Gardiner, for appellant.

W. B. Pierce, of Dexter, for appellee.

SPEAR, J. This case comes up on appeal from the finding of the chairman of the Industrial Commission in favor of the petitioner.

The essential facts as found by him are as follows:

"The only question raised in the case is whether or not the injury to the petitioner is due to an accident arising out of and in the course of her employment.

"The facts brought out in the evidence which was introduced at the hearing were, briefly, as follows:

"Lizzie Dulac was, on the 28th day of August, 1919, an employee of the Dumbarton Woolen Mills at Dexter Me. Her work was in what was known as the cardroom of the mill. On the day in question she had finished her work and was leaving the building to return to her home. There were two exits from the floor of the mill where the cardroom was located, which went out to the street level. There was also a stairway leading from the cardroom to the basement of the mill, one floor below the cardroom. By going to the basement floor Mrs. Dulac could ge to her home a back way which was shorter than by going out on the street level from the cardroom flooor. Besides the stairway leading from the cardroom floor to the basement floor, there was an elevator used to carry freight between the basement and the other two floors of the mill. On the particular night in question, Mrs. Dulac, instead of going down the stairway to the basement, took the elevator. The injury occurred in the basement as she was getting out of the elevator. The respondents contend that in using the elevator Mrs. Dulac

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placed herself outside of the provisisons of the Workmen's Compensation Act (Rev. St. c. 50), in that the use of the elevator was forbidden to employees except in handling freight, and further that no part of Mrs. Dulac's work required the use of the elevator in any way."

The elevator was installed and used for the purpose of carrying freight to the mill, with a landing on the same floor as the cardroom where the petitioner worked but not in or near that room. To reach the elevator shaft from the cardoom, it was necessary to go through a door into another room and pass up a short alleyway, into the elevator building which constituted an ell on the mill building. The elevator consisted merely of a platform 7 or 8 feet square with two sides and a beam across. It is too evident for controversy that this crude elevator, situated as it was, was not intended for passenger purposes, although the evidence shows that it was used some by individual workmen in going up and down, and by the plaintiff, as she says, a maximum of eighteen times during her eight years' employment.

There is no evidence that the respondent or any of its agents knew of the plaintiff's personal use of the elevator. On the day of the injury, she was alone on the elevator and attempting to operate it herself, and was injured as the testimony unquestionably shows by her own ignorance of how to operate. But the manner of the accident is not material. Her act is not barred by section 8.

Under these admitted facts and circumstances, was she injured in an accident "arising out of and in the course of her employment"?

1. What part of her employment did this accident arise out of? Undoubtedly her entrance and departure from the building and premises in coming to her work or going to her house was a part of her employment. But if there were several regular avenues of approach and departure designed for these express purposes, has an employee a right to take a forbidden and hazardous way instead of the safe and regular way and hold the employer liable? While the evidence may warrant the conclusion that this elevator was used occasionally by the employers, in moving between floors, yet it would be puerile to claim that the plaintiff, who had been in the mill eight years, did not know that this eleveator was installed and used for freight and no personal service. She knew there were several avenues of approach and departure designed for these express purposes.

A mathematical calculation, based upon her own testimony, will show that, if she worked 300 days a year she used these regular avenues of entrance and exit about 2,400 times, while using the elevator giving the maximum to her own testimony, only 18 times. The average use of the elevator would be once in 133 days.

Under this analysis of facts, according to the highest claim of the plaintiff, there is no evidence, whatever, that she used the elevator on the day of the accident, with the impression that it was the regular, usual, or accustomed way for her to go from her workroom to the street. The evidence is also conclusive that the employer would not have permitted her to have attempted to operate the elevator had he known she had, or intended to do so. He had notices posted against the use of it by any employee.

It was a dangerous machine. He knew it. The law of self-preservation was ample incentive to forbid and prevent its use. The conclusion is therefore inevitable both from the undisputed testimony and the overwhelming circumstances, that this elevator was not intended for personal use nor as a means of ingress or egress from the factory. Her own testimony is conclusive upon this point. She says:

Q. Did anybody ever see you riding in the elevator?

A. I don't think so.

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Q. And you never did that (used it) when anybody was around to see you, did you?

A. No.

She then says she never saw any one go down on the elevator.

On direct examination:

Q. When people got through work at night, have you seen them go down in the elevator?

No.

Again on direct:

Q. I will ask you again. Did you ever go down on the elevator before?

A. Yes, three or four times she has gone down that way.

Q. When people got through work at night, have you seen them go down in the elevator?

No.

Q. Do you understand what Mr. Cloutier (interpreter) says?

A. Yes.

There can be no misunderstanding upon the important fact that she never saw any operator use the elevator for exit and that no one ever saw her use it for that purpose.

In corroboration, if corroboration is needed, Leach, for five years overseer of the cardroom in which Mrs. Dulac worked, says:

Q. Did you ever see Mrs. Dulac on the freight elevator?

A. No.

In regard to the use of the elvator, he says:

Q. Is it in sight all the time?

A. No you have to go through a little door and into this elevator building, and there is a little passageway of four or five feet, before you get to the elevator.

Q. What direction do you give to your employees in regard to using the elevator?

A. Don't give any, because we don't have to use it.

Q. It isn't used by your room?

A. My room doesn't use it; nobody that works there uses it.

From a fair analysis and statement of evidence, the following facts are established beyond any question:

(1) That the plaintiff was never seen to use the elevator, and never saw any other person use it for the purpose of leaving the building.

(2) That she knew of no permission by usage, by seeing it used by a single other person for the purpose of exit.

(3) That her employer had no knowledge that she ever used it, or intended to use it.

(4) That it was a freight conveyor and not intended for use by the employees.

(5) That the plaintiff knew this as well as the employer, or any other operative, knew it.

[1] The chairman of the Commission, however, notwithstanding the above facts, proven by the evidence of the plaintiff herself, and supported by all the other testimony, holds, as we understand his finding, that the only defense to the claim must be found in secton 8, by showing a willful intent to cause the accident. There was no willful intent within the meaning of the statute. It requires neither argument nor citation to establish that fact.

[2] Accordingly, the only ground upon which the finding of the chairman could be based is that it was the habit of the employees to use the elevator for the purpse of exit, and that the plaintiff had a right to do as the others did, upon the implied consent of the employer. But

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it is evident that for one to invoke the use of a particular usage as this was, as a reason or excuse for changing contractual relations, it must be first shown that such usaage is known to the party invoking it. Such knowledge is absolutely negatived by the plaintiff's own testimony.

In Norton v. University, 106 Me. 436, 76 Atl. 912, it is said: In the first place, it was not claimed to be other than a local usage, and as such it could have no effect unless known to both parties so that they might be presumed to have contracted with reference to it. If not known to the parties their rights and liabilities could in no event be affected by it. The burden rests upon the plaintiff to prove such knowledge.

In Stevens v. Reeves, 9 Pick. (Mass.) 198, it is said with reference to invoking the custom that an operative in a factory should give two weeks' notice of an intention to quit. In order to make this a part of the contract, as the usage supposed is a particular one and not a general custom, it should here appear that the denfendant knew the usage, when he entered upon the work or before he left it. This is required in order to give effect to a particular usage so as to operate upon a contract.

That the use of the elevator in question, if used by the employees, was a particular one, not a general custom, needs no discussion. Bodfish v. Fox, 23 Me. 90, 39 Am. Dec. 611. See, also, Norton v. University of Maine, 106 Me. 440, 76 Atl. 912.

[3] That the relationship of the plaintiff and defendant is contractual needs no discussion. Their common-law relation of master and servant are allowed to be changed by the consent of the parties. By formal written notice, they are authorized, but not compelled, to modify their rights and their remedy as prescirbed by the common law. R. S. c. 50 §§ 6 and 7.

[4] Among other things, the employee agrees that his right to recover shall occur from an accident "arising out of or in the course of his employment." This is clearly a contractual righ.t The burden of proof is on him to establish these facts. Westman's Case, 118 Me. 135, 106 Atl. 532, Mailman's Case, 118 Me. 172, 106 Atl. 606.

The plaintiff, in the present case, does not bring her contention either within the doctrine of the English case, McGuire v. Gabbott, 10 N. C. C. A. 356, when a hoist in which the petitioner was ascending gave way, in which the court say: "But it was habitually used by the foreman in charge of the building and by the men every morning when they came." The usage was known to all and also a means of conveyance employed by the defendant.

Nor do the facts bring it within the rule of Von Ette's Case, 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D, 641, where the men were working, by night in a compositor's room poorly ventilated with a temperature at times of 110 degrees The plaintiff went out upon an adjoining roof for air, fell from the roof, and was killed. In holding that the accident arose out of his employment, the court say upon the question of usage:

"There was ample evidence of a general practice of the men who worked in the composing room to go out upon the roof to get fresh air and cool off on hot nights and that such practice was known to the employer."

The court says upon these facts:

"The question whether the injury arose out of and in the course of the employment is one of some difficutly. A majoriy of the court are unable to say that the finding of the board was wrong. The accident happened upon the premises of the employer, and we think, in view of the practice which might have been found to exist under which the men went upon the roof for fresh air, that the act of the deceased, in going

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there on a warm night, was not necesarily outside his employment, but could have been found to be incidental thereto."

This case, by a divided court, clearly turns upon the fact of a "practice found to exist" and known to the decedent and employer alike. Hence, the contractual relations were modified in respect of the scope of employment.

But no such relation is found in the case at bar.

In Mailman's Case the court define the phrase "arising out of and in the course of the employment":

"Both of these elements must appear. The accident must have arisen out of and in the course of the employment. In other words it must have been due to a risk to which the deceased was exposed while employed and because employed by the defendant."

It will be seen from this definition, which is the best we have yet observed, that there are two distinct elements of proof namely risk while employed, and risk because employed. See Westman's Case, 118 Me. 139, 106, Atl. 532. Let us pass the first element "while employed" and apply the test of the second, "because employed." In Westman's Case the second element is further defined as follows:

"An injury is received in course of the employment when it comes while the workman is doing the duty which he is employed to perform.

This is quoted from McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306.

Can it be said under the evidence and circumstances that the plaintiff was injured "because employed," or while she was doing the duty which she "was employed to perform"?

[5] On the contrary, the plaintiff's own evidence proves that the use of the elevator was no part of her work, duty, or privilege; that it was not incidental to her work; that she never saw an employee use it, nor does she know that any person ever saw her use it for the purpose of exit; that it had no connection with the room in which she worked, that it was situated entirely apart from it "in a little building built on" and could be reached only by going through a little door" and "into the elevator building" and through "a little alleyway, four or five feet before you get to the elevator"; that she had no occasion to use the elevator for exit, as there was "a good easy flight of stairs" leading from the cardroom directly to the floor below, and that there were two regular exits from her room directly to the street, on the street level.

The admitted facts in this case take it out of the realm of uncertainty or even conjecture. They negative any causal relation between the plaintiff's employment and her use of the elevator. As seen, it was neither a part of nor in contemplation of her employment. The reverse, rather, is true.

We are therefore of the opinion that the accident did not occur in the course of the plaintiff's employment.

Under the conceded facts, we are of the opinion, also, that the plaintiff's case cannot be regarded as an injury "arising out of her employment." Westman's Case lays down this rule:

"The great weight of authority sustains the view that these words 'arising out of' mean that there must be some causal connection between the conditions under which the employee worked, and the injury which he received. * * * 'Under this test,, if the injury can be seen to have followed' as a natural incident of the work, and to have been contemplated, by a reasonable person familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing, proximate cause, and which comes from a hazard to which the workman would have been equally exposed apart from the employment."

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Again it is said:

"It might with safety be said that in order for the accident to arise out of the employment, the employment must be the proximate cause of the accident."

Recalling without restating the facts can it be said there is any causal connection between the conditions under which the plantiff worked and her injury? That her injury was the result of the exposure occasioned by the nature of her employment? If so, what was it? She had no occasion to use the elevator. She was not authorized to use it; whether she knew it or not, it was against the rule. She had no knowledge of any usage, or implied consent of the employer, as it or its agent never saw or knew her to use it.

Not only was her use of the elevator not a natural incident to her work to have been contemplated, but an unexpected incident, not reasonable to have been contemplated. She never was known by any person, her employer, its agent or other employee, as her evidence proves, to use it for the purpose of exit. There was no incident or fact upon which the employer could base even a conjecture, much less a "contemplation," that she ever had or ever would use the elevator as she did. Accordingly, we are unable to find any evidence whatever that her injury can "fairly be traced to the employment as a contributing, proximate cause."

As much as we regret the misfortune of this case, it is yet a matter of legal interpretation which the court is bound to recognize regardless of the parties involved.

Recognizing the force of the statute that the finding of the chairman shall be final in the absence of fraud, we are nevertheless of the opinion that, upon the undisputed facts in the case at bar, there was no adequate evidence for the finding, and consequently as a matter of law it should be set aside.

Appeal sustained.

Decree reversed.

Petition dismissed.

MACDONALD v. EMPLOYERS' LIABILITY ASSUR. CORPORATION ET AL.

(Supreme Judicial Court of Maine. March 15, 1921.)

112 Atlantic Reporter, 719

1. MASTER AND SERVANT—COMPENSATION COMMISSION'S FINDING REVIEWABLE TO DETERMINE EXISTENCE OF EVIDENCE.

Though, under Workmen's Compensation Act, § 34, there can be no appeal upon questions of fact found by the Industrial Accident Commission or its chairman, and his decision in the absence of fraud shall be final, the court can on appeal review the findings on questions of fact to the extent of ascertaining whether there is any palpable evidence upon which the decision can be sustained.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

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2. MASTER AND SERVANT — QUESTIONS OF LAW IN COMPENSATION CASE REVIEWABLE.

Under the Workmen's Compensation Act all questions of law raised by the pleadings are subject to the revision of the law court on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

3. MASTER AND SERVANT — CONTINUANCE WITHIN DISCRETION OF COMMISSION.

What constitutes a speedy, efficient, and inexpensive procedure, required by the Workmen's Compensation Act, is a question of fact addressed to the discretion of the Industrial Accident Commission's chairman, and his granting a continuance at his own volition can be reviewed only if his discretion has been abused.

(For other cases, see Master and Servant, Dec. Dig. § 414.)

4. MASTER AND SERVANT — DEPENDENCY, UNLESS PRESUMED, MUST BE FOUND AS FACT.

Under Workmen's Compensation Act, § 1, par. 8, defining dependents, construed with section 12, providing for compensation if the employee leaves only partial dependents, a state of dependency must first be found as a fact except in the cases where it is conclusively presumed, before employer or insurer can be held liable for the payment of any sum for the support of the claimant.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

5. MASTER AND SERVANT—"DEPENDENT" WITHIN COMSATION ACT DEFINED.

Within Workmen's Compensation Act, "dependent," which ordinarily means one relying on something for support, not self-sustaining, is limited to one who must rely on the contributions of the employee for some substantial portion of his necessary support (quoting Words and Phrases, Second Series. Dependent).

(For other cases, see Master and Servant, Dec. Dig. § 388.)

6. MASTER AND SERVANT—DEPENDENCY DETERMINED AS OF TIME OF INJURY.

Under the express provisions of Workmen's Compensation Act. § 1, par. 8, that questions of entire or partial dependency shall be determined as the fact may have been at the time of the injury, a ruling by the chairman of the Commission that dependency rests on the amount of the contributions by the employee during the past year or two, and the condition of the parent during the past year, was erroneous.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

7. MASTER AND SERVANT — REVIEWING COURT, AFTER SUSTAINING OBJECTIONS, CAN DETERMINE CASE ON EVIDENCE.

Under Workmen's Compensation Act, § 34, providing for appeal to the law court as in cases of equity, except that findings of fact shall not be reviewed, the court after sustaining objections to a ruling of the chairman on a matter of law, can determine the case upon the evidence found in the report.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

8. MASTER AND SERVANT — COMPENSATION CLAIMANT'S STATUS IN SOCIETY CONSIDERED IN DETERMINING "DEPENDENCY."

In determining the question of dependency under the Workmen's Compensation Act, the status of the claimant in society and his reason-

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able needs and expectations should be considered, since there is no dependency if the claimant's own earnings were sufficient to sustain himself and family, in a manner befitting his class and position in life.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

9. MASTER AND SERVANT — INTENT OF COMPENSATION ACT STATED.

The intent of the Workmen's Compensation Act was not to burden the industries of the state, but to transfer the burden resulting from industrial accidents to the industry and thereby finally to distribute it upon society as a whole.

(For other cases, see Master and Servant, Dec. Dig. § 348.)

10. MASTER AND SERVANT — COMPENSATION CLAIMANT MUST SHOW ACTUAL DEPENDENCY.

A claimant for compensation as a partial dependent under the Workmen's Compensation Act must show that his earnings were insufficient for the support of the family without assistance from the employee at the time of the injury.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

11. MASTER AND SERVANT—PORTION OF CHILD'S CONTRIBUTIONS PAID FOR LUXURIES NOT CONSIDERED IN DETERMINING PARENT'S DEPENDENCY.

On a father's claim for compensation for the death of his minor son, where there was evidence to sustain the finding that the claimant was partially dependent on the son, the amount expended by the claimant for the purchase of an automobile, for unnecessary repairs to the house, and for amusements are to be deducted from the contributions by the son to the family in determining amount contributed by the employee to the support of the partial dependent on which the amount of compensation is based.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

12. MASTER AND SERVANT—ONLY PORTION OF EARNINGS USED FOR LAWFUL SUPPORT CONSIDERED IN DETERMINING PARTIAL DEPENDENCY.

Under Workmen's Compensation Act, § 1, par. 8, defining dependents as those who are dependent on the earnings of the employee, it must be shown, to establish a claim of depenency, not what part of the earnings were paid to the claimant, but what part was actually used by him for actual and lawful support.

(For other cases, see Master and Servant, Dec. Dig. § 388.)

Appeal from Supreme Judicial Court, Cumberland County, at Law.

Proceeding under the Workmen's Compensation Act by George Mac Donald to recover compensation for the death of his minor son, Walter MacDonald, employee, opposed by the Employers' Liability Assurance Corporation and the Pocahontas Coal & Fuel Company. From a decision of the chairman of the Industrial Accdent Commission confirmed by a sitting justice of the Supreme Judicial Court awarding compensation, the employer and insurer appeal. Appeal sustained, and decree modified by reducing the amount of the compensation.

Argued before Cornish, C. J., and Spear, Phillbrook, Dunn, and Deasy, JJ.

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Robert Payson, of Portland, for appellants.
Samuel L. Bates, of Portland, for appellee.

SPEAR, J. This is an appeal from the decision of the chairman of the Industrial Accident Commission confirmed by a sitting justice of the Supreme Judicial Court in accordance with the provisions of R. S. c. 50, by which decision compensation at the rate of $9.60 per week for a period of 300 weeks was awarded the claimant for the death of his minor son, Walter MacDonald.

Walter was injured in the course of his employment on February 24, 1920, and died as a result of his injuries on March 8th following.

It may be well, in view of the issues raised in this case, to briefly review the method and effect of the procedure in bringing these accident cases before the law court.

Section 34, which prescribes the procedure, provides: First, that the justice of the Supreme Judicial Court, sitting as in chancery, shall render a decree in accordance with the finding of the Commissioner and notify all parties. This decree is merely perfunctory. The justice rendering it passes neither upon the facts nor the law. The effect of the decree and all proceedings in relation to it are to be in the same as though rendered in a suit in equity, duly heard and determined by the court, except there shall be no appeal upon the question of fact found by the Commission or its chairman, nor if the decree is based upon a memorandum of agreement approved by the Commission.

[1] Notwithstanding there shall be no appeal upon the questions of fact found by the Commission or its chairman, and that his decision, in the absence of fraud, upon all questions of fact shall be final, our court has nevertheless held that the finding of the Commission or its chairman upon questions of fact is reviewable upon the appeal to the law court to the extent of ascertaining whether or not there is any palpable evidence upon which the decision can be sustained. Mailman's Case, 118 Me. 172, 106 Atl. 606; Westman's Case, 118 Me. 133, 106 Atl. 532.

[2] While the statute was intended by the Legislature to submit the final decision of all questions of fact to the Commission or its chairman, it is nevertheless obvious that it equally intended to leave all questions of law raised by the pleadings subject to the revision of the law court, as it is therein provided as follows:

"Upon any appeal therefrom, the procedure shall be the same as appeals in equity procedure, and the law court may, after consideration, reverse or modify any decree made by the justice based upon erroneous ruling or finding of law.

The present case comes up on the three following acts and rulings of the chairman by reason of which the respondents claim they have been aggrieved:

(1) The chairman, upon his own motion and against objection, continued the hearing of the case after the evidence was in and both parties had rested from April 15, 1920, to April 28, 1920. He therefore failed to observe the mandate of the statute, and his decision based on both hearings is void.

(2) The chairman failed to note the generally recognized meaning of the word "dependent" in defining the claimant "partially dependent."

(3) The chairman failed to take into consideration, in fixing the amount of compensation, the money paid over to claimant by the deceased for the purchase and maintenance of an automobile, which claimant admits was not a necessity. He also failed to take into consideration an excessive charge for repairs on claimant's house.

[3] The respondent claims that the continuance at the volition of the chairman was in contravention of the command of the statute requiring "a speedy, efficient, and inexpensive" method of procedure.

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But we are of the opinion that what constitutes "a speedy, efficient, and inexpensive procedure" under the statute is a question of fact addresed to the discretion of the chairman. It should be only upon the conclusion that his discretion has been abused that the appellate court should be called upon to exercise its power of review.

We discover nothing under the statute, which removes the present case from the application of the rule laid down in Atkins v. Field, 89 Me. 281, 36 Atl. 375, 56 Am. St. Rep. 424.

The first objection must be overruled

The second objection regarding the meaning of "dependency" presents a mixed question of law and fact. Under this objection we come to the question as to who are to be adjudicated dependents within the meaning of the Workmen's Compensation Act. We find the definition as to certain persons in section 1, par. 8, to be as follows:

"'Dependents' shall mean members of the employee's family or next of kin, who are wholly or partly dependent upon the earnings of the employee for support at the time of the injury."

Then the paragraph proceeds to specify those classes which shall be presumed to be wholly dependent for support upon a deceased employee. But the claimant's case does not come within either of these specifications.

After defining the status of those who are conclusively presumed to be wholly dependent, the statute then proceeds further and provides for those who may be partially dependent and how entire or partial dependents may be ascertained:

"In all cases questions of entire or partial dependency shall be determined in accordance with the fact, as the fact may have been at the time of the injury."

—and then proceeds to prescribe in what proportions the compensation shall be divided in case of partial dependency.

[4] Excepting the cases enumerated in the state where "dependency" is defined as conclusive, a state of dependency must first be found as a condition precedent to holding the respondent liable for the payment of any sum whatever for the support of the claimant; for, if there is no dependency, there is no support contemplated by the statute. Dependency having been found the statute then proceeds to prescribe a method of determining the degree as the dependency may be total or partial.

This interpretation is confirmed by the language of section 12, which provides as follows:

"If the employee leaves dependents only partly dependent upon his earnings for support at the time of his injury, the employer shall pay such dependents for a period of three hundred weeks from the date of the injury a weekly compensation equal to the same proportion of the weekly payments herein provided for the benefit of persons wholly dependent as the amount contributed annually by the employee to such partial dependents bears to the annual earnings of the deceased at the time of injury."

From this quotation it will be seen that the ratio of the computation herein prescribed is predicated upon the premise of "the benefit of persons wholly dependent."

[5] Accordingly "wholly dependent" must first be defined and then the degree established in case of partial dependency. Dependent is defined as follows:

Webster's Dictionary:

"Relying on, or subject to something for support: not able, to exist or sustain itself; not self-sustaining."

Worcester's Dictionary:

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"Having dependence; deriving support from; relying upon for means of subsistence."

1 Words and Phrases, Second Series, 1299:

"For a parent to be 'Dependent' on a child for support within Rem. & Bal. Code, § 194, giving dependent parents a right of action for wrongful death of an adult child, it must appear that there is a substantial degree of dependency, need, on the part of parent, and a recognition of it on the part of the child, and an occasional contribution from a son to a parent does not establish a condition of dependency. Bortle v. Northern Pacific Ry. Co. 111 Pac. 788, 789, 60 Wash. 552, Ann. Cas. 1912B, 731 But the statute will not be so strictly construed as to say that it means wholly dependent or that the parent must have no means of support or livelihood other than the deceased. Neither a father, 46 years old, who has successfully carried on a teaming business is practically out of debt, and who could probably find employment, except for a depression in business condition, nor his wife, are 'dependent' within the statute. Kanton v. Kelley 118 Pac. 890, 891, 65 Wash. 614 citing Bortle v. Northern Pac. Ry. Co., 111 Pac. 788, 60 Wash. 552, Ann. Cas. 1912B, 731."

The chairman of the Commission however, with reference as to what constituted dependency, ruled as follows:

"The question of dependency rests on the amount the deceased contributed to his father during the past year or two years, and therefore his own earning capacity would have to do with, and his condition during the past year."

[6] The finding, as the evidence shows, was based upon this ruling. To this ruling a specific objection was taken. The ruling was clearly wrong. It ignores the statute with reference to the distinction to be made between the facts necessary to establish the dependency at the time of the injury, in the first instance, and the facts necessary for fixing the amount of compensation to be paid after a state of dependency has once been found.

Under the language of the statute except in the cases specifically defined, "dependency" is predicated upon the question of whether the claimants are wholly or partly dependent on the earnings of the employee for support "at the time of the injury." The "time of the injury" therefore becomes an important limitation.

In determining "dependency," accordingly, it becomes immaterial how much or how little the deceased may have contrbuted to the claimant in the past. It matters not how dependent the claimant may have been in the past; for the statute upon which his entire right wholly depends requires him to sustain the burden of proof that he was dependent for support "at the time of the injury."

The statute which defines "dependency" repeats in every specification, whether in the case of a wife, husband, or child that it shall be determined in accordance with the fact as the fact may have been "at the time of the injury," and hence admits no interpretation of its clear declaration that "dependency" is based upon the status of the claimant at the time of the decease of the person upon whose death his claim is based.

The second objection must be sustained.

Murphy's Case, 218 Mass. 278, 105 N. E. 635, cited by the chairman is in no way in conflict with the above conclusion. Dependency was assumed, and the only question stated by the court is "whether the father is entitled to $4 a week minimum compensation, or some fraction thereof." The discussion seems to have turned upon whether the amount which Walter earned should be turned in to the support of the whole family, upon which the court say:

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"Whether it is wise to distinquish as to the support of the individual members of a family in a case like this, as the insurer suggests, is for the Legislature."

The case therefore has no bearing upon the time to which the determination of dependency under our statute, at least, must be referred.

[7] Notwithstanding the objections are sustained the court is nevertheless authorized under the equity powers of the statute to proceed to a determination of the case upon the evidence found in the report.

There are two distinct questions to be considered:

(1) Was the claimant "wholly or partly dependent upon the earnings of the employee for support at the time of the injury"?

(2) If so, but only if so, what compensation should be awarded under the act as gauged by his contribution to the family support?

Under the first proposition, we think there is sufficient evidence to establish partial dependency. It will serve no purpose to discuss the evidence in support of this concluson. We therefore proceed directly to the question as to what compensaton should be awarded under the law and the evidence.

This brings us to the distinction between evidence admissible to prove "dependency" and evidence to show the proportional amount to which the claimant is entitled when having been found wholly or partially dependent "at the time of the injury."

[8] In determining the question of dependency, the status of the claimant in society and his reasonable needs and expectations should be considered.

Upon this point the following quotation from Gherardi v. Connecticut Co. (Conn.) 103 Atl. 668, is pertinent and reasonable:

"But this much may be said broadly and generally that no one not belonging to the enumerated classes of persons conclusively presumed to be dependent is entitled to be regarded as a dependent or partial dependent whose financial resources at his command or within his power to command by the exercise of such efforts on his part as he reasonably ought to exert in view of the existing conditions are sufficient to sustain himself and family in a manner befitting his class and position in life without being supplemented by the outside assistance which has been received or some measure of it. * * * But, as it is no purpose of the law to give aid and comfort to slackers in respect of their obligations as members of society, so it is that a claim of dependency will meet defeat if it appear that the claimant by the expenditure of such efforts as under all circumstances, ought fairly and reasonably to be expected of him, is of ability to be self and family supporting according to the proper measure of such support."

We think this quotation expresses a sound and reasonable ground upon which the claimant, under the language and spirit of our statute, may be regarded as wholly or partially dependent.

[9] The intent of the statute was not to burden the industries of the state, but, as said in Scott's Case, 117 Me. 444, 104 Atl. 797:

"To transfer the burdens resulting from industrial accidents regardless of who may be at fault, from the individual to the industry and finally distribute it upon society as a whole by compelling the industry, in which the accident occurs through the employer, to contribute to the support of those who were actually and lawfully dependent upon the deceased for their sustenance during his lifetime."

[10] From this quotation it will be seen that the purpose of the distribution authorized by the statute was to aid those "actually and lawfully dependent," and not for the purpose of enabling a claimant to live in a manner inconsistent with his position in life, his method of living and his earning.

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The claimant, accordingly to the spirit and purpose of this statute, must show that he was actually and lawfully dependent or partially dependent, as the case may be, and unable to support his family, without assistance at the time of the decease of the person upon whose earnings he relies.

Applying these rules to the case at bar, we come to the following state of facts with respect to the use the claimant was making of his money at the time his son was injured: (1) He owned an equity in a house, the exact value of which is not given, but which is in the neighborhood of $800. This is too great to be ignored. (2) During the last year he "painted and papered inside of the house and painted part of the outside"; Painted the inside from top to bottom. (3) His daughter took the music lessons each week totaling $52 per year exclusive of car fares. (4) Claimant went to town two or three nights a week for amusements. (5) Claimants wife went to town a couple of nights a week for amusements. (6) Claimant bought an automobile for which he paid $200 down, and was obligated to the payment of $40 per month, and admits that such automobile was not necessary. The buying of this automobile was a part of the arrangement under which deceased turned over his earnings to the family purse.

[11] The plaintiff's property rights and the uses which he was making of his money at the time of his son's death as above expressed, we think, are fairly and reasonbly deducible from the testimony.

In determining the amount of compensation under the above conclusions of fact, the respondents do not argue the matter of the music lessons and trips to town for amusement by purchased auto, and are content to leave the matter to the judgment of the court. As suggested by defendant's counsel, these items may be more valuable in their bearing upon the extent of partial dependency than in fixing the amount of the compensation.

For the purposes of this case and without intent to make a precedent in any other case, we omit the determination of whether or not music lessons and amusements come within the meaning of the word "support" as used in the statute.

The respondents, however, do strenuousuly contend that the allowance of $250 for paint and repairs on the claimant's house is excessive and cannot be considered as a contribution to support upon which the claimant was "actually and lawfully dependent." They contend as follows:

"This is 16 2-3 per cent. of the value of the house ($1,500) as given in the printed case. Such a percentage should cover taxes, repairs, and a reasonable return on the investment, and we submit, is altogether too much too charge to repairs alone. Take 10 per cent. as a fair annual outlay for repairs, and we believe this is liberal, we should have a saving in this item of $100 per year or $1.92 per week.

"Ignoring the amount already paid in on the automobile but considering the $40 per month due thereon, we have a weekly charge of $9.32 for this item, without considering in any way the cost of maintenance of the automobile. Spending money, or $2 per week, has already been deducted."

We are of the opinion that the above contentions are sound and should be sustained.

The sum of these items is $13.15, and therefore of the $18 paid in weekly by the son the father was actually receiving $4.85 of it towards his support. Upon this basis this compensation should therefore be $^{485}/_{1000}$ of what a person wholly dependent upon the deceased would have received. Such a person would have received $10.80 per week, and so the claimant in this case is entitled to receive $2.91 per week, instead of $9.60, as allowed.

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[12] It will be noted by reading paragraph 8 of section 1 that the defendants are those who are dependent upon the earnings of the employee." Therefore it must be shown, not what part of the earnings were paid to the claimant, but what part was actually used by the claimant for actual and lawful support.

Appeal sustained. Decree modified by substituting the sum of $2.91 in the place of $9.60 as the weekly compensation awarded.

WHITE v. EASTERN MFG. CO. ET AL.

(Supreme Judicial Court of Maine. March 15, 1921.)

112 Atlantic Reporter, 841

1. MASTER AND SERVANT — INJURY TO EMPLOYEE ANSWERING CALL AS CITY FIREMAN HELD NOT COMPENSABLE AS ONE "ARISING OUT OF AND IN COURSE OF EMPLOYMENT."

Cleaner employed by manufacturing company at its mill, also a member of the volunteer fire department of the city receiving from the organization a salary of $65 a year, permitted by his employing company to leave his work for a fire without loss of pay, *held* not to have suffered an injury arising out of and in the course of his employment to entitle him to compensation under the Compensation Act, where on hearing the city fire alarm, he left his work inside his employer's building, ran down a platform, and, on reaching a flight of steps at the end jumped entirely over them, to the injury of his ankle.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of employment.)

2. MASTER AND SERVANT — COMPENSATION ACT DOES NOT MAKE EMPLOYER INSURER AGAINST ALL INJURIES.

Though the Workmen's Compensation Act should receive a liberal construction so that its beneficient purpose may be reasonably accomplished, its provisions cannot be extended to the degree of making the employer an insurer of his workmen against all misfortunes, however received, while they happen to be on his premises.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

Appeal from Supreme Judicial Court, Penobscot County, in Equity.

Proceedings for compensation under the Workmen's Compensation Act by Albert E. White, the employee, opposed by the eastern Manufacturing Company, the employer, and the American Mutual Liability Insurance Commany, the insurer. From a decision of the chairman of the Industrial Accident Commission in favor of petitioner, the employer and insurer appeal. Appeal sustained, and compensation denied.

Argued before Cornish, C. J., and Spear, Dunn, Wilson, and Deasy, JJ.

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Andrews & Nelson, of Augusta, and W. T. Gardiner, of Gardiner, for appellants.

Albert E. White, pro se.

Spear, J. This case comes before the law court on an appeal from a decision of the chairman of the Industrial Accident Commission of Maine rendered and filed in the office of said Commission October 27, 1920.

Statement of Facts

On August 3, 1920, the claimant was employed as a cleaner by the Eastern Manufacturing Company at their mill in South Brewer, Me. He was also a member of the volunteer fire department of South Brewer, and received from that organization a salary of $65 per year, dependent upon his attendance at fires. It was the custom of the Eastern Manufacturing Company to allow their employees who belonged to the Municipal Fire Department to leave their work for the purpose of attending fires, and no deduction was made from their wages for time so lost. At 11 a. m. August 3, 1920, the city fire alarm sounded and the claimant left his work inside his employer's building and started for the fire. He ran down a platform and on reaching a flight of five or six steps, at the end jumped entirely over the steps receiving a slight injury to his ankle on striking the ground. He continued to the fire, but was incapacitated for his work at the Eastern Manufacturing Company for the next 13 days. His petition requested compensation for an injury arising out of and in the course of his employment. Hearing was held on the same, and the Commission awarded compensation for a period of 3 days commencing 10 days after the accident.

At the hearing before the chairman of the Industrial Accident Commission there was no conflict of testimony or dispute as to the manner in which the accident occurred and the injury received.

The decision of the chairman in favor of the petitioner is based upon the following finding in which it is said:

Universally compensation has been awarded an employee, injured accidentally while going to his work or leaving his work if he be still on the company's premises and conducting himself in a proper manner. In the case at bar Mr. White was leaving his work as he had a right to do. Under such circumstances he was still on the company's premises. Had he been injured similarly on the way out to lunch or at the close of the day, there can be no doubt he would have been entitled to compensation."

Upon the foregoing statement of facts, the finding of the chairman, the only question presented upon the appeal is whether or not upon the undisputed facts, as a matter of law, the accident arose "out of" and "in the course of" the employment.

There is no doubt whatever that, when an accident occurs to an employee, conducting himself properly, upon the premises of the employer, while coming to or departing from his work, such accident falls within the provisions of the statute as it is absolutely necessary that an employee must come and go in order to engage in an employment at all. Consequently an accident happening to him under such conditions both arises "out of" and "in the course of" his employment. But that is not the case at bar.

In Westman's Case, 118 Me. 133, 106 Atl. 532, it was decided that under the terms of the statute and the rules of evidence it was incumbent upon the claimant for compensation to assume the burden of proof that his injury occurred:

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(a) By accident.
(b) That the accident arose out of the employment.
(c) That the accident arose in the course of the employment.

Then the opinion proceeds to differentiate between the meaning of the phrases "arises out of" and "in the course of" as follows:

"Even if there be an accident which occurred in the course of the employment, if it did not arise out of the employment, there can be no recovery and even though there be an accident which arose out of the employment, if it did not arise in the course of the employment, there can be no recovery.

Under the above distinction, an accident must both "arise out of" and be "in the course of" the employment.

The petitioner was employed to do certain work in the mill of the respondents. He was engaged in this work when the fire alarm sounded. At that moment he ceased to work for the respondents and started on the run from the mill to begin work in the pay of the fire department. The work in the fire department was no part of and had no connection with his duties of employment in the mill.

It is perfectly evident that at some point and some moment his employment ended with the mill and commenced with the fire department. By no process of reasoning can the point of separation between these two employments be fixed except at the time he left his employment for the respondent and began his employment for the fire company. He could not be working for both at the same time.

The fact that he was upon the premises when the accident occurrred can have no bearing upon the question unless the accident arose out of or in the course of his employment.

The interpretation of the phrases "out of" and "in the course of" have been fully reviewed in Westmans Case, 118 Me. 133, 106 Atl. 532, and Mailman's Case, 118 Me. 172, 106 Atl. 606.

In the former case the court say:

"The great weight of authority sustained the view that these words 'arising out of' mean that there must be some causal connection between the conditions under which the employee worked and the injury he received. * * * It excludes an injury which cannot fairly be traced to the employment as a contributing, proximate cause, and which comes from a hazard to which the workman would have been equally exposed apart from the employment."

"The accidents arising out of the employment * * * are those in which it is possible to trace the injury to the nature of the employee's work or to the risks to which the employer's business exposes the employee."

It might with safety be said that, in order for the accident to "arise out of" the employment, the employment must have been the proximate cause of the accident.

In Westman's Case it is said:

"An injury is received in the course of the employment when it comes while the workman is doing the duty which he is employed to perform."

In Mailman's Case, 118 Me. 172, 106 Atl. 606, the court say:

Both of these elements must appear. The accident must have arisen out of and in the course of the employment. In other words, it must have been due to a risk to which the deceased was exposed while employed and because employed."

We are of the opinion that in the present case the accident of which the petitioner complains did not arise "out of" nor "in the course of" his employment.

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It did not "arise out of" because when the petitioner dropped his broom in the mill he left his work for the time being for the respondents, and, when he started for the fire, began his work, for the time being, for the fire department. He was responding to the call of a different employer and on his way to engage in the new employment. His work in the mill did not at all require him to leave the mill at the time he started for the fire. It was because of the fire, and not because of his work in the mill, that he proceeded to leave the building. He happened to be in the mill when the alarm sounded, and hence had to leave the mill, not however, in doing a mill duty, but a fireman's duty.

The accident did not "arise out of" his employment, because there was no causal connection between the petitioner's work—what he was doing at the time of the accident—and the injury which he received. Not his employment in the mill, but his employment in the fire department in which he was engaged when leaping over the steps, was the proximate cause of the accident.

Nor do we think the risk arose "in the course of" the employment. Westman's case states the rule under this head as follows:

"An injury is received in the course of the employment when it comes while the workman is doing the duty which he is employed to perform."

The risk did not arise in the present case because the petitioner was "doing the duty which he was employed to perform." The risk was due to the call of the fire department. It would have been precisely the same, under the contract with the fire department had he been working in any other employment, whatever it might have been. His work in the fire department had no connection with his work in the mill. Wherever he was or whatever he was doing, at the sound of the alarm it was his duty to drop his employment and forthwith assume his duties as a fireman. He happened to be in the mill at the time, but upon the alarm his duty by contract began with the fire department.

Accordingly the risk to which the petitioner was exposed in going to the fire was not at all "because he was employed" by the defendant, but because he was employed by the fire department, in the important duty which that connection imposed upon him of at once leaving his regular work to engage in the fire department work in protecting the community against the ravages of fire.

Analogous to the case at bar is Pierce v. Boyer-Van Kuram Lumber & Coal Co., 99 Neb. 321, 156 N. W. 509, L. R. A. 1916D, 970, in which it is said:

"There is no doubt, under the many authorities cited by both parties, that if the workman abandons his employment, even for a short time, and engages in play, or some occupation entirely foreign to his employment, he is not entitled to compensation for an accident by which he is injured while so doing."

See, also, Urban v. Topping Bros., 184 App. Div. 633, 172 N. Y. Supp. 432; Inland Steel Co. v. Lambert, 66 Ind. App. 246, 118 N. E. 162; Rochford's Case, 234 Mass. 93, 124 N. E. 891.

The rule seems to be well stated by the associate legal member of the Maine Industrial Accident Commission in Doughty v. Sargent Dennison Co., in a decision rendered March 18, 1920, as follows:

"Clearly compensation is not recoverable where an employee is injured while doing something solely for his own benefit; where, although the injury arises from the risk of the occupation, it is received while the employee has turned aside from the employment for his own purpose."

See, also, cases cited under the above decision.

[1] We discover no rule of law or reason in view of which it can be said that the accident and the injury for which the petitioner claims

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compensation arose "out of" and "in the course of" his employment. This case is of little consequence in the amount involved ($6.43) either to the employer or to the employee, but it is important in arriving at a proper interpretation of the statute applicable to such a case.

[2] In arriving at the above conclusion, we do not lose sight of the well-settled rule that the Compensation Act (Rev. St. 1916, c. 50) should receive a liberal construction so that its beneficient purpose may be reasonably accomplished. Its provisions, however, cannot be justly or legally extended to the degree of making the employer an insurer of his workmen against all misfortunes, however, received while they happen to be upon his premises. Such was not the intent of the statute. .

The employer has rights as well as the employed. Their rights stand upon an equality in the eye of the law. Perversion of the law, either to benefit the employee or protect the employer, has the tendency only to bring the law into contempt. This compensation Act therefore should be administered with great care and caution, with judicial discretion and impartial purpose, striving only to discover the spirit and the letter of the law, and to apply them without fear or favor.

Appeal sustained.

Compensation denied.

BELL'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. March 7, 1921.)

130 Northeastern Reporter, 67.

1. MASTER AND SERVANT—COMPENSATION ACT APPLIES TO EMPLOYEE ON EMPLOYER'S PREMISES DOING WHAT IS INCIDENT TO WORK.

The protection of the Workmen's Compensation Act attends an employee while he is on the employer's premises and doing what is necessarily incident to his work.

(For other cases, see Master and Servant, Dec. Dig. § 375[1].)

2. MASTER AND SERVANT — ACCIDENTS ON WAY FROM WORK NOT ORDINARILY IN "COURSE OF EMPLOYMENT."

Accidents which happen to an employee on his way home from work. and not on the employer's premises, are not regarded, as a rule, as arising in the course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 376[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

4. MASTER AND SERVANT — EMPLOYER CANNOT CONFER ON EMPLOYEES GOING FROM WORK RIGHT TO CROSS RAILROAD.

An employer cannot confer on employees going to and from work the right to cross railroad tracks adjoining its premises at a place not a public crossing so as to make an injury by a train compensable where it had acquired no right to use such crossing.

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

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5. MASTER AND SERVANT—INJURY TO EMPLOYEE CROSSING RAILROAD HELD NOT TO "ARISE OUT OF AND IN COURSE OF EMPLOYMENT."

Though a driveway lead from an employer's premises parallel with railroad tracks to a gate opposite the dead end of a street, where there were planks for the passage of teams over the railroad and though an employee was taken over that route when employed, and no other convenient and safe way of going to and from his work was provided, where he was struck by a train while crossing the tracks, the injury did not arise out of and in the course of his employment, where his contract did not provide that he was to be considered in the service while crossing the tracks, and the employer had no legal right to use such crossing

(For Master and Servant, see Dec. Dig. § 375[2].)

6. MASTER AND SERVANT—SUPERIOR COURT MUST DETERMINE PROPER DECREE ON FACTS FOUND BY INDUSTRIAL ACCIDENT BOARD.

When copies of the decision of the Industrial accident Board on a claim under the Workmen's Compensation Act and papers in connection therewith are transmitted to the superior court, it is the duty of that court to determine what decree the law requires on the facts found by the Board.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

Appeal to Superior Court, Suffolk County.

Proceedings under the Workmen's Compensation Act for the death of Grover C. Bell, opposed by the Commonwealth Chemical Company, employer and the Massachusetts Bonding & Insurance Company, insurer. Compensation was awarded, and a decree therefor entered by the superior court, and the insurer appeals. Reversed.

Joseph A. Dennison and Robert Gallagher, both of Boston, for appellant.

Harold S. Davis and Hawley K. Rising, both of Boston, for appellee.

De Courcy, J. The plant of the Commonwealth Chemical Company, the employer, was erected near the northerly end of a large tract of marsh land lying between the Malden river on the east and the Boston & Maine Railroad on the west; a portion of the southerly bound touching the Revere Beach Parkway. Between the parkway and the building was salt marsh. Bell lived on the opposite side of the tracks from the chemical company's plant on Fifth street, in Wellington village. The Board member who heard the case found:

"Bell could have taken a path along the railroad tracks on the side toward the chemical company's works in a route leading directly away from his home and further by climbing up the abutment of the bridge reach the Revere Beach Parkway and then gone at right angles on the bridge over the tracks, and then along the other side of the railroad tracks toward the direction of his home until he came to the dead end of Fifth street and thereby reach his home. At times it was physically possible to have crossed the stretch of marsh land adjacent to the chemical company's plant and thereby reach the Revere Beach Parkway. Both of these routes, I find, were impractical and dangerous."

There was a driveway from the northwestern corner of the employer's premises along a right of way parallel with the track. and leading to a gate at the side of the railroad location a short distance north of Wellington station and opposite the dead end of Fifth street. At

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this place there were planks between the rails, for the passage of teams over the railroad, and gates on both sides of the tracks which were kept locked part of the time.

When Bell entered the employ of the chemical company in February, 1917, the superintendent accompanied him, and took him over a route from the station platform, near Fifth street, across the inbound and outbound passenger tracks, to a platform, then to the southerly end of that platform, and across the outbound freight track to the above-described way at the northwest corner of the employer's premises. "The testimony further showed that the employees of the said company who lived in the direction Bell resides took the same route that he was taking the day he first went to the chemical company's works and thereafter used until the day of his injury." Bell was following it, on his way home from work on the morning of June 8, 1917, when he was struck by a train and fatally injured. The Industrial Accident Board on review made the additional findings, that the practice of using this route "was well known both to the subscribers and to the Boston & Maine Railroad, no objections thereto having been made by either the chemical company or the railroad; * * * the employee used this route twice a day in going to and from work; and the superintendent for the subscribers knew that he had used this route, by observation, on many occasions."

[1, 2] The scope of a workman's employment is not strictly limited to the time he is actually engaged at his specific work. The protection of the Compensation Act (Laws 1911, c. 751, as amended by Laws 1912, c. 571) attends him while he is on the employer's premises and doing what is necessarily incident to his work. Without attempting to lay down any hard and fast rule as to when the employment begins and ends, for the purposes of the Compensation Act, we have held that the employee was within the scope of his employment while making his exit from the employer's premises at the end of his day's work. For instance, in Stacy's Case, 225 Mass. 174, 114 N. E. 206, the pond which the employee was crossing on the ice on his way home was "the premises of the employer." In O'Brien's Case, 228 Mass. 380, 117 N. E. 619, the workman had started to go home, and was descending a stairway on the outside of the factory building when he was injured. In Sundine's Case, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318, although the common stairs on which the employee was injured remained in the control of the landlord, the employer and his employees had a legal right to use the stairs, which were the only means available for going to and from the workshop on the fourth floor. See also, Hallett's Case, 232 Mass. 49, 121 N. E. 503; White v. E. T. Slattery Co., 236 Mass. 28, 34, 127 N. E. 597. On the other hand, accidents which happen to an employee on his way home from work, but not on the employer's premises, as a rule are not regarded as arising in the course of his employment. Ordinarily he has then ceased to be engaged in his employer's business, and is not doing anything he was employed to do. Donahue's Case, 226 Mass. 595, 116 N. E. 226, L. R. A. 1918A, 215; Rourke's Case, 237 Mass.—, 129 N. E. 603. If he is injured on the public street, he does not come within the benefit of the act, unless his work is of a kind which is pursued on the highway and he is engaged at the time of the accident in the actual work for which he is employed, and not merely using the highway in the exercise of the public right of passage, Keaney's Case, 232 Mass. 532, 122 N. E. 739.

In the present case, the employee Bell had ended his night's work, and left the employer's premises. He was his own master. The Industrial Accident Board found and ruled:

"Decedent's employment relation, under his contract of hire with the subscribers, began at the time he left the public highway and entered the railroad right of way abutting the premises of said

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subscribers as the license by reason of his employment by the Commonwealth Chemical Company, on his way to work, and did not terminate until he left the railroad tracks to enter the public highway upon his return home from work."

So far as this is a ruling of law, it is apparently based upon decisions under the English act, which hold that employment continues until the employee reaches a public road. Longhurst v. John Stewart & Sons, Ltd., [1916] 2 K. B. 803. Our statute never has been so construed. So far as the statement of the board is a finding of fact, it is not supported by the evidence.

[3] In crossing the railroad tracks the employee was a mere licensee, if not a trespasser. Lynch v. Boston & Maine Railroad, 226 Mass. 522, 116 N. E. 248, L. R. A. 1917E, 819. He may have been criminally liable under the Railroad Law (St. 1906, c. 463, pt. 2, § 232). Wright v. Boston & Albany Railroad, 142 Mass. 296, 7 N. E. 866. Whatever right he or his employer may have had to use the grade crossing at the end of Fifth street, where precautions were taken for the protection of those using it and of the trains, the Board was not justified in their finding that—

"There is no question in this case as to the employee's right, as one of the workmen employed by the subscribers, to enter and cross the railroad at the place where the injury occurred."

[4] The employer could not confer upon its employees the right to cross the railroad location, nor did it assume to possess or confer any such right. See John Stewart & Sons, Ltd., v. Longhurst, [1917] A. C. 249; Charles R. Davidson v. McRobb, [1918] A. C. 304, 331. In Fox v. Reese and Kirby, 115 L. T. (N. S.) 358, cited by the Board, the railway on which the accident occurred was a private one, leading to the works where the workman was employed, and it was a recognized and regular way used by the workman by permission of the owners.

[5] In the present case, admittedly the general public had no right to cross the railroad track at the place of the accident. The chemical company acquired no such right for its officers, employees or others. Bell's contract of employment did not provide that he was to be considered in the employer's service while crossing the railroad tracks in going from the factory to his home. No such term can be read into the contract by implication based on the failure of the chemical company to provide other ways to and from the factory that were convenient and safe. It is not to be inferred that the company assumed to give Bell a right to cross the railroad location which its own officers could not use except as trespassers. In short, he acquired no such right from his contract of service.

It follows that the employee was on his own business, and not that of his employer, when he was injured on the railroad tracks. His contract did not contemplate, nor was he in fact engaged in, any service for the employer at that place. The risk from which he suffered was not a risk of his employment. The train which injured him was not owned by the chemical company, and was not connected with its business, or with the work for which Bell was employed. The case is not distinguishable in principle from Fumiciello's Case, 219 Mass. 488, 107 N. E. 349 where the employee was killed by a train when on his way home from work. We are constrained to say that the board were not warranted in finding that the employee's injury arose out of and in the course of his employment, within the meaning of the Workmen's Compensation Act.

[6] It is recited in the decree that the court ruled it "had no function to perform except to enter a decree" in accordance with the decision of the Industrial Accident Board. This was erroneous. As was said in Brown's Case, 228 Mass. 31, 38, 116 N. E. 897, 899:

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"When copies of the decision of the Board and all papers in connection therewith have been transmitted to the superior court, it is the duty of that court to take such action and make such a decree as the law requires on the facts found by the Board. It is for the superior court to determine what order or decree ought to be made on the facts found. It has jurisdiction over the case in the same way and to the same extent that it has for example in a suit in equity where the facts have been found by a master. This was fully set forth in McNicol's Case, 215 Mass. 497."

Decree reversed.

FRIZZI'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. March 1, 1921.)

130 Northeastern Reporter, 95

MASTER AND SERVANT—SUSPENSION OF COMPENSATION PAYMENTS, WITH APPROVAL OF ACCIDENT BOARD LEFT OPEN QUESTION WHETHER PARTIAL INCAPACITY EXISTED.

Where payments of compensation to an injured employee were discontinued with the approval of the Industrial Accident Board, under Workmen's Compensation Act, pt. 2, § 4, as amended by St. 1916, c. 90, § 1, on the ground that the employee was totally incapacitated for a period, *held*, that such suspension of payments by the insurer, with the ex parte approval of the Board, is to be construed as leaving open for future determination the question whether, after hearing, the payments were rightly discontinued; also the question whether partial incapacity existed, and, if so, its extent.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Appeal from Superior Court, Suffolk County.

Proceeding for compensation, under the Workmen's Compensation Act, by Antonio Frizzi, the employee, opposed by the Bethlehem Shipbuilding Corporation, the employer, and the United States Mutual Liability Insurance Company, the insurer. Compensation was awarded, and the award affirmed by the superior court. From its decree, the insurer appeals. Decree affirmed.

Elias Field, of Boston, for insurer.
Joseph Klarfeld, of Boston, for employee.

CROSBY, J. It is agreed that the employee received an injury arising out of and in the course of his employment on August 20, 1919, that his average weekly wages were $21, and that he was paid compensation up to October 15, 1919, on which date the payments were discontinued with the approval of the Industrial Accident Board. St. 1911, c. 751, part 2, § 4, as amended by Gen. Acts 1916, c. 90, § 1.

A member of the Board, appointed under the provisions of part 3, § 12, as amended, on January 20, 1920, heard the parties on the question of incapacity and made the following findings and rulings:

"That this employee * * * has not sustained the burden of proving that he has been totally incapacitated, because of conditions due to his injury, beyond the date upon which the Board approved the

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discontinuance of compensation payments, October 15, 1919; * * * that this employee has an earning capacity which he has not established. The discontinuance of October 15, 1919, is hereby further confirmed; the employee's rights being reserved under part III, section 12, of the act."

The Industrial Accident Board, on review, found and ruled:

"That this employee was totally incapacitated for work for a period of seven weeks subsequent to October 15, 1919, the date upon which discontinuance of compensation was approved under part II, § 4, of the act; that compensation is due the employee in the sum of ninety-eight dollars ($98); and that all incapacity for work terminate on December 3, 1919."

It is the contention of the insurer that Board was without authority to act under part 3, § 12. Although the payments for total incapacity were discontinued with the approval of the Board, there was no adjudication that all incapacity had ceased. The effect of the order was not a decision on the merits. The suspension of payments by the insurer with the ex parte approval of the board, is to be construed as leaving open for future determinaton the question whether after hearing the payments were rightly discontinued, and also the question whether partial incapacity existed, and, if so, its extent.

That. determination is what the Board undertook to make by the decision now before us. Dscontinuance of payments with the approval of the Board on the basis of total incapacity was not the equivalent of a decision that there was no incapacity. The Board has now made the decision that all disability terminated on December 3, 1919, which is final; plainly it had authority to make it. In this respect the case is governed by Hunnewell's Case, 220 Mass. 351, 107 N. E. 934. See Lemieux's Case, 223 Mass. 346, 111 N. E. 782.

The finding of the Board that the employee was totally incapacitated for work for a period of seven weeks from October 15, 1919, cannot be said to have been unwarranted

Decree affirmed.

STAFFORD'S CASE.

(Supreme Judicial Court of Massachusetts. Suffolk. March 7, 1921.)

130 Northeastern Reporter 109

1. MASTER AND SERVANT—FINDING OF ACCIDENT BOARD SUPPORTED BY EVIDENCE MUST STAND.

A finding of the Industrial Accident Board that one claiming compensation for death under the Workmen's Compensation Act was not a member of the decedent's family must stand. when supported by evidence.

(For other cases, see Master and Servant, Dec. Dig. § 417[6].)

2. MASTER AND SERVANT—AUNT WITH WHOM DECEASED LIVED HELD NOT A "MEMBER OF HIS FAMILY," SO AS TO BE HIS "DEPENDENT," WITHIN COMPENSATION ACT.

Where decedent and his sister had lived from childhood with an aunt in a house owned by her husband and, after his death, by her and her stepson, and she owned the furniture and paid the household bills, and deceased and his sister gave her part of their earnings, a finding was

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warranted that deceased was a member of her family rather than the head of a family of which she was a member, within St. 1911, c. 751, pt. 5, § 2, defining dependents.

(For other cases, see Master and Servant, Dec. Dig. § 388.

(For other definitions, see Words and Phrases, First and Second Series, Dependent.)

Appeal from Superior Court, Suffolk County.

Proceedings under the Workmen's Compensation Act by Elizabeth A. Murphy for compensation for the death of Joseph J. Stafford, opposed by E. S. Booth & Co., employer, and the Employers' Liability Assurance Corporation, insurer. Compensation was denied, and the claim dismissed by the superior court, and the claimant appeals. Affirmed.

William Reed Bigelow and Arthur E. Digan, both of Boston, for appellant.

Sawyer, Hardy, Stone & Morrison, of Boston (Gay Gleason, of Boston, of counsel), for insurer.

De Courcy, J. The employee received injuries arising out of and in the course of his employment, which resulted in his death December 13, 1918. He was unmarried; and the next of kin surviving him was his sister Louise. The claimant, Elizabeth A. Murphy, was his aunt. The employee and his sister had lived with her most of the time since childhood. The house in which they lived had been owned for many years by the claimant's husband; and after his death in 1916, she owned one-third interest therein, and bought her stepson's two-third interest in January. 1919. It is agreed that the average weekly wage of the employee was $24.58. He gave the claimant $15 a week on an average; and Louise, who earned $11 a week, after retaining what she needed, gave the remainder to her aunt. Mrs. Murphy owned the household furniture, and paid the household bills.

[1] The Workmen's Compensation Act defines dependents as "members of the employee's family or next of kin who were wholly or partly dependent upon the earnings of the employee for support at the time of the injury." St. 1911, c. 751, part 5, § 2. Admittedly the claimant was not next of kin, since the employee's sister survived him. The Industrial Accident Board has found that she was not a member of the employee's family; and this finding must stand, as it finds support in the evidence. In the language of the Board member:

"The deceased had, to a very considerable extent, been brought up by the petitioner. As a boy he certainly had not been the head of the family. While away from the household in later years, he made no contribution to keep the household going. He at one time left the household because of trouble with * * * [his aunt's stepson]. This does not indicate that he had 'the exclusive management of the household affairs.' Nothing in the evidence tends to indicate that the deceased at any time thereafter assumed such control. The testimony of the claimant showed pretty plainly that she considered that she was the controlling and predominating factor in keeping the household intact."

[2] The board was warranted in finding that the employee was a member of his aunt's family, rather than the head of a family of which she was a member. Kelley's Case, 222 Mass. 538, 111 N. E. 395; Cowden's Case, 225 Mass. 66, 113 N. E. 1036; Mahoney's Case, 228 Mass. 555, 17 N. E. 794; Pass Case, 232 Mass. 515, 122 N. E. 642.

Decree affirmed.

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CHIOVITTE v. ZENITH FURNACE CO. (No. 22224.)

(Supreme Court of Minnesota. Feb. 25, 1921.)

181 Northwestern Reporter, 643

(Syllabus by the Court.)

1. MASTER AND SERVANT—COMPENSATION FOR PARTIAL LOSS OF SIGHT SHOULD BE PAID FOR TIME IN PROPORTION WHICH INJURY BEARS TO TOTAL LOSS.

Where a workman sustains an injury which results in the partial loss of the sight of one eye, he is entitled to compensation during that part of 100 weeks which the extent of injury to the eye bears to its total loss, at the rate prescribed for the loss of an eye.

(For other cases, see Master and Servant, Dec. Dig. § 385[11¼].)

2. MASTER AND SERVANT—COMPENSATION FOR LOSS OF MEMBERS NOT DEPENDENT ON DECREASE IN EARNINGS.

The liability for the compensation prescribed in the statute for the injuries enumerated therein is absolute and not dependent upon an actual decrease in earnings.

(For other cases, see Master and Servant, Dec. Dig. § 385[11].)

3. MASTER AND SERVANT—"MEMBER" IN COMPENSATION ACT INCLUDES EYE.

The term "member" as used in the Workmen's Compensation Statute includes the eye.

(For other cases, see Master and Servant, Dec. Dig. § 385 [11¼].)

(For other definitions, see Words and Phrases, First and Second Series, Member.)

Certiorari from District Court, St. Louis County; H. A. Dancer, Judge.

Proceedings under the Workmen's Compensation Act by Tony Chiovitte for compensation for injuries, opposed by the Zenith Furnace Company, employer. Compensation was awarded, and the employer brings certiorari. Affirmed.

Washburn, Bailey & Mitchell, of Duluth, for Relator-Employer.

M. E. Louisell and John R. Heino, both of Duluth, for Employe-Respondent.

TAYLOR, C. A writ of certiorari brings before this court, for review, a judgment of the district court of St. Louis county awarding to the plaintiff, an employee of the defendant, the sum $15 per week for a period of 60 weeks as compensation for the partial loss of the sight of his right eye.

The case was submitted to the district court on the pleadings and a stipulated statement of facts.

It is admitted that plaintiff, while engaged in the performance of his duties, sustained an injury to his right eye which resulted in permanently imparing the sight of that eye to the extent of 68 per centum of its usefulness; that he received compensation from defendant at the rate of $15 per week for 8 weeks which covered the full period that

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he was unable to work; and that he returned to work, and is now regularly employed by the defendant and is receiving higher wages than at the time of the accident.

The statute, section 8207, G. S. 1913, as amended by chapter 442 of the laws of 1919, provides:

"Following is the schedule of compensation:

"(a) For injury producing temporary total disability. * * *

"(b) In all cases of temporary partial disability. * * *

"(c) For the permanent partial disability the compensation shall be based upon the extent of such disability. In cases included by the following schedule the compensation shall be that named in the schedule, to wit: * * * For the loss of an eye, sixty-six and two-thirds per centum of the daily wages during one hundred (100) weeks. * * *

"In all cases of permanent partial disability it shall be considered that the permanent loss of the use of member shall be equivalent to and draw the same compensation as the loss of that member; but the compensation in and by said schedule provided, shall be in lieu of all other compensation in such cases.

"In cases of permanent partial disability due to injury to a member, resulting in less than total loss of such member not otherwise compensated in this schedule, compensation shall be paid at the prescribed rate during that part of the time specified in the schedule for the total loss of the respective member, which the extent of injury to the member bears to its total loss.

"All compensation provided in clause (c) of this section for loss of members, or loss of use of members are subject to the same limitations as to maximum and minimum as are stated in clause (a).

"In all other cases of permanent partial disability not above enumerated the compensation shall be sixty-six and two-thirds per centum of the difference between the wage of the workman at the time of the injury and the wage he is able to earn in his partially disabled condition, subject to the maximum of fifteen ($15.00) dollars per week. Compensation shall continue during disability, not, however, beyond three hundred (300) weeks.

"For permanent total disability as defined in subsection (e) below, sixty-six and two-thirds per centum of the wages received at the time of the injury, subject to a maximum compensation of fifteen ($15.00) dollars per week and a minimum compensation of six and one-half ($6.50) dollars per week. * * * This compensation shall be paid during such permanent total disability not exceeding five hundred and fifty (550) weeks. * * *

"(e) The total and permanent loss of the sight of both eyes * * * shall constitute total disability.

[1] The compensation for the loss of one, eye is a specified weekly payment for a period of 100 weeks but the compensation for the partial loss of the sight of one eye is not specifically stated in the schedule. The compensation for the total loss of the sight of both eyes is a specified weekly payment for the period of 550 weeks but the compensation for the partial loss of the sight of both eyes is not specifically stated in the schedule.

Defendant contends that the compensation for partial loss of the sight of an eye is not specifically stated in the schedule, the case is governed by the clause which provides that—

"In all other cases of permanent partial disability not above enumerated the compensation shall be sixty-six and two-thirds per centum of the difference between the wage of the workman at the time of the injury and the wage he is able to earn in his partially disabled condition.

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—and that consequently plaintiff is not entitled to further compensation as he is receiving higher wages than he received at the time of the injury. Zinken v. Melrose Granite Co., 143 Minn. 397, 173 N. W. 857, is cited in support of this contention. The Zinken Case arose under chapter 209 of the laws of 1915; but while that statute has been changed in some respects, particularly as to the amount of compensation to be allowed, the provision which bore on the questions here involved were substantially the same as those in the present statute.

In that case Zinken had sustained an injury which resulted in the loss of three-fourths of his normal power of vision—the loss of one eye and of one-half the sight of the other—and was unable to earn any wages. The question was whether he should be considered as having sustained two separate injuries—one to each eye—which would result in giving him compensation during 100 weeks for the total loss of one eye and during 50 weeks for the loss of one-half the sight of the other; or whether he should be considered as having sustained a single injury which destroyed three-fourths of his normal power of vision and rendered him unable to earn wages. For the loss of both eyes the statute gave a compensation much greater than twice that allowed for the loss of one, recognizing that the total disability resulting from blindness was much greater than double the disability resulting from the loss of one eye. The injury to both eyes had been caused in the same manner and in the same accident; and it was held that the injury should not be split into two parts with a separate allowance for each part but should be considered as an entirety for the purpose of measuring the compensation to which the workman was entitled; and it was further held that he was entitled to recover under the above provision as no other seemed to be as applicable to such a situation. A similar result was reached in State ex rel. v. District Court, 133 Minn. 439, 158 N. W. 700, which involved the total loss of one eye and the nearly total loss of the other; and a somewhat similar rule was applied in State ex rel. v. District Court, 129. Minn. 91, 151 N. W. 530, which involved an injury to both hand and arm; and also in State ex rel. v. District Court. 144 Minn. 198, 174 N. W. 826.

[2] The statute contains a lengthy schedule specifically prescribing the compensation to be paid for the loss of various members of the body therein named, and recognizes the loss of any such member as constituting a permanent partial disability. For the injuries enumerated in the schedule, the prescrbed compensation is to be paid, and the liability therefor is made absolute and is not dependent upon an actual decrease in earnings. After prescribing the compensation for the injuries specifically named, the statute further provides that—

"In cases of permanent partial disability due to injury to a member resulting in less than total loss of such member not otherwise compensated in this schedule, compensation shall be paid at the prescribed rate during that part of the time specified in the schedule for the total loss of the respective member, which the extent of injury to the member bears to its total loss."

This provision recognizes that an injury which results in less than total loss of a member constitutes a permanent partial disability to the extent which the "injury to the member bears to its total loss." and prescribes as compensation therefor a like proportional part of the compensation allowed for such total loss. State ex rel. v. District Court 136 Minn. 147, 161 N. W. 391. The obligation to pay the prescribed compensation for such partial disability is not dependent upon an actual decrease in earnings but is made absolute.

It was clearly the legislative intention that when the schedule prescribes the compensation to be paid for the loss of a member, this provision should control and determine the compensation to be paid for

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its partial loss and that the partial loss of the use of a member should be equivalent to and draw the same compensation as the partial loss of that member. The clause on which defendant relies is placed at the end of the provisions relating to partial disability, apparently as a sort of catch-all to cover those cases which otherwise might be omitted and by its terms applies only to those cases not before enumerated.

The compensation for the loss of one eye is a specified weekly payment for a period of 100 weeks. Plaintiff lost 68 per centum of the sight of one eye and therefore became entitled to the specified weekly payment for a period of 68 weeks. The trial court correctly so held and, as plaintiff had received compensation for only eight weeks, awarded it to him for the remaining 60 weeks. Defendant concedes that the award is correct unless the case is governed by the rule applied in the Zinken Case.

[3] A question is raised as to whether an eye is included in the term "member" as used in the statute. This was apparently suggested by a passing remark in the Zinken Case. An examination of the various statutory provisions relating to the eye and of the manner in which the term "member" is used in the statute leaves no doubt that this term was intended to refer to and include the eye as well as the other integral parts of the body named in the schedule.

Judgment affirmed.

CONNELLY v. CARNEGIE DOCK & FUEL CO. (No. 22186.)

(Supreme Court of Minnesota. March 11, 1921.)

181 Northwestern Reporter, 857

(Syllabus by the Court.)

1. MASTER AND SERVANT — JUDGMENT FOR COMPENSATION NOT AMENDABLE FOR JUDICIAL ERROR AFTER LAPSE OF TIME FOR REVIEW.

The judgment in a compensation case cannot be amended by the district court because of judicial error in it after the time for review in the Supreme Court has passed.

(For other cases, see Master and Servant, Dec. Dig. § 411.)

2. MASTER AND SERVANT—COMPENSATION ACT HELD NOT TO AUTHORIZE MODIFICATION OF AWARD FOR JUDICIAL ERROR IN AMOUNT; "INCREASE OR DECREASE OF INCAPACITY."

The Compensation Act (Gen. St. 1913, § 8222), providing for the modification of a judgment on the ground of "increase or decrease of incapacity," does not authorize a modification because of judicial error in determining the amount of the award.

(For other cases, see Master and Servant, Dec. Dig. § 419.)

Certiorari from District Court, Ramsey County.

Proceedings by Patrick Connelly against Carnegie Dock & Fuel Company to recover compensation under the Workmen's Compensation Act. A judgment awarding compensation was amended, and defendant brings certiorari. Reversed.

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Dill, Hoke, Krause & Faegre, of Minneapolis, for relator.
Geo. G. Chapin and P. D. Scannell, both of St. Paul, for respondent.

DIBELL, J. On motion of the plaintiff the court amended a judgment awarding him compensation under the Workmen's Compensation Act (Gen. St. 1913, c. 84a). The judgment was entered on December 9, 1918. The amended judgment was entered on September 23, 1920. The defendant brings certiorari.

1. On December 9, 1918, judgment was entered in a proceeding under the compensation act in favor of the plaintiff for $1,800, payable in installments. The amount was contested. The plaintiff claimed more. The trial court was of the opinion that the case was governed by State v. District Court, 129 Minn. 156, 151 N. W. 910. The amount of the award was based on the authority of that case. On August 8, 1919, Zinken v. Melrose Granite Co., 143 Minn. 397, 173 N. W. 857, was decided. It is conceded that under the rule there announced plaintiff was entitled to $3,600, payable in installments. On July 27, 1920, the plaintiff made the application which resulted in the amended judgment of September 23, 1920. The amended judgment changed the award to conform to the rule of the Zinken Case.

The judgment was amended because of judicial error. There was no mistake in its entry. It was entered just as the court wanted it entered. It determined the rights of the plaintiff and the defendant just as the court thought they were. The plaintiff did not care to contest its correctness by a review in this court.

[1] There must come a time when a judgment is final against judicial error correctable by the court rendering it. The common law fixed the expiration of the term of court as the time. Under our holdings a judgment cannot be corrected by the court rendering it, because of judicial error, when it stands unchallenged until the time for review by this court is passed. This subject is discussed at length in Gallagher v. Irish-American Bank, 79 Minn. 226, 81 N. W. 1057. The rule is directly held in other cases. Smith v. Minneapolis St. Ry. Co., 134 Minn. 292, 157 N. W. 499, 159 N. W. 623; Tomlinson v. Phelps. 93 Minn. 350. 101 N. W. 496. The cases holding that clerical errors may be corrected after the time of review has passed so as to give effect to the actual determination of the trial court are in recognition of the limitation upon the power to correct judicial error after the right of review is gone. Schloss v. Lennon, 123 Minn. 420, 144 N. W. 148; Northwestern, etc., v. Aylmer, 138 Minn. 140, 164 N. W. 661; National Council v. Silver, 138 Minn. 330, 164 N. W. 1015 and cases cited.

In Gallagher v. Irish-American Bank, 79 Minn. 226, 81 N. W. 1057. the court discussed the statute, now G. S. 1913, § 7786;, relieving a party from his mistakes or neglect within one year and the general rule relative to the correction of judicial error by the trial court. In referring to a judgment which it was sought to modify on motion by changing the amounts to be distributed in a sequestration proceeding to different creditors the court said that—

"Such judgment as against a motion for the same purpose, became final and conclusive and was res judicata of all questions that were or might have been urged against it before that time. * * * This inexorable but just rule is necessary to the authority of courts to declare the law, and vitalizes thier judgments with the force that give to them efficacy."

In Smith v. Minneapolis St. Ry. Co., 134 Minn. 292, 159 N. W. 623 it was said:

"We are of the opinion that, when a judgment has become final by the expiration of the time within which an appeal may be taken, it should not be subject to attack upon a motion for a new trial for

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error or insufficiency of evidence. * * * The statute contemplates that an unreversed judgment shall be final at the expiration of the six months within which an appeal may be taken."

In Tomlinson v. Phelps, 93 Minn. 350. 101 N. W. 496, in referring to a probate decree, the court said:

"If it appears that the original decree of distribution was deliberately entered into as the result of a judicial consideration and construction of the will, then the powers of that court to amend or vacate such decree were exhausted upon the expiration of the time to appeal therefrom."

The result is that the judgment in a compensation proceeding, like other judgments, cannot be corrected for judicial error by the court rendering it after the time for review has passed, unless there is a provision in the compensation act authorizing a correction.

[2] 2. The Compensation Act provides for a modification of the judgment in certain cases. It provides that all lump sum payments shall be final, but that an award payable periodically for more than six months may be modified on the application of either party "on the ground of increase or decrease of incapacity due solely to the injury." G. S. 1913, § 8222. In State v. District Court, 136 Minn. 147, 161 N. W. 391, Justice Bunn, in referring to this statute, said:

"It is quite manifest that this section was not intended as a method of correcting errors in fixing the amount of compensation, as the remedy is not available until after six months from the award, and then only where there has been an 'increase or decrease of incapacity.' This clearly means an increase or decrease of capacity since the award was made, a change in circumstances that justifies a modification."

Again in State v. District Court, 134 Minn. 189, 158 N. W. 825, where a new trial was sought on the ground of newly discovered evidence, affecting the extent of the injury, the Chief Justice said:

"It is not the contemplation of the Compensation Act that there be retrials for error as in an ordinary action. Upon the determination of the case judgment is entered. There is a right to a review of questions of law by certiorari. Laws 1913, p. 688, c. 467, § 30 (G. S. 1913, § 8225). The act provides that all awards not exceeding the compensation for six months' disability shall be final and not subject to readjustment and that all lump sum payments shall be final. Laws 1913, p. 687, c. 467, §§ 26, 27 (G. S. 1913, §§ 8221, 8222). The court however, has power to open its judgments and correct or modify them upon the presentation of newly discovered evidence, when manifest wrong has been done, upon substantially the principle on which it rests its inherent power to grant a new trial. This power need not of necessity be invoked before the lapse of the sixty day period in which a review may be sought by certiorari. See G. S. 1913, § 8313. The statute allowing relief within a year applies. G. S. 1913, § 7786."

In the case just cited the court affirmed the order of the trial court opening the case for the purpose of introducing additional evidence upon the extent of the injury, expressing a caution against a too free exercise of the power.

There is nothing in the statute cited making the judgment subject to review from time to time for judicial error.

Judgment reversed.

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ABEL CONST. CO. ET AL. v. GOODMAN. (No. 21816.)

(Supreme Court of Nebraska. Feb. 23, 1921.)

181 Northwestern Reporter, 713.

(Syllabus by the Court.)

1. MASTER AND SERVANT—COMPENSATION WITH STATUORY WAITING TIME PENALTY PROPERLY ALLOWED.

An employer appealed from an award of the compensation commissioner, who had allowed its employee 100 weeks' compensation for the loss of the sight of an eye, notwithstanding compensation for 25 weeks had previously been paid by the employer. On appeal the district court deducted the 25 weeks compensation, formerly paid, and rendered a judgment against the employer for the remaining 75 weeks' compensation, as provided by the act, and for statutory "waiting time" from the date of the award by the commissioner. *Held*, that the court did not err. Rev. St. 1913, § 3666, as amended by Laws 1917, c. 85, § 9½.

(For other cases, see Master and Servant Dec. Dig. § 391½, New vol. 7A Key-No. Series.)

2. MASTER AND SERVANT—EMPLOYER, APPEALING FROM COMPENSATION JUDGMENT HELD LIABLE FOR STATUTORY WAITING TIME PENALTY.

When an employer appeals from a judgment of the district court in favor of his employee and it is affirmed in this court, such employer is liable for the statutory "waiting time," from the date of such judgment, for the full period of time allowed by the Employers' Liability Act, until it is paid under the mandate issued by this court, when the appeal taken to this court is not based on such a reasonable controversy as would justify an appeal.

(For other cases, see Master and Servant, § 391½, New, vol. 7A Key-No. Series.

3. MASTER AND SERVANT—DEFAULT, THOUGH DUE TO IGNORANCE OF LAW, GROUND FOR PENALTY.

Ignorance of the law is not a shield from liability for its infraction.

(For other cases, see Master and Servant, § 391½, New, vol. 7A Key-No. Series.)

4. MASTER AND SERVANT—ATTORNEY'S FEE HELD NOT TAXABLE IN COMPENSATION CASE.

In an action under the employers' Liability Act, even though a recovery is had, an atttorney's fee cannot be taxed as a part of the costs under section 3212, Rev. St. 1913, as amended by Laws 1919, c. 103, § 2, which applies only to an action at law on an insurance policy against an insurance company.

(For other cases, see Master and Servant, Dec. Dig. § 420.)

Appeal from District Court, Lancaster County; Stewart, Judge.

Petition to the Compensation Commissioner by the Abel Construction Company against William K. Goodman for an order to discontinue further payments as compensation to defendant for personal injuries. Petition denied by an award made, and on plaintiff's appeal to the district court, wherein Ocean Accident and Guarantee Corporation im-

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pleaded by cross-petition, judgment was awarded against plaintiff, and plaintiff and cross-petitioner appeal. Affirmed in part, and reversed in part and remanded, with directions.

Hall, Baird & Williams, of Lincoln, for appellants.
R. J. Greene of Lincoln, for appellee.

DEAN, J. While employed by the Abel Construction Company, and earning $24 a week, William K. Goodman, defendant, sustained an injury, November 6, 1918, that caused him to lose the sight of his left eye while he was cleaning cement sacks. Thereupon plaintiff paid him $12 a week for 25 weeks, as compensation, and $50 for medical treatment. Thereafter plaintiff refused to make further weekly payments, but offered to pay $350 or $400, presumably in full settlement, which defendant refused. On June 25, 1919, the employer filed a petition in the compensation commisioner's office asking that officer to order a discontinuance of further payments. The commissioner denied the application and made an award to defendant of $12 a week for 100 weeks as compensation on account of the injury. The award was in addition to the $300, or $12 a week for 25 weeks, that plaintiff formerly paid the defendant in this behalf. The award, however, excepted $32 from the total amount to be paid; the commissioner holding that this sum was paid by plaintiff "after temporary disability ended." From the award plaintiff appealed to the district court.

On appeal the court held that the defendant was entitled to compensation for 100 weeks only, and that, compensation for 25 weeks having already been paid there remained only 75 weeks for which payment could lawfully be demanded at $12 a week. The payments being then delinquent, judgment was rendered against the plaintiff for $900 and interest, or a total of $912. the court also held that defendant was entitled to recover $414 for statutory waiting time, making a sum total of $1,326 and costs, for which, on October 23, 1920, judgment was rendered. In addition thereto the court taxed an attorney's fee of $200 as costs. Plaintiff contends that the court erred in permitting defendant to recover either for an attorney's fee or for statutory "waiting time." From the judgment plaintiff appealed to this court.

The record shows clearly enough that the sight of defendant's left eye was destroyed while he was in the employ of plaintiff and that the accident arose out of an and in the course of his employment.

The circumstances attending the casualty bring it within section 3662, Rev. St. 1913, as amended by chapter 85, § 7, Laws 1917, which classifies certain injuries and establishes a schedule of compensation. The act as amended is separated into three parts. Subdivision 3 provides, inter alia:

"For all disability resulting from permanent injury of the following classes," i. e., for the loss of a hand, arm, foot, leg, or eye, "the compensation shall be exclusively as follows: * * * For the loss of an eye, sixty-six and two-thirds per centum of daily wages during 100 weeks," but "shall not be more than twelve dollars per week, nor less than six dollars per week: Provided, that if at the time of injury the employee receives wages of less than six dollars per week, then he shall receive the full amount of such wages per week as compensation."

Subdivision 3 also provides:

"Permanent loss of the use of a hand, arm, foot, leg or eye shall be considered as the equivalent of the loss of such hand, arm, leg, or eye."

[1] The Legislature having provided that "for all disability resulting" from the loss of an eye "the compensation shall be exclusively"

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as provided in subdivision 3 of the act defendant comes clearly within its meaning. It follows that defendant, earning a weekly wage of $24 was, under the act, entitled to $12 a week as compensation for 100 weeks namely, $1,200. In making the reduction of $300 from the commissioner's award the district court applied the plain and unambiguous language of the law to the facts. Hull v. United States Fidelity & Guaranty Co., 102 Neb. 246, 166 N. W. 628.

[2] Plaintiff contends that, because the commissioner rendered an excessive award of compensation in the sum of $300, it should not be bound to pay the statutory waiting time penalty, and argues, but erroneously, that it comes within the rule announced in Updike Grain Co. v. Swanson, 104 Neb. 661, 178 N. W. 618. It was there held that to excuse the employer from such liability there must be a reasonable controversy between the parties as to liability for certain installments of compensation. In the present case reasonable grounds do not appear for controversy respecting the duty of the employer to pay the remaining 75 installments. It is clear that the award of the commissioner was excessive as to 25 weekly installments of $12 each. It is equally clear that the employee had been blinded in one eye, and that he was then entitled, under the facts and the law, to 75 additional weekly installments of compensation in the sum of $12 each. And it just as clearly appears that it was plaintiff's duty to have continued making the payments required by law until the end of the 100-week period instead of applying to the commissioner for an order to have the payments discontinued. But, having sought to have the commissioner's award reviewed, the appeal at most should have been directed to seeking a reduction of the award to a payment of compensation for 75 weeks. To say that the employer ignored or that it misconstrued the clear provisions of the law is no answer to the employee's demand for payment for "waiting time," under the act, which he cites and sets out in his brief, and which plainly provides that "fifty per centum shall be added for waiting time for all delinquent payments after 30 days' notice has been given" of disability. Rev. St. 1913, § 3666, as amended by Laws 1917, c. 85, § 9½.

[3] The employer, in extenuation, points out that, within two weeks after completing the $300 payment to its employee, it, as plaintiff, began this proceeding June 25, 1919, before the compensation commissioner to have further payments discontinued, and that through no fault of plaintiff the matter was not heard and disposed of until September 9, 1920, more than 14 months after the commencement of the proceedings, and that in the exercise of its statutory right it appealed to the district court. Even so, it does not follows that the employee, who did not cause the delay, should be denied a lawful right merely because the employer failed in the performance of a plain legal duty. Ignorance of the law is not a shield from liability for its infraction.

[4] We think the court erred in the taxation of an attorney's fee as costs, notwithstanding the Ocean Accident & Guarantee Corporation, Limited, the insurer of the employer, by some means that it is not necessary to discuss here, seems to have become a party plaintiff after the case reached the district court. In support of this argument on this point defendant invokes section 3212, Rev. St. 1913, as amended by Laws 1919, c. 103, § 2. For the purpose of this discussion the amendment is not material. The act as amended reads:

"In all cases where the beneficiary, or other person entitled thereto, brings an action at law upon any policy of life, accident, liability, sickness, guaranty, fidelity or other insurance of a similar nature, or upon any certificate issued by a fraternal beneficiary association, against any company, person or association, doing business in this state, the court upon rendering judgment against such company, person or association,

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shall allow the plaintiff a reasonable sum as attorney's fee in addition to the amount of his recovery to be taxed as part of the costs, and if such cause if appealed the appelate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings."

It is sufficient answer to say that the present case is not "an action at law upon any policy of life, accident, liability, * * * or other insurance." It follows that section 3212 has no application to a cause brought under the Employers' Liability Act. The statute under which this action is brought provides a special proceeding for the purpose of effecting a speedy settlement between an employer and his employee when they come within its provisions. United States Fidelity & Guaranty Co. v. Wickline, 103 Neb. 21, 170 N. W. 193, 6 A. L. R. 1267; Hull v. United States Guaranty & Fidelity Co., 102 Neb. 246, 166 N. W. 628.

There is some question, as plaintiff points out, with respect to the regularity of defendant's cross-appeal, but we have treated it as though it had been regularly made, and conclude that he is not entitled to recover thereon.

With respect to the taxation of an attorney's fee as costs the judgment is reversed. In all else the judgment is affirmed, except that as to the statutory waiting time penalty it is ordered that the districit court modify its judgment so that the total amount of defendant's recovery for waiting time shall be the sum of $6 a week for 75 weeks.

Affirmed in part and reversed in part and remanded with directions.

Rose, J., not sitting.

HALL v. GERMANTOWN STATE BANK ET AL. (No. 21815.)

(Supreme Court of Nebraska. Feb. 23, 1921.)

181 Northwestern Reporter, 609

(Syllabus by the Court.)

1. MASTER AND SERVANT—COMPENSATION PAYMENTS DO NOT CARRY PENALTIES FOR NONPAYMENT UNTIL OBLIGATION IS DEFINITELY SETTLED.

"Under the Workmen's Compensation Act periodical instalments of compensation for an injury to an employee do not become due, in the sense that they carry the statutory penalties for nonpayment, until the obligation of the employer is definitely ascertained or settled in the exercise of proper diligence on his part, where there is a reasonable controversy over the extent of the injury as a basis for the number of periodical payments and the amount of each." Osborn v. Omaha Structural Steel Co., 105 Neb. —, 179 N. W. 1022.

(For other cases, see Master and Servant, Dec. Dig. § 391½, New vol. 7A Key-No. Series.)

2. MASTER AND SERVANT—COMPENSATION ADMITTEDLY DUE MUST BE TENDERED TO AVOID PENALTY.

Where in such action the controversy is over the percentage of loss of the use of an injured arm, and where the testimony in behalf of the employer admits a given percentage of permanent partial disability, such employer to be relieved of the penalty provided in the act for nonpayment, must pay or tender to the employee the amount admittedly due.

(For other cases, see Master and Servant, Dec. Dig. § 391½, New vol. 7A Key-No. Series.)

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3. MASTER AND SERVANT—EVIDENCE HELD TO PRESENT CONTROVERSY OVER COMPENSATION WITH PENALTY.

Evidence examined, and *held* in part to present a reasonable controversy as to the extent of the injury.

(For other cases, see Master and Servant, Dec. Dig. § 391½, New vol. 7A Key-No. Series.)

Appeal from District Court, Lancaster County; Stewart, Judge.

Proceedings under Workmen's Compensation Act by Robert G. Hall, employee, against the Germantown State Bank, employer, and Ocean Accident & Guarantee Corporation, Limited, insurance carrier. From an award of compensation, defendants appeal Affirmed on condition.

Hall, Baird & Williams, of Lincoln, for appellants.
R. J. Greene, of Lincoln, for appellee.

DAY, J. This is an appeal by the defendants from a judgment of the district court for Lancaster County awarding plaintiff compensation together with a penalty for waiting time and attorney's fee, in an action arising under the provisions of the Workmen's Compensation Act. Laws 1913, c. 198.

On December 18, 1919, the plaintiff while employed as a brickmason by the defendant Germantown State Bank, suffered a fracture of the head of the radius at the right elbow and joint. It is conceded that the injury arose out of and in the course of the employment, and also that defendant Ocean Accident & Guarantee Corporation carried the risk and was properly made a party defendant At the time of the accident the plaintiff was earning $67.50 a week, which would entitle him to recover $15 a week compensation.

Following the accident the defendant insurance company voluntarily paid the plaintiff $15 a week for a period of 17 weeks, or up to April 13, 1920, at which time its agent informed the plaintiff that he was able to resume his work, that the company would pay no further sums on account of the injury, and that if he received any more he would have to get it through an award of the compensation commissioner. The plaintiff, thereupon, resumed his work at the former wages, performing it, however, with great pain and considerable disadvantage on account of the limitations in the use of his arm. He was not able to keep up the speed required in working for contractors and was finally obliged to forego that class of work.

A complaint was filed before the compensation commissioner by the plaintiff, and upon a hearing on September 10, 1920, an award was made that the plaintiff have and recover from the defendants the sum of $15 a week for a period of 22½ weeks, commencing April 15, 1920, together with medical and hospital expenses. From this award defendants appealed to the district court, where upon a trial on October 25, 1920, it was adjudged that the plaintiff have an recover compensation from the defendants for a period of 22½ weeks at the rate of $15 a week, with interest thereon, and for waiting time—in all $480—together with an attorney's fee of $100.

It is argued by the defendants that the judgment allowing compensation for 22½ weeks is excessive and not supported by the evidence, and also that the court erred in allowing any sum as a penalty for waiting time. The testimony is clear that for a period of 17 weeks immediately following the accident the plaintiff was wholly incapacitated from performing his usual labor. At the expiration of that period there existed a stiffness of the elbow joint and some limitation in the free

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movement of the arm. The case was tried upon the theory that the plaintiff had suffered a permanent partial loss of the use of his arm. The physician called on behalf of the defendants admitted that there was a slight limitation of the use of the arm, that there was a limitation of flexion of between one and three degrees, and gave his opinion that in terms of percentage the disability of the arm was "5 per cent. at most.

The plaintiff, in his own behalf, stated his inability to do the work as he had formerly done. He exhibited his arm to the court, and demonstrated, by going through various movements, the limitation of the natural movements of the arm. A letter was also received in evidence, without objection, from a physician who had examined the plaintiff's arm on August 14, 1920, which stated that the plaintiff had "joint irritation and strickening of right elbow; pronation and supernation of right radius, about 10 to 15 per cent."

While the testimony may not be entirely free from doubt, we are fairly satisfied that the finding of the trial court that plaintiff was entitled to compensation for 22½ weeks is supported by the testimony. We are of the opinion, however, that the court misapplied the law to the facts in allowing a penalty for waiting time for the entire period of 22½ weeks. The controversy was over the extent of plaintiff's permanent partial loss of the use of his arm.

Under the provisions of the Compensation Act, an employee, for the loss of an arm, is entitled to receive compensation, at the rate designated, for a period of 225 weeks, and for the permanent partial loss of the use of an arm the compensation allowed is such proportion of the entire loss as the disability produced bears to the whole. Rev. St. 1913, § 3662, as amended by chapter 91, § 2, Laws 1919.

[1, 2] As we construe the testimony, the defendants' evidence is a practical admission that the plaintiff had suffered a 5 per cent. disability, which would entitle him to compensation for 11¼ weeks. The mere fact that the plaintiff was claiming a greater percentage of disability was no legal justification for the defendants withholding the payments admittedly due. In order to relieve themselves from the penalty, the defendants should have at least made tender of the amount admittedly due. The plaintiff, on the other hand was claiming that his disability was more than 5 per cent. of the loss of the use of his arm, and in this contention the court agreed with him and found that his disability was equal to 10 per cent., or for a period of 22½ weeks. Rev. St. 1913, § 3666, as amended by chapter 91, § 4, Laws 1919, provides in part:

"Except as hereinafter provided, all amounts of compensation payable under the provisions of this article shall be payable periodically in accordance with the methods of payment of the wages of the employee at the time of the injury or death. Provided, fifty per centum shall be added for waiting time for all of delinquent payments after thirty days' notice has been given of disability."

[3] Construing this provision in Updike Grain Co. v. Swanson, 105 Neb. —, 178 N. W. 618, and Osborn v. Omaha Structural Steel Co., 105 Neb. —, 179 N. W. 1022, it was held that the periodical instalments of compensation for an injury to an employee do not become due, in the sense that they carry the statutory penalties for nonpayment, until the obligation of the employer is definitely ascertained or settled in the exercise of proper diligence on his part, where there is a reasonable controversy over the extent of the injury as a basis for the number of periodical payments and the amount of each. As we view the testimony there was a reasonable controversy as to whether the plaintiff's disability exceeded 5 per cent. of the loss of use of his arm. Upon the whole record we are of the opinion that plaintiff is entitled to recover compensation for 22½ weeks at the rate of $15 a week, together with the

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50 per cent. penalty for one-half of that period, with interest thereon, and the attorney's fee allowed by the court. The defendant's having succeeded in reducing the judgment of the trial court, no attorney's fee will be allowed in this court.

Although proper notice was not given by the plaintiff in his cross-appeal, we have considered it as though properly made, and conclude that the judgment of the district court is all that the plaintiff is entitled to recover under the record as made.

From what has been said, it follows that the judgment is excessive to the amount of $58.13. If the plaintiff files a remittitur of $58.13 within 10 days, the judgment will be affirmed; otherwise, it will be reversed and remanded.

Affirmed on condition.

SOCHA v. CUDAHY PACKING CO. (No. 21810.)

(Supreme Court of Nebraska. Feb. 23, 1921.)

181 Northwestern Reporter, 706

(Syllabus by the Court.)

1. MASTER AND SERVANT — INJURY BY AIR HOSE HELD TO "ARISE OUT OF THE EMPLOYMENT."

Where the nature of the employment is such as to expose a worker to a wrongful act by another worker, which may reasonably be said to have been induced by the peculiar conditions of the employment, the manner in which it was carried on, and the appliances required, such an act may reasonably be said to "arise out of the employment."

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT—ANTICIPATION OF ACCIDENT ELEMENT IN DETERMINING QUESTION WHETHER INJURY AROSE OUT OF EMPLOYMENT.

While the fact that an employer may have anticipated such an accident as liable to happen is not a ground of liability under the Workmen's Compensation Act, since negligence is not an element in the determination of the award, it affords some light upon the question whether the injury may reasonably be said to "arise out of the employment."

(For other cases, see Master and Servant, Dec. Dig. § 373.)

Appeal from District Court, Douglas County; Sears, Judge.

Proceedings under the Workmen's Compensation Act by Julia Socha against the Cudahy Packing Company to recover for the death of Albert Socha, employee. Judgment for plaintiff, and defendant appeals. Affirmed.

C. W. Sears, of Omaha, for appellant.

Edward F. Leary and Geo. H. Merten, both of Omaha, for appellee.

LETTON, J. Appeal from judgment in favor of a dependent widow under the Workmen's Compensation Act. Laws 1913, c. 198.

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Albert Socha was in the employment of the Cudahy Packing Company. In the room in which he was employed were vats in which meat was cooked. When sufficiently cooled, the meat, in metal baskets or crates, was lifted from the vats by means of a compressed air lift attached to an overhead trolley by which the crates were rolled to and emptied upon and at one side of a table about six feet wide. Socha's work was to push the cooked meat across so that the trimmers, who stood upon the other side of the table, could reach it. This at times required a stooping position over the table. The evidence sustains the finding of the trial court that, while Socha was actually engaged in performing this service, and was not engaged in any playful or sportive acts, he sustained accidental injuries, from which he died, as a result of the playful application of a compresed air hose against his person by a fellow workman. The assault caused a rupture of the intestines resulting in septicemia.

It was shown that a printed placard warning against the danger of such use of compressed air was on a bulletin board at the gate to the plant, through which the men entered. A photograph shows that 17 placards on other subjects were upon this board. The two men concerned in the act were Polish, and barely understood the English language enough to testify. The placard is printed in English. There is no proof that their attention had ever been called to the placard, or to the danger of such use of compressed air, or that they had any knowledge of the consequences which might ensue from such an act.

[1] It is admitted that the injury occurred in the course of the employment, and the question presented is whether it arose "out of" the employment. The argument of appellant is that the employer is not liable because the injury did not arise "out of the employment," and that, when the statute of another jurisdiction is adopted, the construction given there is also adopted, unless a contrary intention is expressed by the adopting Legislature.

Reliance is placed mainly upon the holding in Pierce v. Boyer-Van Kuran Lumber Co., 99 Neb. 321, 156 N. W. 509, L. R. A. 1916D, 970. In that case it is not quite clear from the opinion how far the injured workman had participated in the skylarking. The decision is based upon Hulley v. Moosbrugger, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203; but the facts in that case are quite different from those before us; and, while the general principle that willful or sportive acts of a fellow employee causing injury to a workman, not arising out of the employment, do not afford a basis for compensation is sound, yet the courts are not uniform in their decisions as to what acts "arise out of the employment." The opinion in the Hulley Case quotes with approval from McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, as follows:

"It arises 'out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. * * * The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

Some courts go much farther than others in extending the scope of the term "arising out of" the employment as shown by the following

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cases, in which compensation was allowed: Markell v. Green Felt Shoe Co., 221 N. Y. 493, 116 N. E. 1060. Claimant, while employed as foreman of the shoe company, received injuries resulting in the loss of an eye through the act of an employee of a machinery company who had been repairing machines in defendant's plant, and who, approaching claimant in a dark room, placed his arms about claimant's neck, and drew his head forward on to a lead pencil in his pocket in such a manner that the lead penetrated the eyeball.

In re Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A 1917A, 544, horses, of which the claimant was the driver, were sprinkled with water by another employee, who intentionallvy sprinkled some water on claimant. Shortly afterwards claimant touched the other workman on the shoulder saying, "George, don't do that again." The other man slapped claimant on the shoulder, and, as claimant turned around, his finger struck claimant's left eye causing the injury. In Leonbruno v. Champlain Silk Mills, 229 N. Y. 470, 128 N. E. 711, an employee, while devoting his time to his work, was struck in the eye by an apple thrown by a fellow servant engaged in horse play. Verschleiser v. Joseph Stern Son, 229 N. Y. 192, 128 N. E. 126. In Pekin Cooperage Co. v. Industrial Board, 277 Ill. 53, 115 N. E. 128 a workman was injured by being thrown or falling upon a cement floor, while waiting in line for his pay, by the jostling of fellow workmen, in which he did not engage. In Pekin Cooperage Co. v. Industrial Commission, 285 Ill. 31, 120 N. E. 530, a worker was injured in a quarrel with another over interference with his work. In Marchiatello v. Lynch Realty Co., 94 Conn. 260, 108 Atl. 799, an office boy carelessly picked up and discharged an automatic pistol, the ball passing through a partition and striking a watchman while performing his duties. In re Loper, 64 Ind. App. 571, 110 N. E. 324, is an air hose case very similar to this one.

Other courts adhere to a stricter contruction of the statute. Cases collected in note on page 47, L. R. A. 1916A; Coronado Beach Co. v. Pillsbury, 172, Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164; Federal Rubber Mfg. Co. v. Havolic, 162 Wis. 341, 156 N. W. 143, L. R. A. 1916D, 968; Tarpper v. Weston-Mott Co., 200 Mich. 275, 166 N. W. 857, L. R. A. 1918E, 507; Payne v. Industrial Commissiion, 295 Ill. 388, 129 N. E. 122. The three latter cases are air hose cases, but there are additional facts in evidence in this case which to us are important and justify a distinction, such as is made in In re Loper, supra.

In England it has been held that, where an assault is likely to happen from the nature of the work being performed, such as a schoolmaster in an industrial school, assaulted by several of the boys in pursuance of a plan; a cashier carrying money, who was assaulted and robbed; or a foreman of a moving company assaulted by a man whom he had declined to employ. Trim Joint District School Board v. Kelly, App. Cas. 1914 (Eng.) 667; Nisbet v. Rayne & Burn, 2 K. B. Div. 1910 (Eng.) 689; Weekes v. Stead & Co., W. N. 1914 (Eng.) 263.

In Challis v. London & S. W. R. Co., 2 K. B. Div. (Eng.) 154, it was held that, where the workman was injured by a stone thrown by a boy intentionally compensation might be held. This is in conflict with the earlier case of Armitage v. Lancashire & Y. R. Co., 2 K. B. Div. (Eng.) 18, cited and relied upon in the Hulley Case.

In Dennis v. White & Co., App. Cas. 1917 (Eng.) 479, it is said by Lord Finlay:

"If the injury is the result of an assault it is material to show that the employment is such as to involve liability to such mishaps; as in the case of a gamekeeper or watchman. See Mitchinson v. Day Bros. and Weekes v. Stead & Co. Where the risk is one shared by all men,

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whether in or out of employment in order to show that the accident arose out of the employment it must be established that special exposure to it is involved."

In a Scotch case, Shaw v. Macfarlane, 52 S. L. R. (1914) 236, a workman in a foundry, stooping in proximity to molten metal, was struck by an intoxicated stranger, fell, and was burned by the metal. It was held the accident arose out of the employment, and it was stated that an earlier case holding to the contrary could not, "looking to the subsequent march of judicial decision, now be supported as sound law."

In this country, in McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, a workman was killed by an intoxicated fellow servant, who, "when intoxicated, was quarelsome and dangerous, and unsafe to be permitted to work with his fellow employees, all of which was known to the superintendent." Compensation was allowed.

In Stuart v. City of Kansas City, 102 Kan. 307, 171 Pac. 913, a workman in the habit of playing jokes on the other workman, which habit was known to his immediate superior, threw some mortar in the eye of a workman who was engaged in his regular work. It was held that the injury arose out of the employment. But the court also took the view that the mere fact that an injury is occasioned by the sportive or malicious act of a fellow employee does not of itself establish that the injury arose out of the employment. In Polar Ice & Fuel Co. v. Mulray (Ind. App.) 119 N. E. 149, the same principle is applied.

In State v. District Court, 140 Minn. 75, 167 N. W. 283, L. R. A. 1918E, 502, a worker in a factory where it was customary for some of the workmen to throw missiles at one another while engaged in work, was struck and injured by such a missile. The employer knew, or should have known, of this custom. It was held that the injury "arose out of the employment." The court cites the Pierce Case, but holds that the facts were so different that that case was not applicable.

[2] The very fact that injuries of this nature, resulting from the sportive use of compressed air under like circumstances, have been before the courts in a number of cases worthy of note. Such a combination of elements seems to present a situation attractive and suggestive to a youthful, or to a rude and untutored, mind having no knowledge of the serious or fatal consequences liable to result. This combination of elements may arise out of the nature of the occupation. The liability to perform such acts by the employees was known to the employer, since as we have seen, warning notices in all langage foreign to that of the workmen had been placed upon the bulletin board; and the fact that the men had previously played with the air hose, but not in this manner, was known to the foreman, Schultze, Socha's immediate superior. Though negligence is not a necessary element in an award under the act, such knowledge affords light upon the question whether the injury may reasonably be said to arise out of the employment. If a person familiar with the whole situation could reasonably contemplate that such an accident might result from the peculiar nature and circumstances of the employment and the nature of the place where the injured man was required to work, then it may reasonably be said to arise out of it. The principles quoted from the McNicol's Case seem to us to be sound.

[3] We are of the opinion that, under all the facts, such a happening might reasonably have been foreseen, and, in fact, was anticipated by the employer in this case, and that the accident arose out of the employment. So far as the case of Pierce v. Boyer-Van Kuran Lumber Co., supra, is in conflict with the principles herein announced, it is overruled.

The decision of each case rests upon the facts proved, and, since no English case is similar to this in its facts, and the contention as

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to the adoption of the English construction of the statute does not seem convincing, the general principle of the English rule is not departed from.

Affirmed.

SKOUITCHI v. CHIC CLOAK & SUIT CO., INC., ET AL.

(Court of Appeals of New York. March 1, 1921.)

130 Northwestern Reporter, 299.

1. MASTER AND SERVANT — CORPORATE OFFICERS HELD ENTITLED TO COMPENSATION AS "EMPLOYEE."

The president and treasurer of a cloak and suit company, owning 10 shares of its 120 shares of capital stock, who was employed as manager, and as such performed services in packing, shipping, selling, and delivering goods, and who, while so doing, sustained injuries, is entitled to compensation as an employee for such injuries under the general provisions of the Workmen's Compensation Law; his case not being governed by or dependent upon the amendment to section 54 made in 1916.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series, Employee.)

2. MASTER AND SERVANT—CORPORATE OFFICER, SERVING AS EMPLOYEE, ENTITLED TO COMPENSATION BASED ON WAGES RECEIVED AS EMPLOYEE.

A person holding the title of an executive managing officer of a corporation, and at the same time being its employee and performing the work of such in which he is injured, should be allowed to draw compensation, based only on wages received by him in his capacity as employee, and not on those received as executive manager.

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding for compensation under the Workmen's Compensation Act by Irving Skouitchi, the employee, opposed by the Chic Cloak & Suit Company, Incorporated, the employer, and the General Accident, Fire & Life Assurance Corporation, Limited, the insurance carrier. From an order of the Appellate Division (192 App. Div. 768, 183 N. Y. Supp. 321), reversing an award made by the State Industrial Commission, and dismissing the claim, the State Industrial Commission appeals. Order of the Appellate Division modified, by providing that the claim be remitted, and not dismissed.

Charles D. Newton Atty. Gen. (E. C. Aiken, of Albany of counsel), for appellant.

Alfred W. Meldon, of New York City, for respondents.

HISCOCK, C. J. Upon evidence which sustained them, findings were made by the Industrial Commission to the effect that claimant owned 10 shares of a value of $10 per share, out of 120 shares of the capital stock of a small corporation engaged in the clothing business, and was its president and treasurer; that in these capacities, however, he performed no

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substantial duties, the business being supervised by a general superintendent, and even the checks signed by another person; that he was "employed" as manager, and as such performed services in packing and shipping and selling and delivering goods; that while he was thus engaged in his regular work he met with an accident, which caused the injuries for which compensation was sought; that his "average weekly wage * * * was the sum of $33.70."

On these and other appropriate formal findings an award was made The Appellate Division, however, took the view that the award could only be sustained under the amendment made to section 54 of the Workmen's Compensation Law (Consol. Laws, c. 67) in 1916, which permitted the insurance of "employers who perform labor incidental to their occupations," and, certain requirements of that amendment not having been complied with, it reversed the award and dismissed the claim.

We are of the opinion that the Appellate Division erred in its view that the claim could only be established by virtue of the amendment in question. In fact, it may be a debatable question whether that amendment can be applied in the case of an employer which is a corporation. Of course, a corporation itself could not be injured, or draw compensation for injuries, as provided in the Compensation Law. In its case advantage could be taken of the provision for insurance of employers only by holding that the act covered the officers and agents of the employer and permitted them to recover compensation. We refrain, however, from deciding this question at this time, because we do not regard it as being involved.

[1] The amendment plainly was intended to cover the case of an employer who maintained his status as such, but who nevertheless did some work of the character usually performed by an employee. Such a situation would arise for instance, in the case of a tailor who employed four or five men and did some work with them. He would remain an employer, and obviously could not become an employee of himself as an employer. If he received any compensation for injury, it would be as employer under the amendment in question. But all this would not preclude a person who was really an employee from securing compensation as such for injuries received in the course of his employment, even though he might hold a title as officer in a corporation If he was actually employed to perform services as an employee, such as are contemplated by the Workmen's Compensation Law, there is no reason why he should not come within its benefits independent of the amendment of 1916.

A corporation is a complete entity separate and distinguishable from its stockholders and officers, and if it sees fit to have one of the latter serve it in the capacity of an ordinary employee, we see nothing to prevent it from so doing. That seems to us to be the present case. The claimant was "employed" as general manager. The term "general manager" is somewhat ambiguous and of itself might indicate either an executive and important officer, or a person performing ordinary duties of an employee. The evidence and findings in this case show that the position was of the latter class, and that the claimant performed ordinary detail and manual work, such as would be required of a typical employee. Under these circumstances we think that he was entitled to secure compensation as such for injuries under the general provisions of the Compensation Law, and that his case was not governed by or dependent upon the amendment of 1916.

There is nothing in our decision in the case of Matter of Bowne v. Bowne Co., 221 N. Y. 28, 116 N. E. 364 (which curiously is stated by the Attorney General in his brief to have been decided before the amendment of 1916 was adopted), which contravenes this view. On the other hand, the effect of what was said by Judge Pound in its entirety sus-

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tain the view which we are now taking of the facts presented on this appeal. In that case the claim was the owner of a majority of the capital stock of a corporation of which he was the president. The Commission found that he was "employed as president." His ordinary duties were those which pertained to the position of a managing executive officer, and the manual work in the course of which he was injured was merely a casual occurrence. He received as a stockholder and an executive officer substantial dividends and salary, which were in no wise abated or impaired by his accident. Under those circumstances we said that it would be an unreasonable interpretation of the Compensation Law to regard him as an employee, such as was intended and provided for by that satute in awarding compensation for injured employees. It was fully recognized, however, that there was nothing to prevent a corporation, if it so desired from hiring one of its officers to be and to perform the work of such an employee as was contemplated by the statute. We simply held that "the higher executive officers of a corporation are not, as such, its employees in the ordinary use of the word." 221 N. Y. 30, 116 N. E. 365.

We think, therefore, that it was erroneous for the Appellate Division to dismiss the claim on the theory that no recovery could be had. With some hesitation, however, we have reached the conclusion that it was proper to reverse the award, sending the claim back for further proceedings instead of dismissing it.

[2] A person holding the title of an executive managing official, and at the same time being an employee and performing the work of such, should be allowed only to draw compensation based on wages received by him in the latter capacity. The finding in this case states that the claimant received an average weekly wage of $33.70, but it is not stated whether that was all received in his capacity as employee. In view of the evidence and other findings, it very probably may be that such was the fact, and that no part of this amount was apportioned to his position as president and treasurer. Nevertheless the evidence is so conflicting and unsatisfactory that we conclude that there should be a specific finding upon this subject, and that the claim should be remitted to the Industrial Commission for such further proceedings as may be necessary to that end.

The order of the Appellate Division therefore, should be modified, by providing that the claim be remitted, and not dismissed, with costs to abide event.

Hogan, Cardozo, Pound, McLaughlin, Crane, and Andrews, JJ., concur.

Ordered accordingly.

KOLPIEN v. O'DONNELL LUMBER CO. ET AL.

(Court of Appeals of New York. March 1, 1921.)

130 Northeastern Reporter, 301.

MASTER AND SERVANT—COMPENSATION AWARD TO CORPORATE OFFICER, ALSO EMPLOYEE, REVERSED, AND CLAIM REMITTED FOR ADDITIONAL FINDINGS.

On appeal from an order of the Appellate Division affirming award under the Workmen's Compensation Act (Consol. Laws, c. 67), made by the Industrial Commission to the president and treasurer of the employing corporation, also employed as manager, in which capacity he per-

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formed manual labor, where there is no finding that the manager did not discharge any duties as president or treasurer, or that his substantial compensation of some $46 a week was received by him in the capacity of employee, the award must be reversed and the claim remitted to the Industrial Commission for rehearing and further proceedings.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding for compensation under the Workmen's Compensation Act by Frank L. Kolpien, the employee, opposed by the O'Donnell Lumber Company, the employer and the Lumber Mutual Casualty Insurance Company of New York, the insurance carrier. From a unanimous order of the Appellate Division (191 App. Div. 764, 182 N. Y. Supp. 155), affirming an award made by the State Industrial Commission, the employer and insurance carrier appeal by permission. Award reversed, and claim remitted to the Industrial Commission for rehearing and further proceedings.

D. Theodore Kelly of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

HISCOCK, C. J. The findings in this case are to the effect that the claimant was president and treasurer of a corporation and held a majority of its capital stock; that he was president and treasurer, and also "employed" as manager, in which latter capactiy he performed manual labor, such as an ordinary employee might perform, and that it was while engaged in the performance of these duties that he was injured; that his "average weekly wage * * * was the sum of $46.16."

Much that has been said in the case of Skouitchi v. Chic Cloak & Suit Co., Inc., 130 N. E. 299, decided herewith, is applicable to the present claim, and its repitition is unnecessary. The extent of the claimant's stockholdings, however, is much more important than in the Skouitchi Case, and there is no finding that he did not discharge any duties as president or treasurer, or that his very substantial compensation was received by him in the capacity of employee. If, indeed, we were permitted to look to the evidence for the purpose of trying to find testimony sustaining an additional finding that his wages were thus receved, we should find, to the contrary, that he received a salary of $2,500 a year as president and as manager.

Under these circumstances, we think that the award must be reversed and the claim remitted to the Industrial Commission for a rehearing and further findings, with costs to abide event.

Hogan, Cardozo, Pound, McLaughlin, Crane and Andrews, JJ., concur.

Ordered accordingly.

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HUBBS v. ADDISON ELECTRIC LIGHT & POWER CO. ET AL.

(Court of Appeals of New York. March 1, 1921.)

130 Northeastern Reporter, 302.

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION; FINDINGS OF COMMISSION CONCLUSIVE.

The findings of the Industrial Commission are conclusive on the Court of Appeals in a workmen's compensation case.

(For other cases, see Master and Servant, Dec. Dig. § 418[6].)

2. MASTER AND SERVANT — COMPENSATION ALLOWABLE TO CORPORATE OFFICER AND STOCKHOLDER EMPLOYED AS MANAGER, DOING MANUAL LABOR.

Where the Industrial Commission found that claimant owned a large proportion of the capital stock of a comparatively small electric light and power company, and was its secretary and treasurer, that he was employed as a general manager, and as such performed manual labor at the company's plant and away from it, receiving as general manager the weekly wage of $25, such findings sustained an award of compensation to him for injuries received in such employment.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding for compensation under the Workmen's Compensation Act (Consol. Laws, c. 67) by Melvin G. Hubbs, the employee, opposed by the Addison Electric Light & Power Company, the employer, and the Utilities Mutual Insurance Company, the insurance carrier. From an unanimous order of the Appellate Division (191 App. Div. 765, 182 N. Y. Supp. 152), affirming an award made by the State Industrial Commission, the employer and insurance carrier appeal by permission. Order of the Appellate Division affirmed.

See, also, 183 N. Y. Supp. 950.

Edward R. Rayher, of New York City, for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondents.

HISCOCK, C. J. In this case it has been found that the claimant owned a large proportion of the capital stock of a comparatively small electric light and power company and was its secretary and treasurer; that he was employed as a general manager and as such "peformed manual labor at his employer's plant * * * and away from the plant"; that his weekly wage as such general manager was the sum of $25.

[1, 2] The decision of this case is largely controlled by what has been said in the Skouitchi Case, 130 N. E. 299, and the Kollien Case, 130 N. E. 301, decided herewith. The findings, which are conclusive upon us, show that the claimant was "employed" as general manager; that in such capacity he performed various manual services, such as an ordinary employee might perform; and that for his services in this particular capacity he received a certain weekly wage. In this latter respect the findings differ from those made in the other two cases to which reference has been made in that they show just what his wages were in his capacity of employee.

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Under these circumstances we think that the award is sustained by the findings, and that the order of the Appellate Division should be affirmed, with costs.

Hogan, Cardozo, Pound, McLaughlin, Crane, and Andrews, JJ., concur.

Order Affirmed.

HEIDEMANN v. AMERICAN DISTRICT TELEGRAPH CO. ET AL.

(Court of Appeals of New York. March 1 1921.)

130 Northeastern Reporter, 302

MASTER AND SERVANT — INJURY TO WATCHMAN ACCIDENTALLY SHOT HELD ONE "ARISING OUT OF EMPLOYMENT," WITHIN COMPENSATION LAW.

A night watchman, employed by a company which furnished subscribers with protection against burglary, suffered death arising "out of" his employment, within the Workmen's Compensation Law, when he was accidentally shot by a police officer then in the pursuit of burglars, though they had not entered the building which the watchman was protecting.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

Hiscock, C. J., and McLaughlin J., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding for compensation under the Workmen's Compensation Law by Nellie Heidemann for the death of her husband, Carl V. Heidemann, opposed by the American District Telegraph Company, the employer, and the Royal Indemnity Company, the insurer. From an order of the Appellate Division of the Supreme Court (193 App. Div. 402, 183 N. Y. Supp. 924), reversing by a divided court an award of the State Industrial Commission, and dismissing the claim, claimant appeals. Order of the Appellate Division reversed, and award confirmed.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, and Bernard L. Shientag, of New York City, of counsel), for appellant.

Barnett Cohen of New York City for respondents.

CARDOZO, J. In September, 1919, Carl V. Heidemann was employed as a night watchman by the American District Telegraph Company, which was engaged in the business of furnishing its subscribers with protection against burglary. His duty was to patrol the streets in a given section of Brooklyn, try the doors, and keep watch and ward until relieved. About 3 o'clock in the morning of September 22, 1919, in the course of his regular work, he was accidentally shot by a police officer then in the pursuit of burglars. The first shot was fired in the air; the second hit Heidemann and killed him. An award under the Workmen's Compensation Law, in favor of his widow, was reversed at the Appellate Division on the ground that death, though occurring "in the course of employment," did not arise "out of" employment within the meaning of the statue.

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We reach a different conclusion. Heidemann's duties involved exposure to something more than the ordinary perils of the street, with its collisions, its pitfalls, and the like. Matter of Redner v. Faber & Son, 223 N. Y. 379, 119 N. E. 842; Dennis v. White & Co., [1917] A. C. 479. For him, in a measure not common to the public generally, there was exposure to the perils that come from contact with the criminal and lawless. Other men, if the ill fortune was theirs to be close to an affray, might, indeed, encounter a like fate. Dennis v. White & Co., supra, at pages 489, 492; Thom v. Sinclair, [1917] A. C. 127, 143; Bird v. Keep, 11 B. W. C. C. 133; Allcock v. Rogers, Id. 149, 153. His calling multiplied the chance that he would be near when trouble came, and in multiplying the chance increased exposure to the risk. "He was brought by the conditions of his work "within the zone of special danger." Matter of Leonbruno v. Champlain Silk Mills, 229 N. Y. 470, 472, 128 N. E. 711.

We are told that the death was unrelated to the employment, because the burglars had not entered a building which the employer was protecting. The incidents of service may not be limited so narrowly. It was not only in repelling attack upon the property of his employer's patrons that Heidemann had to face the perils of his calling. He faced them at all times while abroad upon his duties. His employment put him upon the street at night, and put him there in search of trouble. If shots were heard, or cries of distress, or the sounds of an affray, others might run to shelter. His duty was to search the cause. The disturbance might have its origin in the homes and stores and offices intrusted to his care. He could not know unless he looked. Crimes of violence flourish under cover of the night and darkness. That was the very reason why Heidemann was there to guard.

The sudden brawl, the "chance medley" (Blackstone, Comm. book 4, c. 14; People v. Tomlins, 213 N. Y. 240, 244, 107 N E. 496, Ann. Cas. 1916C, 916) are dangers of the streets confronting with steady menace the men who watch while others sleep. Casual and irregular is the risk of the bealted traveler, hurrying to his home. Constant, through long hours, was the risk for Heidemann charged with a duty to seek, where others were free to shun. The difference is no less real because a difference of degree. The tourist on his first voyage may go down with the ship, if evil winds arise. None the less in measuring his risk, we do not class him with the sailor for whom the sea becomes a home. The night, too, has is own hazards, for watchman and for wayfarer. Death came to Heidemann in the performance of his duty, face to face with a peril to which the summons of that duty called him.

The order of the Appellate Division should be reversed, and the award confirmed, with costs in the Appellate Division and in this court.

Hogan, Pound, Crane, and Andrews, JJ., concur.

Hisodck, C. J., and McLaughlin, J., dissent.

Ordered accordingly.

SCHULTZ ET AL. v. CHAMPION WELDING & MFG. CO. ET AL.

(Court of Appeals of New York. March 1, 1921.)

130 Northeastern Reporter, 304

1. MASTER AND SERVANT—INJURY IN AUTOMOBILE COLLISION WHILE ON WAY TO WORK HELD NOT TO "ARISE OUT OF AND IN COURSE OF EMPLOYMENT."

While an employee of a company engaged in building and machine work was a shop foreman, and also looked after certain outside work,

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and, having permission to use the employer's automobile, drove the car to his own home after finishing his day's work, kept the car overnight and in the morning started to drive it on the public highway to his employer's place of business and received fatal injuries in a collision with another car, the injury did not arise out of and in the course of the employment; it occuring while he was on his way to his place of work and before the time he was to go to work

(For other cases, see Master and Servant, Dec. Dig. § 375[2].)

(For other definitions, see Words and Phrases, First and Second Series, Course of Employment.)

2. MASTER AND SERVANT—COMPENSABLE INJURY MUST ARISE BOTH OUT OF AND IN COURSE OF EMPLOYMENT.

Injuries for which an award may be made under the Workmen's Compensation Law must arise both out of and in the course of the employment.

(For other cases, see Master and Servant, Dec. Dig. § 371.)

Cardozo, Pound, and Andrews, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Proceedings by Frances Schultz and others, under the Workmen's Compensation Law (Consol. Laws, c. 67), to recover compensation for the death of Herman G. Schultz, employee, opposed by the Champion Welding & Manufacturing Company, employer, and the Travelers' Insurance Company, insurance carrier. An award of the State Industrial Commission was affirmed by the Appelate Division, one of the justices dissenting (184 N. Y. Supp. 719), and the employer and insurance carrier appeal. Reversed, and claim dismissed.

E. C. Sherwood, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

McLAUGHLIN, J. This appeal is from an order of the Appellate Division, Third Department, affirming, one of the justices dissenting, an award of the State Industrial Commission, made to the widow and minor children of Herman G. Schultz, deceased. The award was made upon the theory that Schultz, sustained fatal injuries arising out of and in the course of his employment by the Champion Welding & Manufacturing Company. The business of this company was "welding and machine work." Schultz was the foreman of its shop and also looked after certain outside work. Shortly after 5 o'clock in the afternoon on the 10th of September, 1919, he left the shop to take charge of an outside job. The employer had an automobile which Schultz at times, was permitted to use, and which he did on this occasion. After he had finished his day's work he drove the car to his own home, it being left entirely to him to determine whether he would take it there or back to his employer's garage. His compensation in no way depended upon the use of the car, and when he decided to take it to his own home his relation was that of a borrower. He kept the car overnight and in the morning started to drive it, on a public highway, to his employer's place of business. While doing so the car collided with another car, and he received injuries from which he died shortly thereafter.

[1, 2] His injuries did not arise out of and in the course of his employment. The risk involved in using the car to go to the place where he was employed on the occasion referred to was no more a risk of the business of the employer than it would have been had he walked. The words "arising out of and in the course of the employ-

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ment" have a clear and definite meaning, and relief under the statute can only be given when the injuries arise both out of and in the course of the employment. Matter of Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344; Matter of Daly v. Bates & Roberts, 224 N. Y. 126, 120 N. E. 118. This injury did not arise out of either. It occurred while he was on the way to the place where he was employed and before the time when he was to go to work.

This court has recently held where an employee is injured while on his way to the place where he is to render service, such injuries do not arise out of the employment and are not connected therewith. Matter of Kowalek v. New York Consolidated R. R. Co., 229 N. Y. 489, 128 N. E. 888; Pierson v. Interborough Rapid Transit Co., 184 App. Div. 678, 172 N. Y. Supp. 492, affirmed, 227 N. Y. 666, 126 N. E. 920.

The order of the Appelate Division and the award of the state Industrial Commission should therefore be reversed, and the claim dismissed, with costs in this court and in the Appellate Division against the State Industrial Commission.

Hiscock, C. J., and Hogan and Crane, JJ., concur.

Cardozo, Pound, and Andrews, JJ., dissent.

Ordered accordingly.

BEEMAN v. BOARD OF EDUCATON OF PENN YAN.

(New York Supreme Court, Appellate Division, Third Department. February 28. 1921.)

187 New York Supplement, 213.

MASTER AND SERVANT—PUBLIC SCHOOL TEACHER CARRYING ON CHEMICAL EXPERIMENTS NOT ENGAGED IN "HAZAROUS OCCUPATION," WITHIN COMPENSATION LAW.

A school-teacher, carrying on chemical experiments prescribed by the Education Law, is not engaged in "hazardous occupation," within the meaning of Workmen's Compensation Law, under Const. art. 1, § 19.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

(For other definitions, see Words and Phrases, First and Second Series, Hazardous.)

John M. Kellogg, P. J., and Henry T. Kellogg, J., dissenting.

Appeal from State Industrial Commission.

Proceeding by Emily E. Beeman under the Workmen's Compensation Law, to obtain compensation for personal injuries, opposed by the Board of Education of Penn Yan, the employer. There was an award of compensation, and the employer appeals. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Henry T. Kellogg, Kiley, and Van Kirk, JJ.

George S. Sheppard, of Penn Yan, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

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WOODWARD, J. I am unable to concur in the opinion of the Presiding Justice that a school-teacher, in carrying on chemical experiments prescribed by the Education Law, is engaged in a hazardous occupation, within the meaning of the Workmen's Compensation Law (Consol, Laws c. 67). The evidence is clear that the claimant was engaged in instructing her class in the classroom of the school in Penn Yan, when an explosion occurred which resulted in her injury. The learned Presiding Justice suggests that "by group 25 of section 2 of the Compensation Law the handling of explosives and dangerous chemicals and laboratories are hazardous employments," but the reading of group 25 suggests no such idea in my mind, when read in connection with the general purpose of the statute, which was to provide for compensation to those injured in carrying on industries essentially hazardous; the compensation being charged against the product and distributed as a part of the overhead costs of production.

The constitutional provision (article 1, § 19) was adopted upon the express proviso "that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer," and where there is no business upon which such charge may be made there is no warrant for the statute, and the provisions of section 2 are all to be read in connection with this constitutional proviso. Group 25, when thus limited, is confined to employers engaged in the business of "manufacture, storage or handling of explosives and dangerous chemicals, corrosive acids or salts, gasoline, petroleum, gunpowder or ammunition; laboratories; ice harvesting, ice storage and ice distribution," for pecuniary gain. Section 3, subd. 5.

The suggestion that an employer, under subdivison 3 of section 3 of of the Workmen's Compensation Law, includes "a state and a municipal corporation, or other political subdivision thereof," and that "by group 44 it is not necessary that it should be carrying on the employment for pecuniary gain," seems to me to overlook both the letter and the spirit of the act. Group 44 refers to "employment as a keeper, guard, nurse or orderly in a prison, reformatory, insane asylum or hospital maintained or operated by the state or municipal corporation or other subdivision thereof, notwithstanding the definitions of terms 'employment,' 'employer' or 'employee' in subdivision 5 section 3 of this chapter," and by its term excludes school-teachers or other employees outside of the enumerated class. Aultman & Taylor Co. v. Syme, 163 N. Y. 54, 57, 57 N. E. 168, 79 Am. St. Rep. 565.

Group 43 comes nearer to a justification for this award. under the provision that "any employment enumerated in the foregoing groups and carried on by the state or a municipal corporation or other subdivision thereof, notwithstanding the definition of the term 'employment' in subdivision 5 of section 3 of this chapter"; but school-teaching is not one of the employments enumerated in the foregoing groups. The handling of chemicals was purely incidental to the principal calling. An employee as defined in subdivision 4 (not 5) of section 3 of the act "means a person engaged in one of the occupations enumerated in section 2 or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises," etc., and I apprehend that a school-teacher is not engaged in any of the occupations enumerated in section 2, and that a board of education is not engaged in the "principal business" of "carrying on or conducting a hazardous employment upon the premises," etc.

In Matter of Claim of Krug (before this court for decision,)—App. Div.——, 186 N. Y. Supp. 727, I have discussed this general subject, and if right in that case the award here cannot be sustained.

The award should be reversed, and the claim dismissed.

Kiley and Van Kirk, JJ., concur.

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JOHN M. KELLOGG, P. J. (dissenting). Claimant, who was employed by the appellant to teach biology and also to do laboratory work in its schools, lost her eye by an explosion while she was performing a hydrogen demonstration in the laboratory, by pouring certain acids into a flask, because of the combination of the chemicals and the handling of them.

It is urged that school-teaching is not a dangerous employment, and that the appellant is not an employee, within the meaning of the Workmen's Compensation Law. The evidence of the claimant as to her work in the laboratory, the nature of it, and the conditions of her employment are not denied; the principal contention being that upon the most favorable view of the facts as she states them, and as the commision has found them, there is no liability.

By group 25 of section 2 of the Compensation Law, the handling of explosives and dangerous chemicals and laboratories are hazardous employments. The word "laboratories," in the connection in which is used, evidently means work in laboratories. The handling of explosive and dangerous chemicals is not necessarily confined to chemicals which in themselves are dangerous, but must cover those which, in the use or handling which the employee makes of them, become dangerous or hazardous. Each of two or more chemicals may, in itself, be harmless; but, when used together, they may become dangerous. An employee, handling such chemicals, falls within the act. If the claimant has overstated her laboratory work, the manner of doing it, or the terms of the employment, that was a question of fact, which should have been met by the employer. There being no denial of the evidence, the commission had the right to give it the most favorable consideration and its favorable construction of the evidence is a question of fact, which we cannot review. We must therefore treat the claimant as an employee in a hazardous employment. The fact that the statutes of the state require the teacher in her grade to perform certain laboratory experiments and demonstrations does not exempt her employer from liability but makes it clear that such work was a part of the employment.

The appellant employer is within subdivision 3 of section 3 of the Workmen's Compensation Law, which includes "a state and a municipal corporation, or other political subdivision thereof," and by group 44 it is not necessary that it should be carrying on the employment for pecuniary gain. Under subdivision 1 of section 3 of the General Corporation Law the appellant is a municipal corporation." The school district not only includes the village of Penn Yan, but reaches out and includes a part of the adjoining towns. The Compensation Law, by requiring the school district to insure, carries with it the power to raise the premium by taxation. We must conclude, therefore, that the claimant was an employee, the appellant the employer, and the employment hazardous.

The award should therefore be affirmed.

Henry T. Kellogg, J., concurs.

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BIXBY v. COTSWOOD COMFORTABLE CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. March 2, 1921.)

186 New York Supplement, 762.

1. MASTER AND SERVANT—DIPHTHERIA HELD NOT SHOWN TO HAVE BEEN CAUSED BY COMPENSATION CLAIMANT'S WORK OR ACCIDENT.

In a proceeding under the Workmen's Compensation Law, *held*, that there was nothing to show that diphtheria, causing disability, was the natural and unavoidable result of an accident or anything which occurred while claimant was at work; evidence being that he worked in a damp pit and got wet when he went out in the rain.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—NOTICE OF COMPENSABLE INJURY MAY BE EXCUSED.

The only ground on which the Industrial Commission may excuse the giving of the notice required by Workmen's Compensation Law, § 18, is either that the notice could not have been given, or no prejudice has been caused thereby.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

3. MASTER AND SERVANT—NOTICE OF DEVELOPMENT OF DIPHTHERIA NOT NOTICE OF INJURY, REQUIRED BY COMPENSATION LAW.

A notice, however formal, that servant had a case of diphtheria, would not be notice of an accidental injury arising out of and in the course of employment, and, if it was intended to hold the employer responsible for such disease, it was the duty of the claimant to give the notice required by the Workmen's Compensation Law, containing the time, place, nature, and cause of the injury.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

4. MASTER AND SERVANT—NOTICE REQUIRED BY COMPENSATION LAW NOT MERE FORM.

It is the duty of the State Industrial Commission to follow the rules laid down by the Court of Appeals, and not to treat as a mere matter of form the provisions of Workmen's Compensation Law, § 18, requiring notice to employer of time, place, nature, and cause of injury.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

5. MASTER AND SERVANT — COMPENSATION CLAIMANT MUST SHOW WANT OF NOTICE DID NOT PREJUDICE EMPLOYER.

The requirements of Workmen's Compensation Law, § 18, that notice be given employer of time, place, nature, and cause of injury, are a condition precedent to the right to an award; and where the Commission acts to relieve the claimant from giving such notice, it should be only on evidence furnished by the claimant that the failure of notice did not operate to prejudice the employer and the insurance carrier, and the facts on which the conclusion rests, and not the mere conclusion, should be given in the record.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

Cochrane, J., dissenting.

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Appeal from State Industrial Commission.

Proceeding by J. W. Bixby under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the Cotswood Comfortable Company, the employer, and the Maryland Casualty & Guaranty Company, insurance carrier. There was an award of compensation by the State Industrial Commission, and the employer and insurance carrier appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Bond, Schoeneck & King, of Syracuse (Clarence R. King, of Syracuse, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. [1] The claimant's disability concededly resulted from diphtheria, a germ disease. The testimony of the attending physician is positive upon these propositions, and there is no dispute. The claimant testified in effect that he was employed as a carpenter and millwright; that on the 12th day of May, 1919, he was obliged in the course of his employment to enter a pit below the floor level; that this pit was about 20 inches deep; that he was obliged to lie down to perform the work; that the pit was damp; that he was also obliged to go out into the rain to get materials, and his clothes were rendered wet; that he went home that night not feeling well; that he awoke in the morning with a cold, and the evidence shows that he developed diphtheria. It is not claimed that anything in the nature of an accident occurred in the pit; that there was anything different from the experiences of the two months prior, during which time he had been doing like work off and on; and the claimant's own physician declines to testify that there was any necessary relation between the diphtheria and the work which the claimant was doing.

It seems clear that there is the same defect of proof in this case that was pointed out by the court in Matter of Eldridge v. Endicott, Johnson & Co., 228 N. Y. 21, 126 N. E. 254. There is nothing to show that diphtheria is the natural and unavoidable result of anything which occurred on the 12th day of May, 1919; no accident was established; no evidence was offered to show that the germ disease of diphtheria "naturally and unavoidably" resulted from an accidental injury. Workmen's Compensation Law (Consol. Laws, c. 67) § 3, subd. 7. "An accidental event takes place without one's foresight or expectation; an event that proceeds from an unknown cause, or is an unusual effect of the known cause, and therefore not expected." Matter of Woodruff v. Howes Construction Co., 228 N. Y. 276, 278, 127 N. E. 270. The claimant knew that the pit was damp; knew that he would get wet if he went out in the rain; no unusual effect of the known cause is suggested. There was, therefore, nothing in the nature of an accident, and there is no evidence of probative force that the diphtheria was in any sense a necessary result from the exposure to which the claimant deliberately subjected himself.

[2, 3] Notwithstanding the deliberate decision of the Court of Appeals in Matter of Bloomfield v. November, 223 N. Y. 265, 119 N. E. 705, the State Industrial Commission goes on making a purely formal conclusion of fact that "neither the employer nor the insurance carrier was prejudiced by the lack of such notice (required by section 18), if any, because the employer had knowledge of the injury and the resultant diphtheria thereafter." The statute (Workmen's Compensation Law, § 18) provides for a written notice which shall "contain

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the name and address of the employee, and state in ordinary language the time, place, nature and cause of the injury," and the only ground on which the commission may excuse the giving of this notice is either that "notice for some sufficient reason could not have been given, or on the ground that the state fund, insurance company, or employer, as the case may be, has not been prejudiced thereby." Here the evidence is conclusive that no notice whatever was given of any alleged injury.

The claimant's wife telephoned to the employer's office that the claimant was ill; it may be that there was information reaching the employer that the claimant had developed diphtheria, but there is not a particle of evidence that any one representing the employer or the insurance carrier had any notice of an alleged personal injury "arising out of and in the course of the employment," or anything intended to put them on inquiry. There was nothing which was in any sense an equivalent of the notice required to be in writing; no notice of the "time, place, nature and cause" of the alleged injury, or of any "such disease or infection as may naturally and unavoidably result therefrom." Section 3, subd. 7. Claimant's own physician testified, and was not disputed, that diphtheria is not one of the diseases which ordinarily or naturally comes from injury, and that it was a germ disease. Obviously a notice however formal that the claimant had a case of diphtheria would not be notice of an accidental injury arising out of and in the course of employment, and if it was intended to hold the employer responsible for a disease alleged to have resulted from such an injury it was the duty of the claimant to give the notice required by the statute; to state the "time, place, nature and cause of the injury."

[4, 5] It is perhaps not necessary to determine this question, in view of the previous point decided; but we conceive it to be the duty of the State Industrial Commission to follow the rules laid down by the Court of Appeals, and not to treat the provisions of section 18 as a mere matter of form. The requirements of the statute are a condition precedent to the right to an award, and where the Commission acts to relieve the claimant it should be only upon evidence furnished by the claimant that the failure of notice did not operate to prejudice the employer and the insurance carrier: the facts on which the conclusion rests, not the mere conclusion, should be given in the record. The award appealed from should be reversed.

Award reversed, and claim dismissed. All concur, John M. Kellogg, P. J., on the ground of failure to give notice, except Cochrane, J., dissenting.

DONOVAN v. ALLIANCE ELECTRIC CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. March 2, 1921.)

186 New York Supplement, 813.

1. MASTER AND SERVANT—COMPENSATION HELD NOT RECOVERABLE FOR SLEEPING SICKNESS, FOLLOWING BUMPING OF HEAD; "INJURY."

An employee, whose head was bumped, was not entitled to compensation for sleeping sickness of which he became a victim subsequent to accident, in absence of evidence that the disease was caused by the acci-

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dent; such disease not being an "injury," within Const. art. 1, § 19, and Workmen's Compensation Law, § 3, subd. 7, defining compensable injuries as accidental injuries arising out of and in the course of employment such disease or infection as may naturally and unavoidably result therefrom.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Injury.)

2. MASTER AND SERVANT—FINDING THAT SLEEPING SICKNESS OF COMPENSATION CLAIMANT WAS "CAUSED OR ACTIVATED" BY INJURY NOT A FINDING THAT INJURY CAUSED SICKNESS.

Finding of State Industrial Commission in Workmen's Compensation proceeding, that sickness was "caused or activated by the injury received," being in the disjunctive, was not a finding that the accident caused the sickness.

(For other cases, see Master and Servant, Dec. Dig. § 416.)

3. MASTER AND SERVANT—THEORY OF WORKMEN'S COMPENSATION LAW STATED.

The theory of the Workmen's Compensation Law sanctioned by Const. art. 1, § 19, is that the accidents of an industry are proper overhead charges.

(For other cases, see Master and Servant, Dec. Dig. § 346.)

John M. Kellogg, P. J., and Kiley, J., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Joseph P. Donovan for compensation for injuries, opposed by the Alliance Electric Company, employer and the Ætna Life Insurance Company, insurance carrier. Award for claimant by State Industrial Commission, and the employer and insurance carrier appeal. Award reversed, with directions.

See, also, 191 App. Div. 303, 181 N. Y. Supp. 823.

Argued before John M. Kellogg, P. J., and Woodward Cochrane, Henry T. Kellogg, and Kiley, JJ.

James B. Henney, of New York City (Wiliam H. Foster, of Syracuse, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. [1, 2] I am unable to find evidence justifying the conclusion that a man whose head was bumped and who subsequently developed sleeping sickness, is entitled to compensation for such sickness. Whatever disability resulted from the injury to the head is, of course, compensable; but neither the Constitution of this state, amended to permit of the Workmen's Compensation Law (section 19, art. 1), or the statute, contemplates payment for diseases which are not the natural and unavoidable result of accidental injuries, as defined by subdivision 7 of section 3 of the Workmen's Compensation Law (Consol. Laws, c. 67). The Constitution provides that nothing shall prevent the Legislature from providing "compensation for injuries to employees or for death of employees resulting from such injuries," making no mention of disease, and the statute provides (subdivision 7, § 3) that injuries "mean only acci-

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dental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom."

The wholly undisputed testimony of Dr. Kennedy is to the effect that sleeping sickness is the result of an infectious disease, and that it is in no wise the result of trauma, and the finding of the Commission that the sleeping sickness was "caused or activated by the injury received while engaged in the regular course of employment" is without support in the evidence. Dr. Kennedy's testimony is that sleeping sickness is not the result of trauma, but of infection; that the fact that the claimant developed sleeping sickness following the bump upon his head is merely a coincidence, and the finding of the Commission is not that the disease was caused by the accident, but is in the disjunctive, that it was "caused or activated by the injury." Of course this is not a finding that it was "such disease or infection as may naturally and unavoidably result" from the injury; it is not a finding that it was the cause of the disease at all. It is merely a finding that it caused or activated an infectious disease, and is not a finding of either of those alleged results.

It is generally understood that an infection does not result from a mere bump in any event. Dr. Kennedy is very definite in his testimony that traumatism is not involved in sleeping sickness, so that the finding that the claimant is afflicted with sleeping sickness, caused or activated by the bumping of his head, is not only unsupported by the evidence, but it fails to establish that there is "such disease or infection as may naturally and unavoidably" result from the accident which concededly befell the claimant. Sleeping sickness, according to the testimony in the record, is not a natural result of the bump which the claimant received; no evidence is elicited that it could even activate an infection already existing. It is "only * * * such disease or infection as may naturally and unavoidably result" from the accident that is contemplated, and we have no right to extend the statute to cases not within the language of the law.

[3] The claimant is suffering from a disease which comes to a considerable number of people. It is comparatively little known, but recent experience has demonstated, according to Dr. Kennedy, that it is entirely apart from traumatism, and the alleged fact that this claimant never had any previous illness is not evidence that he would not have had sleeping sickness if this accident had never happened. The purpose of the statute, as sanctioned by the amendment of the Constitution, was to provide compensation for industrial accidents, for accidents inherent in the modern system of production, and not for the pensioning of those who suffered from disease not caused by such accidents. The theory of the law is that the accidents of an industry are proper overhead charges (section 19, art. 1), and the effort of the Commission to enlarge the scope of the statute and to impose the burden of infectious disease upon the industrial life of the state ought not to receive the sanction of this court.

The award shoud be reversed, and the Commission be directed to compensate the claimant for the injuries to his head not for the disease which is not shown to have resulted from the injury. All concur, except John M. Kellogg, P. J., and Kiley, J., who dissent.

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GRILLO ET AL. v. SHERMAN-STALTER CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. February 28, 1921.)

186 New York Supplement, 810.

2. MASTER AND SERVANT — COMPENSATION CLAIM, NOT FILED WITHIN ONE YEAR, BARRED.

Under Workmen's Compensation Law, § 28, the failure of the mother of illegitimate children of deceased employee to file claim for compensation for the children within one year from the death of employee *held* fatal to the right of such children to recover compensation.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

3. MASTER AND SERVANT—GUARDIAN'S DELAY IN FILING CLAIM FOR COMPENSATION PRECLUDES RECOVERY.

The failure of guardian of children of deceased employee to comply with Workmen's Compensation Law, §§ 28, 116, by filing claim for compensation within one year after his appointment as guardian, subsequent to employee's death, *held* to bar children's claim.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

5. MASTER AND SERVANT — ILLEGITIMATE CHILDREN'S CLAIM FOR COMPENSATION FOR DEATH OF FATHER SHOULD BE MADE BY MOTHER.

The claim for compensation under Workmen's Compensation Law for illegitimate children of deceased employee should be made by the mother of such children.

(For other cases, see Master and Servant, Dec. Dig. § 398.)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding under Workmen's Compensation Law by Filomena Grillo for compensation for death of husband, Abramo De Luca, deceased, and by Joseph P. Salerno, as guardian for acknowledged dependent illegitimate children of Abramo De Luca, for compensation for death of Abramo De Luca, deceased, opposed by the Sherman-Stalter Company, employer, and the Standard Accident Insurance Company of Detroit, Mich., insurance carrier. Awards for claimants by the State Industrial Commission, and the employer and insurance carrier appeal. Awards reversed, and claims dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Henry T. Kellogg, Kiley, and Van Kirk. JJ.

Neile F. Towner, of Albany, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. The State Industrial Commission finds as conclusions of fact that on the 20th day of September, 1917, Abramo De Luca was drowned while engaged in his regular employment in connection with the dredging out of a portion of the Barge Canal near Clyde, and that this portion of the canal was not a part of the navigable waters of the United States. It also finds that De Luca left him surviving a widow,

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living in Italy. with six conceded illegitimate children. dependent upon him at his death. and awards are made to each one of these. The employer and the insurance carrier appeal from the awards.

[1] It is urged against the award made to Filomena Grillo, alleged widow, residing in Italy, that there is no competent evidence that she is the widow of the decedent. There are three certificates. The first of these is an alleged certificate of the birth of "Grillo Filomena, the daughter of Peter and Capparelli Giulia," at Acquaformosa, Italy, on the 12th day of May. 1861. This certificate is signed "D. Rossani, Official of Vital Statistics." and bears a municipal seal. The second certificate purports to be of the marriage of Grillo Filomena. daughter of Peter and Capparelli Giulia. and De Luca Abramo, son of Peter and Matrangolo Maria, and is authenticated in the same manner as the previous certificate. The third purports to be a birth certificate of the family of De Luca Abramo, consisting of the wife and one son and two daughters. This is signed by the same name, but as mayor, and has a municipal seal. It does not show any certificate of birth of the decedent, though it is recited that he was "born in this town," and aside from the likeness of names there is nothing to show that the decedent was the husband of the woman in Italy, or that she was not legally divorced from him.

Section 72 of the Workmen's Compensation Law (Consol. Laws. c. 67) provides that "the Commission may cause depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the Supreme Court"; but we find no authority for accepting certificates of births and marriages and of alleged families as evidence of the fact of relationship between a man killed in America and a woman residing in Italy. even though the names appear to be those of an alleged contracting couple back in the year 1891. Sections 952. 953. and 956 of the Code of Civil Procedure specify the requirements in reference to records and documents entitled to be used as evidence. and it is entirely clear that these certificates by the mayor and official of vital statistics do not come up to the requirements of evidence. Pifumer v. Rheinstein & Haas, Inc., 187 App. Div. 821, 175 N. Y. Supp. 848; Fosket v. Buschmann Co., 193 App. Div. 342, 344, 183 N. Y. Supp. 919, and authorities there cited. The award to the alleged widow may not, therefore. be sustained.

[2. 3] The award to the illegitimate children is challenged on the ground. among others. that no claim for compensation was filed with the Commission within one year from the death of Abramo De Luca. and that the claim was barred by section 28 of the Workmen's Compensation Law at the time the award was made. This provision of the statute is that—

"The right to claim compensation under this chapter shall be forever barred unless within one year * * * after such death, a claim for compensation thereunder shall be filed with the Commission."

Abramo De Luca died from drowning on the 20th day of September, 1917. At a hearing held at Rochester on the 31st day of December, 1918, more than a year after the death of this man. a claim appears to have been signed by the mother of these children, though attention was called at that time to the fact that the year had expired. If this mother had the right to make this claim as guardian or next friend at the time of signing this claim on the 31st day of December, 1918, she had it at all times subsequent to the death of Abramo De Luca. and her failure so to act was fatal to the claim. The statute is positive: "The right to claim compensation" is "forever barred" unless the claim is made within one year, and the only limitation upon this section is that contained in section 116. which provides that the statute shall not run against a "minor dependent" so long as he has no "guardian or next friend."

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If we read this exception to require that the claim shall be filed by the legal guardian or next friend. then it appears in the record that on the 28th day of July. 1919, Joseph P.Salerno was duly appointed guardian for the said illegitimate children, and the payments are directed to be made to him, although he has never made any claim. Assuming that the claim should have been made by the guardian appointed by the court. the exception to the rule laid down in the twenty-eighth section of the statute extends only so long "as he has no committee, guardian or next friend," and that came to an end at the date of the appointment on the 28th day of July. 1919. This guardian has taken no action, and his time to act expired on the 28th day of July, 1920.

[4, 5] We are of the opinion that the mother of these illegitimate children. as guardian by nurture. had the right to the custody and control of their affairs. 3 Am. & Eng. Ency. of Law, 888. At common law the putative father of a bastard child is not bound to support it; this legal obligation devolving upon the mother. 3 Am. & Eng. Ency. of Law, 889; People ex rel. Board of Police v. Shulman, 8 App. Div. 514, 516, 40 N. Y. Supp. 779; Todd v. Weber, 95 N. Y. 181. 189, 47 Am. Rep. 20, and authority there cited. Assuming that illegitimate children, who are not looked upon as children for any civil purposes (3 Am. & Eng. Ency. of Law. 889). have rights under the broad humanitarianism contemplated by the Workmen's Compensation Law, it seems to us clear that the mother is the one who should move in the matter. that she is the guardian or next friend of her offspring. and that the statute did not contemplate the appointment of a guardian to act for her children. The notice required by section 18 of the act contemplates that the person injured, or any one acting for him, may give the notice, and we anticipate that a mother. whether of legitimate or illegitimate children, if living and competent to act, may make a claim and file it with the Commission. If this is true, then her failure to act within the time limited by the statute is fatal to the right to claim an award, and the State Industrial Commission was without jurisdiction of the subject-matter at the time this award was attempted to be made.

The awards in both instances should be reversed, and the claims dismissed. All concur except John M. Kellogg. P. J.. who dissents.

GRUNSICK v. CHARLES SCHAEFER & SON ET AL.

(New York Supreme Court, Appellate Division, Third Department. February 28. 1921.)

186 New York Supplement, 744.

1. MASTER AND SERVANT—EVIDENCE HELD NOT TO SHOW CONTINUING DISABILITY OF COMPENSATION CLAIMANT.

Reports by the Commission's own physician that an injured employee should now resume work, and that there was no consequence of the injury which prevented him from working, though he had a cardiac defect. which was not due to the injury, which might prevent him from laborious work, contradicted only by testimony of the claimant and his wife that he could not work, does not justify the Commission's finding that claimant was still disabled.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

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2. MASTER AND SERVANT—COMPENSATION CLAIMANT HAS BURDEN TO SHOW CONTINUANCE OF DISABILITY.

Where the Commission's physician had reported that claimant was able to resume work. the burden is on claimant to prove continuance of disability thereafter. and on that situation the presumptions provided in Workmen's Compensation Law. § 21. have no bearing.

(For other cases. see Master and Servant, Dec. Dig. § 403.)

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Andreas Grunsick, employee. opposed by Charles Schaefer & Son, employer, and the Ætna Life Insurance Company, insurance carrier. From an award of compensation, based on a finding that employee was still disabled, the employer and insurance carrier appeal. Reversed, and remitted to Commission. with directions.

Argued before John M. Kellogg. P. J.. and Woodward, Henry T. Kellogg, Kiley, and Van Kirk. JJ.

James B Henney, of New York City (William H. Foster, of Syracuse, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. The State Industrial Commission finds as conclusions of fact that "on July 11. 1919, while the said Andrew Grunsick was engaged in the regular course of his employment." he received injuries to his "lower spine and left shoulder. which injuries caused him to be disabled from the 11th day of July, 1919, to the 21st day of May, 1920, on which date he was still disabled."

[1] Compensation was paid upon this case until the 6th day of September. Dr. Lewy made an examination of this man for the Commission on the 1st of October, 1919, and then recommended that "claimant now attempt to resume work." On the 9th of January, 1920, he made a further examination, and reported that "this claimant should resume work now." Still further reporting upon this case on the 20th of February, 1920, Dr. Lewy declared. "This claimant should resume work at once." and on the 19th of March of the same year he again reported that "I find no organic or functional defect in consequence of the injury, which prevents this man from resuming work"; but he says he does find a cardiac defect which "may prevent this man from resuming laborious work." though he declares that "this is not due to the injury." The only evidence in contradiction of this testimony by the Commission's own physicians is that of the claimant and his wife. both of whom say he cannot work. but without showing any intelligent reason why he may not do so, and the learned Attorney General says in his brief that "the claimant seems to be holding out for a large sum of money, as he asks for $6,000," which is clearly the reason why he refuses to work.

[2] "The burden of establishing that the disability did not end with the 10th day of September, 1919." say this court in a very similar case (Chimora v. International Ice Cream Co., 193 App. Div. 538. 539. 184 N. Y. Supp. 500, 501). "is upon the claimant; the presumptions provided in section 21 of the Workmen's Compensation Law have no bearing upon this situation. Matter of Modra v. Little. 223 N. Y. 452. 454." Here the medical testimony is wholly uncontradicted. The claimant's history of the case, as given to Dr. Lewy, does not prove out upon examination, and the mere fact that he will not work while wait-

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ing for an allowance of $6,000 does not justify the finding of the Commission that the disability continues.

The award appealed from should be reversed. and the matter remitted to the Commission, to make an adjustment in harmony with the established facts in this case. On the 9th of January, 1920, Dr. Lewy says "this claimant should resume work now." and in the absence of evidence that the disabilities of the claimant persisted, this should be the outside limit of any award. All concur.

LEDERSON v. CASSIDY & DORFMAN ET AL.

(New York Supreme Court, Appellate Division, Third Department. March 2. 1921.)

187 New York Supplement. 50.

MASTER AND SERVANT—INJURY WHILE DEMONSTRATING ABILITY FOR EMPLOYMENT HELD NOT COMPENSABLE; "EMPLOYEE."

An applicant for employment. who was requested by the proposed employer to demonstrate his ability to operate a machine before being employed. and who was injured while preparing the machine for operation, had not yet become an employee, and is not entitled to compensation under the Workmen's Compensation Law.

(For other cases, see Master and Servant, Dec. Dig. § 361.)

(For other definitions, see Words and Phrases, First and Second Series. Employee.)

Kiley, J.. dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Meyer Lederson. alleged employee. opposed by Cassidy & Dorfman. employer, and the Royal Indemnity Company, insurer. From award of compensation by the State Industrial Commission, the employer and insurer appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Henry T. Kellogg. and Kiley. JJ.

Frank J. O'Neill, of New York City (Barnett Cohen, of New York City, of counsel), for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for State Industrial Commission

JOHN M. KELLOGG. P. J. This is an appeal from an award of compensation made by the State Industrial Commission June 11. 1920. The employer needed a man to run one of its machines. An employee brought with him the claimant, who had a union card and represented himself to be an operative. The finding is:

That the employer informed "the claimant that he would like to see whether or not the claimant knew how to operate a machine before he would hire him. The claimant undertook to prove his qualifications by operating a machine assigned to him by the said William Dorfman, and

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before actually starting on any work on the machine. and while preparing the machine for the purpose of doing certain work assigned to him by William Dorfman, which was to test his ability, and while engaged in the regular course of his employment in adjusting a strap on the machine, which had become loose, the left hand of the claimant got caught in the said machine, thereby causing him to sustain a strain and possible fracture of the left shoulder, together with lacerations of the body, as a result of which injuries he was disabled from October 4, 1919, to February 5, 1920, on which date he was still disabled."

It seems to me there was clearly no contract of employment. The respondents seek to sustain the award by cases where student brakemen had been put upon a train to learn the business and were injured while learning. But there the students were working with the understanding that they were to have compensation when they learned to do the work. Here the company did not undertake to teach the claimant; he claimed to be an operator and it was understood that, before any question of employment, wages, or work was discussed, he must demonstrate that he was an operator. The employment or nonemployment depended upon the result of the test. It cannot be said while making the test he was an employee; he was simply trying to prove that he was fit to become an employee. I think the case is fairly within Brassard v. Delaware & Hudson Co., 186 App. Div. 647, 175 N. Y. Supp. 359; and see Varney v. Ditmars, 217 N. Y. 223, 228, 111 N. E. 822, Ann. Cas. 1916B, 758.

I favor a reversal, and a dismissal of the claim on those authorities. All concur, except—

KILEY, J. It must be that the Presiding Justice overlooked some evidence in this record. The employer's report of injury contains the following:

"Did accident happen on the premises? Yes. Away from the plant of the employer? No. Full name of injured employee: Max Lederson."

"Occupation when injured? Operator. Was injured employee doing his regular work? Just started. How long was injured person in your employment? Just started. Piece or time worker? Week. Working hours per day? Nine."

The injured employee in his claim for compensation says he was a time worker with wages at $50 per week. In his evidence upon a hearing he explained that nothing was said about wages because he had a union card and the schedule of wages for an operator was fixed by the union and that the employers, one of whom was there when he started to work, knew that he would have to pay, and claimant receive, the schedule rate. This was not denied. Mr. W. F. Quigley, who represented the appellant carrier upon the hearing under date of April 7, 1920, wrote the Industrial Commission as follows.

"There is no dispute as to the rate of compensation. The question we raise is one of law."

A hearing was had on February 25, 1920, and an award was made in favor of the claimant. The appellant carrier asked for a further hearing, for the purpose of examining one of the firm as to the contract of hiring, which was granted. That came on June 11, 1920; the member of the firm whose testimony was desired was ill; the attorney for the carrier was permitted to state, for the record, what he would testify to if he was present and sworn as a witness. It was as follows. That claimant was unknown to the employer, who met him at the factory; that a conversation ensued, and that the member of the firm said to him:

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"I would like to see whether or not you know how to operate a machine before I hire you. Just come into the factory and show me. If you are satisfactory, we will then agree upon a price, if I decide to take you on."

Claimant denied that the employer said anything of the kind to him, saying he knew the union scale, and what he would have to pay for his work, and what his work was; that he pointed out the machine to him upon which he was to work, and which he was to operate; that the foreman brought a bundle of cloth or cut goods to him, and upon which he was to work; that he proceeded to get his machine ready, and was so doing when the accident occurred. If the claimant's story was true, he had started in upon his employment and he would be entitled to compensation; if it was not true, then he would not be entitled to compensation. This presented a question of fact, which the Commission was called upon to resolve. Having resolved it in favor of the claimant can we disturb the finding? Section 20, Workmen's Compensation Law (Consol. Laws, c. 67):

"The decision of the Commission shall be final as to all questions of fact, and, except as provided in section 23, as to all questions of law."

Section 23 permits an appeal on questions of law. Brassard v. Delaware & Hudson Co., 186 App. Div. 647, 175 N. Y. Supp. 359, presents different state of facts than involved here, and is not controlling.

I favor affirmance.

POLUCCI v. EMERSON NORRIS CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. March 9. 1921.)

187 New York Supplement, 52

MASTER AND SERVANT—AWARD UNDER COMPENSATION LAW HELD PROPERLY MODIFIED.

Where injured servant filed agreement for compensation at $15 per week, and award was "25 weeks for loss of use of third finger and 15 weeks for loss of fourth finger; total 40 weeks, and case closed." It cannot be said that the Industrial Commission acted wrongfully in brushing aside such decision 2 years later and deciding to modify previous award, under Workmen's Compensation Law, § 15, subd. 3, and sections 22-74 to read "81½ weeks, at $19.23, for loss of one-third of hand"; but of course, the increase over $15 a week should commence at the termination of payment of the previous award.

Appeal from State Industrial Commission.

Proceeding by Basco Polucci under the Workmen's Compensation Law to obtain compensation for personal injuries opposed by the Emerson Norris Company the employer and the Globe Indemnity Company, the insurance carrier. From an award of compensation, the employer and insurance carier appeal. Award modified, and, as modified, affirmed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

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Robert M. McCormick, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (Bernard L. Shientag, of New York City, of counsel), for State Industrial Commission.

Kiley, J. Claimant is a pattern maker, and while so engaged in the plant of his employer at Tuckahoe, Westchester county, N. Y., on February 2, 1918, met with an accident, cutting off his fourth finger, and badly crushing the bone of the third finger. Employer and employee filed an agreement for compensation at $15 per week, which was approved by the State Industrial Commission and an award made accordingly. The basis of this award was "25 weeks for loss of use of third finger and 15 weeks for loss of fourth finger; total 40 weeks and case closed." This decison was made after a hearing had April 30. 1918. On June 1, 1920, more than 2 years after the previous award was made, and with no record evidence of how the Commission was again set in motion, a physician was called in and said the injury constituted the loss of one-third of the hand; without delay, brushing aside argument or suggestion, a decision was then and there made, as follows:

"Decision: Modify previous award to read 81½ weks at $19.23 for loss of one-third of hand."

The first award was made under the provisions of section 15, subdivision 3, of the Workmen's Compensation Law (Consol. Laws, c. 67). The modified award was made under the same section and subdivision. The carrier objects that this cannot be done. The source of power in the Commission for such procedure is found in sections 22-74 of the Workmen's Compensation Law, viz. when conditions have changed or in the interest of justice. It is conceded in this record that there is no change in conditions. Under the provisions of section 15, supra, there is no question but what the claimant was entitled to the award last made. Under section 74 of the Workmen's Compensation Law I think the Commission could say that, when a claimant has received less than the maximum he is entitled to, it is an injustice to him if he does not receive that amount. The reason given by the Commissioner presiding at the hearing when the last award was made was "that what they forgot to do is to give him part of the hand." While I do not like the informal procedure by which this result was reached. I think justice was done. Such conclusion is upheld in Beckmann v. Oelerich & Son, 174 App. Div. 354, 160 N. Y. Supp. 791, Kriegbaum v. Buffalo Wire Works Co., Inc., 182 App. Div. 448, 169 N. Y. Supp. 307. The increase over $15 a week should commence at the termination and payment of the previous award (Salotar v. Neuglass & Co., 228 N. Y. 508, 126 N. E. 922), and as so modified, should be affirmed. All concur.

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NESTER ET AL. v. PABST BREWING CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. February 28, 1921.)

186 New York Suplement, 828

1. MASTER AND SERVANT—EVIDENCE IN COMPENSATION CASE HELD NOT TO SHOW CAUSAL RELATION BETWEEN ACCIDENT AND DEATH BY DISEASE.

Evidence held insufficient to show a causal relation between servant's accidental injury and his death from heart disease, so as to justify an award of the Industrial Commission.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Claim by Delia Nester, widow. on behalf of her infant son for an award under the Workmen's Compensation Law for the death of her husband, Andrew Nester, opposed by the Pabst Brewing Company, employer, and the Standard Accident Insurance Company, insurer. From an award of the State Industrial Commission in favor of claimants, confirming a previous award made in their favor, which was reversed by the Appellate Division (191 App. Div. 312, 181 N. Y. Supp. 477) and recommitted to the commission for further hearing, the employer and insurer appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Van Kirk, Henry T. Kellogg, and Kiley, JJ.

Neile F. Towner, of Albany, for appellants.

Hon. Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, and Bernard L. Shientag, of New York City, of counsel), for respondents.

KILEY, J. [1] Claimant's intestate worked for the employer above named. and had for the four years previous to June 1, 1918. He was a stable man and night watchman; lived over the stables with his family, consisting of these claimants. On said 1st day of June, he was leading three horses down the runway in said stable, in New York City, and one of them became unmanageable; Nestor was thrown down and trampled upon by the horses and severely injured. He had to immediately quit work and was sent to a hospital, his dislocated shoulder set, and other numerous bruises and coutusions examined. He returned, and the company doctor gave him some attention. not much, and ceased attendance July 5, 1918, discharging him as cured. He died July 21 1918, of heart disease. The employer and employee agreed on compensation, which was approved by the Commission, and paid until the day before he died. On subsequent hearing, at which only the attending physician was sworn, and whose evidence was to the effect that there was no causal relation between the accident and the heart disease from which he died (I mean only medical testimony), other evidence was given. Death certificate, with a disclaimer, lay witnesses— an award was made in favor of the claimants. On appeal this court reversed the award, with but one dissent. 191 App. Div. 312, 181 N. Y. Supp. 477. We there held:

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"There is absolutely no evidence that the deceased had a heart lesion at the time of the accident. There is no evidence that the cause of death was heart disease, unless it be the death certificate."

The doctor testified that on two examinations no heart difficulty was found, and we therefore held that any presumption arising from the introduction of the death certificate in evidence, disappeared "in the Potts v. Pardee, 220 N. Y. 431; Fallon v. Swackhamer, 226 N. Y. 447." The case went back for further hearing. The additional evidence introduced was that of an expert, who was asked to give an opinion upon the main question, causal relation, basing his opinion upon the facts disclosed by the record, eliminating the death certificate. His opinion was to the effect that the injury was a contributing cause. No new evidential fact was offered, and I do not think the case differs or is strengthened by the additions made since the last appeal.

[2] The Commission affirmed its previous award. Mr. Shientag's brief is an able argument for sustaining the award but it cannot supply the lack of evidence. I think we are bound by our decision in this case. I report for reversal.

Award reversed, and claim dismissed. All concur, except John M. Kellogg, P. J., who dissents.

NEWHAM v. CHILE EXPLORATION CO.

(New York Supreme Court, Appellate Division, Third Department. February 28, 1921.)

187 New York Supplement 31

1. MASTER AND SERVANT—INDUSTRIAL COMMISSION HELD WARRANTED IN ACCEPTING TESTIMONY OF EMPLOYERS REPRESENTATIVE AS TO PURPOSE OF EMPLOYMENT.

In a proceeding under the Workmen's Compensation Law, the Industrial Commission *held* justified under the evidence in accepting the testimony of the employer's representative that the claimant was employed to watch the stowage of the employer's cargo on a ship by stevedore employed by the captain and report to the employer.

(For other cases, see Master and Servant, Dec. Dig. § 404.)

2. MASTER AND SERVANT — EVIDENCE HELD TO SHOW THAT ALLEGED EMPLOYER WAS IN FACT SUCH.

In a proceeding under the Workmen's Compensation Law, evidence *held* to support finding that one employed to oversee the manner in which the alleged employer's cargo was stowed on a ship by stevedores employed by the captain was in the employ of such alleged employer.

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

3. MASTER AND SERVANT — AGREEMENT HELD NOT TO PREVENT ALLEGED EMPLOYER FROM RAISING QUESTION OF JURISDICTION.

An agreement by the parties to a workmen's compensation proceeding that no question would be raised on appeal, except that as to who

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was the employer, did not deprive the employer of the right to raise the question of lack of jurisdiction because the employment was under a maritime contract.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

6. MASTER AND SERVANT — QUESTION OF JURISDICTION MAY BE FIRST RAISED ON APPEAL.

The question of jurisdiction of the Industrial Commission in a workmen'e compensation proceeding may be first raised on appeal.

(For other cases, see Master and Servant, Dec. Dig. § 417[4].)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law (Consol. Laws, c. 67) by Nicholas Newham for compensation for injuries, opposed by the Chile Exploration Company, employer and self-insurer. Compensation was awarded by the State Industrial Commission, and the employer appeals. Affirmed.

Argued before John M. Kellogg, P. J., and Woodward Cochrane, Henry T. Kellogg, and Kiley, JJ.

Carroll A. Wilson, of New York City (George O. Redington, of New York City, and R. C. Klugescheid, of Brooklyn, of counsel), for appellant.

Charles D. Newton, Atty. Gen., and Bernard L. Shientag, of New York City, for State Industrial Commission.

Wood, Molloy & France, of New York City (Francis X. Hennessy, of New York City, of counsel), for respondent.

VAN KIRK, J. The Chile Exploration Company had engaged a portion of the space in the steamship Naipo, to carry freight from New York to Valparaiso and other ports on the west coast of South America. The ship belonged to the government of Chile. The captain of the ship was given the sole right to employ the stevedore. The claimant, Newham, is and was an expert stevedore. Arne & Co. did checking and tallying of cargoes on the dock for a number of stevedoring companies. Auditore & Co. usually did the stevedoring work for the Chile Exploration Company. The claimant applied to Auditore & Co. for work on this ship. Mr. Edwards, of Arne & Co., was in the office at the time. He conferred with Mr. Talbot, who had charge of affairs for the Chile Exploration Company, and the claimant was thereupon put to work; Mr. Edwards giving him a note to the chief clerk of Arne & Co. on the dock.

The checking and tallying of goods for a cargo is no part of the stevedoring. Checking and tallying is checking the freight as it is delivered at the dock from trucks or lighters, inspecting the packing, and noting the number and quantity of the several parcels or kinds of freight. The stevedoring work was being done by Patane & Co., employed by the captain of the ship. Auditore & Co., under the direction of Mr. Edwards, acting for Mr. Talbot, advanced his wages to Newham. It does not clearly appear to whom Auditore & Co. charged these advancements.

[1] The claimant was not employed as a stevedore, nor as a checker or tallier. The Chile Exploration Company, because it had not employed the stevedores, and because it wanted its cargo space well filled, and the property well stowed to protect it against injury, desired an

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experienced stevedore to watch the work as it was done. Claimant was given no authority to give orders on the boat, or to take part in the stowing of the cargo; he was simply there to observe and report to the shipper, so that, if the cargo was not being properly stowed, the shipper could take it up with the captain of the boat. As to the employment Mr. Talbot says:

"The stevedores doing the work, we didn't know how they did the work, and we wanted the stuff looked out for, to see that none of the stuff was broken up or not properly placed in the steamer, and I wanted somebody there all the time, to have a report given to me if goods were broken, or not properly stowed, or improperly placed in the steamer, and I wanted somebody there all the time that could report it to me, so I could take it up with the captain of the steamer."

And again:

"We wanted him to oversee the work done on the steamer; in case anything was not going right, that he could report it to Mr. Edwards, and Mr. Edwards could report it to us. * * * You see, he (Newham) could not say anything on the steamer; it would have to be taken up by me."

Still again:

"Q. Why was it necessary to have an expert stevedore doing that? A. Because it was better to have a man of that sort, because he would know better how to stow the stuff; for instance, see that they weren't putting light cases on bottom and heavy ones on top, because then they would break, and he would see that right away and correct it."

Mr. Edwards testifies:

"When I hired Newham, I told him not to interfere with the storage of the ship by the other stevedores, unless he saw something wrong, and if he did to report to me, and then I would report to Mr. Talbot."

Mr. Edwards had stated that Newham had some further duty in the line of helping the stevedores, but Edwards was not the agent of the employer. The Commission has accepted, we think justifiably, the testimony of Mr. Talbot on this subject.

The claimant gives this account of the manner of his injury:

The foreman of the stevedoring company "asked me to shift the lighters for him—will I 'be so kind as to move the lighters out of the way?' and I told him, 'Sure.' I started up the dock; I was going up the dock; a fellow was coming down with a hand truck. Of course he was standing there with a piece of iron, and he was right across the dock, and I started. I said to him: 'What's the matter, John?' He says: 'Kindly come aboard; it's too heavy.' I said: 'Hold your hands on the handles of the truck and when I get around I will straighten it out for you.' He was sitting on the truck and freight on the center and freight on the side of the dock, and I went to go around the truck where the iron was, and just as I got around to the end of the plate and started to straighten it up he let go his hand."

The piece of iron slid across and struck his foot. Some time after the foot was amputated. It is not disputed that the amputation necessarily resulted from the injury received.

[2] The appellant claims that the evidence does not sufficiently show that the Chile Exploration Company was the claimant's employer; that Newham was employed by Mr. Talbot, for the Chile Exploration Company, through Mr. Edwards. We find sufficient evidence to support the finding of the Commission in this respect.

We turn, then, to the principal question on this appeal—whether jurisdiction of the subject-matter is in the State Industrial Commission, or in the admiralty courts. The claimant insists that this question is not in this court, because of an agreement with the Industrial Commission to the benefit of the claimant, made under these circumstances:

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The award had been made against Arne & Co. as the employer. Later that award was changed, and the Chile Exploration Company was held to be the employer. That company, however, had not appeared at any hearing, and had had no notice of the hearing at which the adjudication against it was made. It applied for a rehearing, and an agreement was made that the weekly payments should be regularly advanced to Newham during the pendency of the litigation, and that whichever company was finally held to be liable as employer should reimburse the party who had made the advancements. It was understood and agreed, between the Chile Exploration Company and the Commission, that no question should be raised upon the appeal, excepting who was the employer. At that time the question of jurisdiction was not thought of, and was not introduced into the case until the decision of the United States Supreme Court in Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834.

[3-6] The position of the claimant in this respect cannot be sustained. There is a clear distinction between the privilege of appealing and the jurisdiction of the court over the subject-matter in dispute. A party may waive or contract away his right to appeal (3 C. J. 662; Townsend v. Masterson, 15 N. Y. 587), and jurisdiction of the person may be given by consent; but jurisdiction of the subject-matter may not (Sullivan v. Hudson Navigation Co., 182 App. Div. 152, 157, 169 N. Y. Supp. 645; Matter of Doey v. Howland Co., 224 N. Y. 30, 38, 120 N. E. 53; Matter of Caffrey, 52 App. Div. 264, 65 N. Y. Supp. 470; Cooley on Constitutional Limitations [5th Ed.] page 493). The question of jurisdiction may be raised first on appeal. Matter of Caffrey, supra; Matter of Livingston, 34 N. Y. 555, 570.

[7, 8] But Newham was not in a maritime employment, nor was he under a maritime contract. The true test is the subject-matter of the contract—the nature and character of the work to be done. Matter of Doey v. Howland Co., supra, 224 N. Y. 35, 120 N. E. 53. Newham's employer was not the employer of the stevedore. The captain of the ship alone had charge of the stevedoring and the right to hire. The Chile Exploration Company could not employ stevedores for this ship. Newham was not employed to do stevedore work, nor checking and tallying. His employer was not engaged in a maritime business. He was employed to do that which a cargo owner, a shipper, could do himself. had he the necessary knowledge and experience. and that in which such shipper (not the shipowner or captain) would have the chief interest, namely, to observe whether the cargo was safely and properly stowed, in order to protect the property and use all available cargo space. He was to do none of the work and to give no orders; he was simply to report to the shipper what he observed in these respects. He was not then to do any maritime work. but to report only how the maritime work was being done, and this report was to be made to his employer, who was not doing maritime work or business. When injured, Newham was indeed accommodating an employee of the stevedore, a stranger in his relations to Newham's employer; carrying a message for him; and, while so occupied, he volunteered to aid another employee of the stevedore, who was having difficulty with a load on his truck on the dock.

Mr. Talbot, who employed Newham for the Chile Exploration Company, testifies to the purposes for which he employed him, and he testifies that such work is not stevedoring. The fact that Newham was an expert stevedore is not sufficient on which to find that he was at the time doing stevedoring work, or maritime work. When, upon receiving the decision in Knickerbocker Ice Co. v. Stewart, supra, the Chile Exploration Company made its motion to have vacated the former decision, the Industrial Commission, in denying the motion, held

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that Newham was not working under a maritime contract and his case was not within maritime jurisdiction. We find no sufficient reason for believing this decison was erroneous.

No other question as to jurisdiction has been raised or argued.

The award should be affirmed.

All concur, except John M. Kellogg, P. J., who dissents, on the authority of Doey v. Howland Co., 224 N. Y. 30, 120 N. E. 53.

KILEY, J. (concurring). There are two very able briefs in this case; the brief of claimant's counsel I regard as the best I have seen on that side of the question in any of these cases. I have been unable to find that one of the questions here presented has been passed upon heretofore in the courts. It is established that a party may waive his constitutional rights; also that parties cannot confer jurisdiction, not otherwise had, upon a court by stipulation. It is also established that the question of lack of jurisdiction can be raised at any time during the course of the proceeding or action; but it has not been determined whether or not a party can, by stipulation, foreclose his right to raise that question. If he can, this appellant has, by stipulation. foreclosed his right to raise that question upon this appeal.

In the view of the case taken by Judge Van Kirk in his admirable opinion, the question does not have to be decided on the determination of this appeal. He finds that the claimant was not engaged in maritime work. That question is decidedly close. This man was employed, not in the actual physical labor of stevedoring, or to openly superintend or oversee the work of stevedoring; but such work as he was employed to do arose out of and was incidental to maritime work. If the men doing the work of stevedoring placed a small package or article toward the bottom of the pile or tier of the goods or commodity being packed in the hold of the ship, it was claimant's duty and his work to report that to his superior, who could have the error corrected; so that, while claimant did not do the actual physical work of changing the location of the article, he was the one who caused it to be done. In Sullivan v. Hudson Navigation Co., 182 App. Div. 152, 169 N. Y. Supp. 645, Judge Woodward wrote:

"It is not the particular kind of work which the person is qualified to perform, or the fact that he is performing a particular kind of work, which determines the exclusive jurisdiction * * * of admiralty; it is the character of the contract—whether it has reference to maritime service or maritime transactions."

Claimant's contract had reference to both maritime service and maritime transactions. If we should find that it had, then it would be necessary to pass upon the other question above suggested, viz. the force of the stipulation.

I concur in result.

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NIDDS v. STERLING CEILING & LATHING CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. February 28, 1921.)

186 New York Supplement, 758.

MASTER AND SERVANT—COMPENSATION CLAIMANT'S BURDEN OF SHOWING CONTINUED INCAPACITY HELD NOT MET.

The burden of claimant, in second claim for same injury under Compensation Law, of showing continuance of incapacity to work, *held* not met.

(For other cases, see Master and Servant, Dec. Dig. § 405[6].)

Appeal from State Industrial Commission.

Claim for compensation under the Workmen's Compensation Law (Consol. Laws, c. 67)) by Edward Nidds, opposed by the Sterling Ceiling & Lathing Company, employer, and the Ætna Life Insurance Company, insurance carrier. From an award for claimant, the employer and insurance carrier appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Van Kirk, Henry T. Kellogg, and Kiley, JJ.

William H. Foster, of Syracuse, for appellant.

Hon. Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, and Bernard L. Shientag, of New York City, of counsel), for respondents.

KILEY, J. On June 18, 1917, claimant was injured while at work for the employer in Brooklyn, N. Y. He was a metal lather; his average daily wage was $6; he was walking along a partition wall in the building, slightly higher than his head, when a couple of the tile became detached and fell onto his head. This is taken from his first claim for compensation, and is dated June 19, 1917. On December 20, 1917, he filed a second claim, in which he says his scalp was lacerated. The attending physician, under date of April 25, 1919, made a report to the same effect, making the wound 2½ inches. Before the last report of the physician last referred to, claimant settled his claim for injury with the third party, the general contractor, without reference to the compensation, for $250, went back to work, earned from the employer here concerned $392, from a second employer he reciv-ed for work performed $499.41, and from a third $541.

As near as I can figure it out from this record, these amounts were earned before he filed his last claim. When he settled for the $250, he did not pay his physician, and was not likely to, and the claim aforesaid was the result of that oversight. I think this is a fair inference from the evidence. His average weekly wage was $34.62. On December 17, 1919, the Commission made him an award for 66⅔ per cent. of that amount from July 3, 1917, to October 6, 1919, less what he had earned and what he had been theretofore paid, the balance at that time being $422.60, and continued the case. On June 8, 1920, the Commission deducted the $250 paid on settlement and found he had been overpaid. This last award did not contain any order of continuance.

This claimant has been repeatedly urged to go to work; he will not do so. No physician, but the one apparently interested in getting

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his own compensation, can find any reason why this man does not go to work; that he is a malingerer seems clear beyond peradventure. The burden of proving his present incapacity to work is on him, and he has not met that burden. Chimora v. International Ice Co., 193 App. Div. 538, 184 N. Y. Supp. 500. The weight of the evidence, and all evidence worthy of the name, is against claimant's contention.

The award should be reversed, and claim dismissed. All concur.

O'SULLIVAN v. A. H. WOODS THEATRE CO. ET AL.

(New York Supreme Court, Appellate Division, Third Department. March 2, 1921.)

187 New York Supplement, 64.

1. MASTER AND SERVANT — EVIDENCE IN COMPENSATION CASE HELD TO PROVE THEATER WATCHMAN'S DEATH BY FALL FROM STAGE.

In proceeding under Workmen's Compensation Law for compensation for death of watchman in a theater from injuries sustained at a time when he was alone in the theater, evidence *held* to sustain finding that his injuries were caused by falling from the stage.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT—EVIDENCE REQUIRED IN DEATH CASE.

In death cases, the same quality of evidence as to the conduct of the deceased is not required as in a case where he is alive and can testify.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

3. MASTER AND SERVANT — COMPENSATION COMMISSION'S FINDING OF FACT ON EVIDENCE NOT REVIEWABLE.

The court cannot review the determination of the State Industrial Commission as to the facts, if there are any facts tending to sustain it.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Elizabeth O'Sullivan for compensation for the death of Florence O'Sullivan, opposed by the A. H. Woods Theatre Company, employer, and the United States Fidelity & Guaranty Company, insurance carrier. Award by State Industrial Commission for claimant, and the employer and insurance carrier appeal. Award unanimously affirmed.

Argued before John M. Kellogg, P. J., and Woodward Cochrane, Henry T. Kellogg, and Kiley, JJ.

William Warren Dimmick, of New York City, for appellants.

Charles D. Newton, of Geneseo, and E. C. Aiken, Deputy Atty. Gen., for respondent.

JOHN M. KELLOGG, P. J. The employer maintained and cared for the theater building in which the accident occurred. The entertain-

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ments at the theater were staged principally by its president, A. H. Woods, upon his own account; he giving to the Theater Company 50 per cent. of the gross receipts of each entertainment, the latter to maintain the building, heat, light, and clean it, and furnish the chairs, doorkeeper, ticket sellers, and attendants. The deceased employee was employed by the Theater Company, the appellant, as a stage doorman, and on Sundays he acted as watchman. His hours were from 7 a. m. to 7 p. m., and he sustained his injuries Sunday morning while performing his duties. We need not seriously consider the liability of the appellant for death benefits, if the death resulted from an accident.

Sunday morning the decedent, O'Sullivan, went upon duty as the night watchman, Cassidy, left. They had a chat and O'Sullivan was then in good condition. About 8.30 or 8:35 a. m. two employees went to the theater, rapped at the door and got no answer. Upon looking through the glass they saw O'Sullivan dragging himself along the floor towards the door. He attempted to get up enough to unlock the door, but fell back. They forced the door and picked him up. He said:

"I will be all right, just a little upset and nervous. I fell off the stage, and had to crawl all the way out here, and am upset and nervous."

O'Sullivan's face was scratched, and one of the employees got some water and washed the blood off of his face. Some blood fell upon his shirt and vest, and there was a mark on his face where the skin had been broken, and an abrasion—the widow called it a hole in the hand—which had been bleeding, and the blood had dried. He complained of his arm and thought it was broken, and when they moved it for him it hurt him. He was entirely rational, and was anxious that they should not alarm his wife. He was 57 years of age, in good health, with a little hitch or limp in his walk at times, and of good habits. He had not lost a day's work in years.

[1] When the night watchman left the theater, as O'Sullivan entered it, it was in good condition; the footlights were unbroken, and the seats in front of the stage were in their usual condition. The theater was ready for rehearsal that morning, and a metal piece had been placed on some chairs immediately in front of the stage. The stage was about 3 feet above the orchestra floor, and on the front of the stage was an apron of wood which was freshly shellacked several times a week. There is concrete at the edge of the stage, near the footlights, which is shellacked every day. The floor was slippery. Actors used rosin on their shoes to avoid slipping. At the edge of the stage there is a slope of the floor where it goes into the footlights; the drop or depression there being called the pan. O'Sullivan changed his clothes at top room No. 2, and in order to reach this room it was necessary for him to cross the stage. When found he had on the shoes he wore in the theater; his street shoes were in the top room. It is evident, therefore, he had been across the stage into top room No. 2, and had to pass at least partly across the stage. After O'Sullivan was found, it was discovered that several of the footlights were broken near a place where a little ladder came to the stage, and the first two chairs below the stage, at the left side, were broken, tipped back, and partly pulled from the concrete floor into which they were screwed, and the metal piece was not as it was left upon the chairs, but was tipped over and leaning against the chairs in the aisle.

There is no way in which this disordered condition of the footlights and these chairs and the metal piece could have occurred, aside from accounting for it as O'Sullivan stated. The Commission had the right to feel that, after changing his shoes in the top room, he came out across the stage to descend the little ladder, and slipped upon the slippery floor or in the depression, breaking the lights and the seats, and disarranging the metal piece. A man falling from the stage near the

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ladder, at a place where the footlights were found broken, would naturally fall at the place where the seats were broken and the metal piece disarranged. Some accident must have happened at that place after the night watchman left. No suggestion is made of any other manner in which the damage could have occurred to the property at that time. We cannot say there is no evidence to justify the award; in fact it seems to rest comfortably upon the evidence.

[2] In death cases the same quality of evidence as to the conduct of the deceased is not required as in a case where he is alive and can take the stand. It is assumed that, if he could speak, he would give a reasonably satisfactory account of himself as to matters which might not otherwise be understood. Graffe v. Art Color Printing Co., 191 App. Div. 669, 181 N. Y. Supp. 707; Mullen v. Schenectady Ry. Co., 214 N. Y. 300, 305, 108 N. E. 412; Harrison v. N. Y. C. & H. R. R. R. Co., 195 N. Y. 86, 89, 87 N. E. 802; Braun v. Buffalo General Electric Co., 200 N. Y. 485, 496, 94 N. E. 206, 35 L. R. A. (N. S.) 1089, 140 Am. St. Rep. 645, 21 Ann. Cas. 370, and cases cited. But here we have his speech, and it is fully confirmed by the condition of the stage, the seats, and the metal piece. His normal mental condition when discovered, the story he told, and the condition at and near the stage, justified the finding of the Commission that he fell from the stage and received his injuries. The conclusion that the death resulted from the accident fairly rests upon the evidence.

It is said that a hospital record shows that a month before the accident O'Sullivan was treated there for hemiphlegia, and that probably his injury came from a similar attack. The parties who made the record at the hospital can give no satisfactory account of it, but state that they make it up from information which they acquire in almost any way and from what they are told. The wife, and his coemployees, if believed, make it impossible that O'Sullivan could have been treated at the hospital at the time stated. Whether he was at his work every day was a matter of easy proof; his coemployees and the wife testify to the fact. If this was not true it was easy for the employer to prove the time he had lost.

[3] We cannot review the determination of the Commission as to the facts if there are any facts tending to sustain it.

The award should be affirmed.

DELSO ET AL. v. CRUCIBLE STEEL CO. OF AMERICA.

(New York Supreme Court, Appellate Division, Third Department. February 28, 1921.)

187 New York Supplement, 66.

MASTER AND SERVANT — EVIDENCE IN COMPENSATION CASE HELD TO SHOW INJURY CAUSING PNEUMONIA.

In proceeding under the Workmen's Compensation Law to recover compensation for the death of an employee from pneumonia, evidence that the employee had received a slight injury to his chest the day before he was taken sick, and expert testimony that the injury was the inciting cause of the pneumonia *held* sufficient to sustain an award of compensation by the Commission.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

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Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Law by Grace Delso and others for compensation for the death of Peter Delso, employee, opposed by the Crucible Steel Company of America, employer and self-insurer. From an award of compensation by the State Industrial Commission, the employer appeals. Affirmed.

Argued before John M. Kellogg, P. J., and Woodward, Henry T. Kellogg, Kiley, and Van Kirk, JJ.

Bond & Schoeneck, of Syracuse, for appellant.

Charles D. Newton, Atty. Gen., and Bernard L. Shientag, of New York City, for respondent State Industrial Commission.

John P. Hennessey, of Syracuse, for respondent claimant.

VAN KIRK, J. Peter Delso was employed by the Crucible Steel Company of America in its plant in Syracuse. On Wednesday, September 11, 1918, he was working on a machine for reeling and drawing wire. His hands were slippery with oil; his hand slipped, and the left side of his body came in contact with a frame or guard connected wth a spool on which the wire was wound. Exhibit 3A shows a man in the position in which Peter Delso stood just before and at the time of his injury, and on Exhibit A there is a letter A marked on the frame against whch his body struck. A man who saw the accident says that his body fell about six inches. Considering the testimony and the photograph, and the fact that the man stood firmly on his feet, it seems plain that the force of the blow which he received was due to the amount of strain upon his arm when his hand slipped, and that the force of the blow would be greater, the nearer his body was to the frame against which it struck when his hand slipped. When he straightened up, he swore, but said little, if anything, of his injury that afternoon. His work, however, was not active, and much of the time he remained seated. The next day Thursday, he complained of sickness and of the injury, was sent for first aid, ate no lunch, went to his home, and soon to his bed. On Saturday a physician was called, who diagnosed the case as bronchitis. On Sunday the doctor was again called, and pronounced the case pneumonia. In the afternoon a consultation of physicians was had; he died Sunday evening at 9 o'clock, four days after the injury. The death certificate states the cause of death to be "lobar pneumonia, with contributory myocarditis."

In the room in which Delso worked there were strong fumes, which irritated the throat. Prior to the injury, Delso coughed some, suffered some from asthama, but was otherwise strong, and was able to work regularly. Much was made of a dispute whether the pneumonia was on the same side as the injury. The attending physician, Dr. Van Lengen, was a very unsatisfactory witness. His record was incomplete. In testifying he depended upon his memory. The injury was upon the left side. At one time the attending physician says the pneumonia was upon the right side, and again it was on the same side as the injury. It appears that it is very difficult to determine whether pneumonia is affecting both sides, or only one. Experts were examined, two of whom stated that in their opinion the injury was the inciting cause of the pneumonia, and other experts, called for the employer, testified to the contrary.

The employer claimed that the "influenza" was the cause of death. There was a military camp within a little more than 1½ miles from the employer's plant, where the influenza developed, and later there

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were many cases in the city. But the pneumonia, from which Peter Delso died, was not traced with any definiteness to the influenza epidemic.

A reading of all the evidence in the case leaves in the mind a strain of uncertainty; but there was competent evidence that the injury was the inciting cause of the pneumonia; there was a sudden development and a quick termination in the progress of the disease after the injury. There are many circumstances corroborating the opinion of those experts who trace the pneumonia to the injury. The Commission has found that the injury was the cause of the pneumonia. This court is not at liberty, under the evidence and the rules which govern in these cases, to interfere with this finding. In its opinion the Commission states:

"That the decision of the Commission now arrived at is in no way influenced or affected by any observation made by the deputy commissioner as the result of his personal inspection."

—made by him at the plant, without the presence of the employer.

The award of the Commission should be affirmed. All concur.

PINTO v. CHELSEA FIBRE MILLS ET AL.

(New York Supreme Court, Appellate Division, Third Department. March 2, 1921.)

186 New York Supplement, 748.

1. MASTER AND SERVANT—COMMON-LAW PROOF REQUIRED OF ACCIDENTAL INJURY WITHIN COMPENSATION LAW.

Before there can be an award, all the elements of an accidental injury arising out of and in the course of an employment must be shown to exist by common-law proof; Workmen's Compensation Law, § 21, declaring a presumption that the claim comes within the provisions of the act, when there is no substantial evidence to the contrary, not raising a presumption that an accident has happened merely because a claim for compensation is made.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT — AN ULCER IS A "DISEASE" OR "INFECTION" WITHIN COMPENSATION LAW; "INJURY;" "PERSONAL INJURY."

An ulcer is a "disease" or "infection," within Workmen's Compensation Law, § 3, subd. 7, declaring that "injury," or "personal injury," as used in the act, means only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom.

(For other cases, see Master and Servant, Dec. Dig. § 373.)

(For other definitions, see Words and Phrases, First and Second Series, Disease; Infection; Injury; Personal Injury.)

3. MASTER AND SERVANT — COMMISSION MAY NOT MAKE AN AWARD ON PRESUMPTION OF ULCER OF EYE RESULTING FROM HEMP DUST.

The Industrial Commission may not presume that dust from hemp about which an employee is working is charged with disease germs, and

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so, when getting into his eye, is calculated naturally and unavoidably to result in an ulcer thereof, and therefore, in the absence of evidence to that effect, may not make an award on the theory of the ulcer being so caused.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Claim for compensation under the Workmen's Compensation Law by Antonio Pinto against the Chelsea Fibre Mills, his employer, and the America Mutual Liability Insurance Company, insurance carrier. From an award of the State Industrial Commission, the employer and insurance carrier appeal. Award reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward Cochrane, Henry T. Kellogg, and Kiley, JJ.

Jeremiah F. Connor, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. The State Industrial Commission has made an award for the loss of 90 per centum of the vision of the left eye of the claimant, a boy of 15 years of age, for a period of 115.2 weeks. In its conclusion of facts it finds that on or about the 28th day of April, 1919, while the claimant was engaged in his regular employment and while working on a machine at the plant of his employer—

"some particles of dust from same entered his left eye, thereby causing him to rub the same. His injured eye troubled him so much that on the next day he returned to the nurse in the emergency room, who put drops in it. A large irregularly shaped opacity, occupying the entire outer half of the cornea and also the entire pupillary area, developed as a result of the particles in said eye, and on account of which claimant sustained 90 per cent. loss of vision in the left eye. This loss of 90 per cent. of the vision of the left eye is the direct result of the injury which claimant sustained on or about the 28th day of April, 1919."

[1] The defendants contend upon this appeal that there is no evidence to sustain this determination. The Commission, following a custom condemned by the Court of Appeals, has made the opinion of one of the commissioners a part of its finding of facts, and this commissioner tells us in his opinion that the claimant, an Italian boy, not overly bright, "impressed me as truth-telling"; but the impressionability of commissioners is not a substitute for common-law evidence of facts, and the rule is now established that "all the elements of an accidental injury arising out of and in the course of an employment must be shown to exist by common-law proof" (Russo v. Jarvis Stores, Inc., 193 App. Div. 587, 589, 185 N. Y. Supp. 281, 282, and authority there cited), before there is power in the Commission to make an award. Section 21 of the Workmen's Compensation Law (Consol. Laws, c. 67) raises a presumption that the claim comes within the provisions of the act only when there is an "absence of substantial evidence to the contrary"; but this does not raise a presumption that an accident has happened because some one makes a claim for compensation. That is a fact jurisdictional in its character, and it must be established by evidence.

[2, 3] The undisputed evidence in this case is that the claimant is suffering from an ulcer of the cornea, and an ulcer arises "generally in a constitutional disorder." Webster. In other words an ulcer is a

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disease or infection. An injury, or a personal injury, as used in the Workmen's Compensation Law, means "only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." Section 3, subd. 7. No one would contend that mere floating dust, innocuous in its composition, could produce the "direct result" concededly existing in this case. In other words, mere particles of dust, floating in the atmosphere and entering the eye, could not produce an ulcer as a direct result. To establish the fact of an accidental injury under the statute, in the absence of an actual contusion. it is necessary to show that the initial cause—the accident complained of—naturally and unavoidably produced the result for which the claim is made. There is no presumption that the dust, which is alleged to have entered the eye of the claimant, was calculated to "naturally and unavoidably result" in an ulcer of the cornea of the eye, or to permanently impair the vision. Every man, woman and child of years of intelligence knows that dust in the eyes does not produce permanent impairment of the sight under ordinary circumstances. In Matter of Eldridge v. Endicott, Johnson & Co.. 228 N. Y. 21, 24. 25. 126 N. E. 254. 255, the court points out that the Commission is not justified in taking "judicial notice or in presuming that hides such as those in question usually or frequently contain anthrax germs and that a person working about them with an open wound is likely to receive the germ and die of anthrax," and that the Commission is "not authorized to make an award under this section, in the absence of at least some evidence that the employee might with his cut have taken anthrax while at work about the hides." So, in the case now before us the Commission is not authorized to make an award in the absence of evidence that there was something about the dust which is alleged to have lodged in the claimant's eye which would "naturally and unavoidably result" in the disease which has destroyed the vision to some extent.

There is no such evidence in this case. The claimant testified that this alleged accident happened on the 28th day of April, 1919; that he first noticed that his eye bothered him on the day named, and that he went to the nurse in the factory, who put some drops in his eye, and that he told her some dust went in his eye; that he told her immediately; that the forelady in the room where he was employed sent him to the nurse; that the eye never bothered him before that date. The forelady when called as a witness, testified that she was in charge of the room where the claimant worked. and that she did not send him to the nurse; that she never heard of the alleged accident until months later. The nurse testified that the claimant came to her on the 24th day of April and complained of a sore eye; that he said he did not know what was the matter with his eye. The boy was subsequently taken to a hospital and the record there of the history on admission is that "patient says that he waked up in A. M. two or three weeks with a good deal of

The claimant was recalled, identified the forelady. and admitted that he did not think she would lie about what occurred, and said he did not remember. when asked in reference to telling her about the dust getting into his eye. Then, after being admonished by the commissioner, who is impressed of his truthfulness. to "tell me just as truthfully as you know how what happened to you," the claimant again declared that some dust went in his eye. and that it did not hurt him as soon as he got the dust in his eye. but that he began to rub it; that he went to the nurse about half an hour later and told her "it was blood-shot." He admitted that the nurse asked him what had happened. and when asked what he told her he paused, said "I told her just." then laughed, and did not complete the answer. The question being repeated. he said, "I don't remember." He then admitted that he did not tell the nurse just

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then that he had got dust in his eye, and being further pressed said that it was after he was in the hospital, and he was discharged from the hospital on the 29th day of May. He furter admitted that the suggestion of the dust came from the Italian doctor who attended him. and that this was the first time he thought of the dust as the cause of the trouble. This was all brought out by examination on the part of the commissioner. and if there was any confusion on the part of the claimant it was not due to undue severity on the part of the examiner.

In view of the testimony of the nurse, supported by her record that the claimant came to her and complained of his eye on the 24th day of April, and that the claimant insists upon the 28th day of April as the date of his alleged accident. it must be entirely obvious that there is no evidence of probative force of any accident whatever at the time the claimant went to the nurse. and the secretary of the company. who was talking with the nurse when the claimant came in, testifies that the nurse asked him what had happened, and that the claimant denied that anything had happened, or that he got anything in his eye; that he said nothing had happened; that it "just got sore." There was trouble with this eye on the 24th day of April; this testimony is wholly undisputed. The claimant not only stated that nothing had happened, but declared that it just got sore. and he admitted that his first thought of dust in his eye as the cause of the trouble came to him at the time it was suggested by his doctor. weeks after the alleged accident.

No jury would be justified in finding from this testimony that there was an accident on or about the 28th day of April. resulting in an injury to the left eye of the claimant. But, if it be assumed that dust did get in his eye on this date there is absolutely no evidence that the dust which entered his eye was capable of producing the disease or infection "naturally and unavoidably." The dust itself, which the claimant testifies did not hurt him at the time, certainly did not produce the loss of vision; it was only because of some disease or infection that the eye lost its power, and it may not be assumed that dust from hemp is charged with disease germs or bacteria, any more than like assumption is justified in the case of raw hides in the case already referred to. The award should be reversed and the claim dismissed.

Award reversed and claim dismissed. All concur, except John M. Kellogg, P. J., who dissents.

NOBLE v. MATHIESON ALKALI CO., INC., ET AL.

(New York Supreme Court, Appellate Division, Third Department. March 2, 1921.)

186 New York Supplement, 752.

MASTER AND SERVANT — COMPENSATION AWARD FOR HERNIA NOT SUSTAINED, WITHOUT EVIDENCE OF UNUSUAL HAPPENING.

An award of compensation on account of a hernia could not be sustained on evidence that the employee, while working a handle up and down with three other men, felt a pain in the groin, without any evidence of any unusual happening, or evidence that the conditions prevailing

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could produce the condition complained of, merely because the injured employee was the taller of the men working on the handle.

(For other cases, see Master and Servant. Dec. Dig. § 405[4].)

John M. Kellogg, P. J., dissenting.

Appeal from State Industrial Commission.

Proceeding under the Workmen's Compensation Act by Montgomery Noble for compensation for injuries, opposed by the Mathieson Alkali Company. employer, and the Travelers' Insurance Company, in surance carrier. Compensation was awarded by the State. Industrial Commission, and the employer and insurer appeal. Reversed, and claim dismissed.

Argued before John M. Kellogg, P. J., and Woodward, Cochrane, Henry T. Kellogg, and Kiley, JJ.

Benjamin C. Loder, of New York City, for appellants.

Charles D. Newton. Atty. Gen. (E. C. Aiken, of Albany, and Bernard L. Sheintag, of New York City, of counsel), for respondents.

KILEY, J. The claimant was a man 53 years old when the injury complained of occurred. He was at work for his employer, appellant, at its place of business at Niagara Falls, N. Y. He was a millwright's helper, and on the 7th day of November, 1919, was at work in the boiler room jacking up a stack. No unusual effort was required or exerted in this work. Between 4 and 5 o'clock he felt a pain in the region of the groin and was sick to his stomach, went home, and on November 10, 1919, was operated for a simple hernia. In jacking up this stack a handle was used and worked up and down. Three men worked upon it, of whom claimant was the taller.

The Commission in making the award appealed from, used this circumstance in its endeavor to create an unusual hazard. No doctor was called to testify; no evidence of anything unusual happening was given; no slip, fall, nor blow was claimed; no evidence that the conditions prevailing at the time would be likely to or could produce the condition of which claimant complains. We have passed upon similar records adversely to respondents' contention in Hagar v. Griffin Mfg. Co. et al., 193 App. Div. 820, 184 N. Y. Supp. 750, and Gentelong v. American Hide & Leather Co,. 194 App. Div. 9, 184 N. Y. Supp. 808. See Alpert v. Powers, 223 N. Y. 97, 119 N. E. 229, cited in above cases. The award of eight week's compensation is faulty; no evidence to sustain it. Matoris v. Estey Piano Co., 189 App. Div. 297, 178 N. Y. Supp. 408. The award should be reversed.

Award reversed, and claim dismissed. All concur, except John M. Kellogg, P. J., who dissents.

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POSEY v. MOYNEHAN ET AL.

(New York Supreme Court, Appellate Division. Third Department. February 28. 1921.)

186 New York Supplement, 753

1. MASTER AND SERVANT — COMPENSATION CLAIMANT'S OCCUPATION AT TIME OF INJURY QUESTION OF FACT.

In proceeding under the Workmen's Compensation Act, for compensation for injuries to a lumberman's employee, the Industrial Commission's finding on the evidence that claimant was engaged in the actual operation of lumbering, and not in farming, is one of fact.

(For other cases, see Master and Servant, Dec. Dig. § 417[7].)

2. MASTER AND SERVANT — COMPENSATION CLAIMANT'S ENGAGEMENT IN NONAGRICULTURAL EMPLOYMENT SHOWN.

In proceeding for compensation for injuries to a lumberman's employee, evidence that the employee, when injured, was engaged in the employment. and the employer was not engaged in farming. *held* sufficient to sustain the findings of the Industrial Commission to such effect.

(For other cases, see Master and Servant, Dec. Dig. § 405[2].)

3. MASTER AND SERVANT — EMPLOYER, BY POSTING NOTICES, ELECTED TO COME WITHIN COMPENSATION ACT.

An employer, by posting of notices of election to come under the Workmen's Compensation Law, as required by section 3, subd. 5, as amended by Laws. 1917, c. 705. complied with the requirements of the section, and brought his employee within the act.

(For other cases, see Master and Servant, Dec. Dig. § 358.)

Appeal from State Industrial Commission.

Proceeding for compensation under the Workmen's Compensation Act by Napoleon Posy, the employee, opposed by Patrick Moynehan, the employer, and the Ocean Accident & Guarantee Corporation, the insurance carrier. Compensation was awarded by the State Industrial Commission, and the employer and insurance carrier appeal.

Award affirmed.

Argued before John M. Kellogg, P. J.. and Woodward Van Kirk. Henry T. Kellogg, and Kiley, JJ.

Norman G. Hewitt, for appellants.

Charles D. Newton, Atty. Gen. (Bernard L. Shientag, of New York City, E. C. Aiken, of Albany, and Francis H. Slater, of Tupper Lake, of counsel), for respondent.

KILEY. J. There is no question here about the accident, the extent of the injuries received, nor the work actually being perfomed by the claimant. The contest against claimant is the application of the law to the facts as appear in the record. If a question of fact was created, the finding of the Commission must stand. Section 20, Workmen's Compensation Law (Consol. Laws, c. 67.)

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The employer was a large lumber operator; had been for many years previous to the year 1917. He maintained several lumber camps on different jobs in the Adirondack forests in the northern part of this state. All of these several jobs, and all of the operations with reference thereto, were directed from one central point, termed his headquarters, and located at Sabattis, Hamilton county, N. Y. This was at a railroad station, a small settlement in the wilderness, and, so far as the record discloses, all owned and operated by the employer, Moynehan. There was a store and office combined, a boarding house fitted and constructed for lumbermen, and run by the employer, a large barn, with 90-horse capacity, and space for hay and grain of like capacity, and sheds for storage of tools, sleighs, wagons, etc. He employed many men in his lumbering operations—sometimes 100, sometimes less, and at all times more than 4. It was a hazardous occupation under section 2, group 14. of the Workmen's Compensation Law.

Around this central point, herein called headquarters by the employer, and farm by the insurance carrier, were located from 200 to 400 acres of land owned by the employer, as a matter of fact he owned thousands of acres; this land immediately adjacent to this center of operations was used by the employer to raise hay and potatoes, using the same, so far as needed, in his lumbering busines. Claimant was a chore or barn man at these headquarters. He did what he was called upon to do around the boarding house, and cared for the employer's and transients' horses that put up at the stables. When the employer's horses were not needed upon some of the jobs, they were brought to this stable to be cared for, and in warm weather were turned out to pasture on this acreage. It was claimant's occupation to care for and look after these horses.

That this central group of buildings and the operations carried on at and directed therefrom, in connection with the larger operation of actual lumbering, were all a part of the larger enterprise, was a question of fact found by the Commission, and so found on evidence legal and of probative force. Section 3, subdivision 4, of the Workmen's Compensation Law, defines "employee" as follows:

"'Employee' means a person engaged in one of the occupations enumerated in section 2, or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer, and shall not include farm laborers or domestic servants."

The foregoing was the law on September 15, 1917, when claimant, in the course of his employment, while going from the boarding house toward the store, fell and broke both kneecaps, which accident has left him in the crippled condition found by the Commission. I judge from the record that if all of the facts were known claimant could have made his claim under second group 45 of section 2 of the Workmen's Compensation Law. The question is not presented here; the observation is made to recall the possibilities under this law and the progressive tendency of the same. The employer's business was conducted more or less through superintendents and overseers, one of whom made application for the insurance found by the Commission to cover this claimant. The employer stated that claimant was covered and was one among his employees he had insured.

[1. 2] The appellant carrier resists payment of the award upon two grounds. (1) That the employee, at the time of the accident, was not engaged in the actual operation of cutting trees and skidding and getting out logs. It appears from the record that the employer was

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sick that year unto death, and while not actually and actively carrying on the operation of lumberman, as he had theretofore for 20 years and upwards, yet his plant was intact, his facilities ready, and his headquarters as fully manned as at any time. The temporary lull in activity did not render appellant's liability under its contract any the less because of such temporary lull in active operations (2) That the employer was engaged in farming, and it was in such occupation the claimant was occupied when injured. It was a question of fact for the Commission to pass upon from all of the evidence, and I do not think we can disturb its finding.

[3] However, a further advantage to the claimant is disclosed by the record. The employer elected to come under the provisions of this law, as appears from the evidence to the effect that he had posted notices so stating in the men's room at the boarding house comprising a portion of the buildings at headquarters. The accident happened September 15. 1917. Chapter 705 of the Laws of 1917 went into effect July 1, 1917. Subdivision 5 section 3 of the Workmen's Compensation Law was amended by that chapter to read as follows:

"'Employment" includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain, or in connection therewith, except where the employer and his employees have by their joint election, elected to become subject to the provisisions of this chapter as provided in section 2."

The employer, by posting the notices, compiled with the requirements of the section. Matter of Dose v. Moehle Lithographing Co.; 221 N. Y. 401, 117 N. E. 616, must be regarded as salutary and comforting by this claimant.

The award should be affirmed. All concur.

SCHERMERHORN v. GENERAL ELECTRIC CO.

(New York Supreme Court. Appellate Division. Third Department. March 2. 1921.)

186 New York Supplement, 835

CONSTITUTIONAL LAW—MASTER AND SERVANT—COMPENSATION AWARD TO WORKMAN FOR PROPORTIONATE LOSS OF HAND, BASED ON PERSONAL EXAMINATION BY A COMMISSIONER WITHOUT CONSIDERING TESTIMONY, HELD INVALID AS BEING ARBITRARY.

The commissioners. in exercising the powers given to them under Workmen's Compensation Law, §§ 20, 65, 68, cannot make an award under section 15 for an injury in excess of the proportionate loss of hand fixed by the testimony of the physicians, on a personal examination by one of the commisioners, since to permit such an award would be arbitrary, and violate the due process of law provisions of the Constitution.

(For other cases, see Constitutional Law, Dec. Dig. § 306; also Master and Servant, Dec. Dig. § 405[6].)

Henry T. Kellogg, J., concurring in result; John M. Kellogg, P. J., dissenting.

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Appeal from State Industrial Commission.

Proceeding by J. Schermerhorn under the Workmen's Compensation Law to obtain compensation for personal injuries, opposed by the General Electric Company, the employer. There was an award of compensation. and the employer appeals. Award reversed, and matter remitted.

Argued before John M. Kellogg, P. J., and Woodward Cochrane, Henry T. Kellogg, and Kiley, JJ.

Richmond Moot, of Schenectady, for appellant.

Charles D. Newton, Atty. Gen. (E. C. Aiken, Deputy Atty. Gen., of counsel), for State Industrial Commission.

WOODWARD, J. There is no dispute that the claimant was injured in the course of his employment in a manner to entitle him to compensation. The accident occurred on the 14th day of June, 1919, The injury is described as a "contused and lacterated right wrist," and the only question presented upon this appeal is whether the Commission may make an award for an injury in excess of the proportionate loss fixed by the testimony of the physicians, upon the personal examination by one of the commissioners. The greatest possible loss of use of th hand. due to the injury of the wrist, was placed at $33^1/_3$ per centum by the physicians, ranging from that down to 25 per cent. There is no testimony before the Commission from which any greater loss of use may be found. Deputy Commissioner Boyle has, however, made a personal examination of the claihmant's hand, and, ignoring the testimony of the physicians, has fixed it at 40 per centum. None of the facts on which this determination is made rests upon sworn testimony; it is all based upon the statement of this deputy commissioner. He says:

"The claimant in this case has been before me and examined by me seven or eight times since July 23, 1919, and I have found on all examinations a marked loss of gripping power in the right hand, which has not, in my opinion, improved, although there has been some improvement in the condition of coldness and perspiration which has been present in the hand. I find that this loss of power of the hand is equivalent to 40 per cent. of the useful function of the hand, and I make an award of 97.6 weeks at $20 per week."

Various hearings were had in reference to this case, and counsel insisted that the award be confined to the limits fixed by the testimony; but the Commission has ratified the award, and we are asked to determine upon this appeal whether the Commission may fix the extent of injuries without regard to the evidence in the record. In condemnation proceedings. where the commissioners are authorizing to view the premises, and to take into consideration the evidence in connection with such view, it is probably true that the commissioners are not bound by the testimony of witnesses as to the value of the property taken, though it would be rather an extraordinary case where the commissioners would be justified in making an award in excess of the estimates placed upon the values by witnesses testifying in behalf of the parties interested. But in these compensation cases, where the question of the extent of the injuries depends upon highly technical knowledge, no good reason suggests itself why the Legislature should have contemplated such action as is here under consideration.

The statue does not authorize the Commission to view an injury and determine its extent. Section 15 of the act (Consol. Laws, c. 67) particularly specifies the extent of the injuries to be compensated by particular allowances, and then provides that "for the partial loss or

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the partial loss of the use of a hand, arm, foot, leg, or eye, compensation therefore may be awarded for the proportionate loss or proportionate loss of the use of such hand," etc.; but it nowhere delegates to the commissioner the power to arbitrarily determine the proportionate loss, and such a power cannot be presumed to have been granted, for the constitutional requirement of due process of law contemplates the protection of the life, liberty, and property of the citizen against the acts of mere arbitrary power in any department of the government. Westervelt v. Gregg, 12 N. Y. 212, 62 Am. Dec. 160; Bertholf v. O'Reilly, 74 N. Y. 509, 519, 30 Am. Rep. 323. Section 65 of the act provides that—

"Each commissioner and deputy shall, for the purpose of this chapter, have power to administer oaths, certify to official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony."

These powers all contemplate the bringing before the commissioners of the necessary facts for the determination of the questions involved, not to usurpation of the power to determine from a mere personal examination questions which legitimately belong to the field of expert testimony. Section 68 provides that the commission—

"in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties."

It is, however, provided in section 20 that upon "a hearing pursuant to this section either party may present evidence and be represented by counsel," and this, of course, contemplates that the evidence actually produced must be taken into consideration, and that counsel shall have the right customarily exercised by counsel; shall have the right to cross-examine the witnesses, and to have all the evidence upon which the Commission acts spread upon the record. This is necessary to the appeal provided for in section 23 of the act, and the court in Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540, says that there—

"must be in the record some evidence of a sound, competent and recognizedly probative character to sustain the findings and award made, else the findings and award must in fairness be set aside by the court."

There is clearly no evidence in this record of a sound, competent, and recognizedly probative character to sustain the finding that the claimant's hand was injured to the extent of 40 per cent. of its capacity; there is merely the conclusion of a deputy commissioner, unsustained by any evidence in the record. He does not lay before this court the groundwork of fact on which his conclusion is based; he was not sworn, was not subjected to examination or cross-examination. So far as the record goes, it appears that his conclusion was reached after the hearing was closed, and without any one knowing that he contemplated making any personal examination of the claimant.

The award should be reversed, and the case returned to the Commission for a determination upon the evidence which appears in the record. All concur (Henry T. Kellogg, J., in result, on the ground that the loss of use presented a question which those having expert knowledge alone could answer, and he does not agree that the commissioner is not in other cases entitled to use the evidence of his senses to make a determination), except John M. Kellogg, P. J., who dissents.

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WATKINSON v. HOTEL PENNSYLVANIA ET AL.

(New York Supreme Court, Appellate Division. Third Department. February 28, 1921.)

187 New York Supplement, 278

1. MASTER AND SERVANT—EVIDENCE HELD TO SUSTAIN AWARD FOR ACCIDENTAL DEATH BY FALL.

Evidence that bell boy, who was missed during his hours of employment, was later found dead at the bottom of elevator shaft, with a wound in his head, *held* to sustain an award of compensation for accidental death in the course of employment.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

2. MASTER AND SERVANT — COMPENSATION ALLOWANCE TO STATE VALID.

The provision of Workmen's Compensation Law, § 15, subd. 7, for payment to the state treasurer of $100 in every case of injury causing death, where there is no person entitled to compensation is valid.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

Henry T. Kellogg. J., dissenting.

Appeal from Award of State Industrial Commission.

Proceeding under the Workmen's Compensation Law for compensation for the death of William Watkinson, employee, opposed by the Hotel Pennsylvana, employer, and the Travelers' Insurance Company, insurance carrier. From an award of compensation by the State Industrial Commission, employer and insurance carrier appeal. Affirmed.

Argued before John M. Kellogg, P. J., and Woodward, Henry T. Kellogg, Kiley, and Van Kirk, JJ.

Charles D. Newton, Atty. Gen., and Bernard L. Shientag, of New York City (E. C. Aiken, Deputy Atty. Gen., of counsel), for respondent State Industrial Commission.

Benjamin C. Loder, of New York City (E. C. Sherwood and William B. Davis, both of New York City, of counsel), for claimant.

VAN KIRK, J. [1] The evidence in this case discloses that the deceased, Watkinson, was employed at the Hotel Pennsylvania, having more than 50 rooms. as a bell boy, working from 12. midnight to 7 a. m. His duties were to attend guests to rooms and answer calls from rooms. He was engaged in his work on the morning of May 23, 1920. He had answered a call to room 1529, returned his card for this call, and taken another card for room 824. Evidently this latter call had not been filled; the hour stamped on this card was 12:50. Early in the morning of May 23d, search for Watkinson was instituted. Mr. Hall went to the Pullman restaurant, and was there told by the cashier that Watkinson had been there about 1:30 in the morning and purchased two sandwiches. Sometimes late at night bell boys went outside to get food for guests. Passenger elevator shaft No. 8 was usually closed about 1 or 1:30 in the morning, and remained closed till 6.30 or 7 a. m., when it was the custom for the elevator men to take the daily papers to the several floors and leave

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them for the bell boys to distribute to the several rooms. The bell boys usually rode from floor to floor in the elevators, and sometimes they used elevators without permission. In the morning, when the search was instituted for Watkinson, it is said the car was at the fourth floor. Below the main floor (at which the car was usually left when the levator was closed) is a basement, where there is a door into the elevator shaft. About 1 p. m. of May 23d Watkinson's body was found at the bottom of No. 8 shaft, with a mark on his head, showing a blow. The car in shaft 8 had been running since morning In some manner, not disclosed by the evidence, he fell down this shaft. He could not have been in the car, but must have gotten into the shaft below the car. There was no way to get into the shaft, except through a door leading into it from one of the floors.

We have in the evidence, from established facts and fair inference, the framework of a valid claim under the Workmen's Compensation Act (Consol. Laws, c. 67). It appears that Watkinson met his death in the course of his employment; that, the injury arose out of his employment; and it is a fair inference, from the known facts, that his was an accidental injury. The award was justified.

[2] The award is $100 for funeral expenses and to the state treasurer of the state of New York: (1) $100, pursuant to the provisions of subdivison of 7 of section 15 of the Workmen's Compensation Law; (2) $900, pursuant to the provisions of subdivision 8 of section 15 of the Workmen's Compensation Law, as added by Laws 1920, c. 760, § 1. No question is raised as to the award for funeral expenses. or the award under subdivision 7 of section 15, which is valid. Edsall v. Edsall, 179 App. Div. 481, 485, 165 N. Y. Supp. 967, affirmed State Industrial Commission v. Edsall, 222 N. Y. 651, 119 N. E. 1079; 118 N. E. 794; Mountain T. Co. v. Washington, 243 U. S. 219, 235, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642; New York Central R. R. Co. v. White 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed, 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629.

[3] The $900 award under subdivision 8 is attacked upon two grounds:

(1) The Rehabilitation Law (Laws 1920, c. 760. § 2). adding a new article (47) to Education Law (Consol. Laws, c. 16), conflicts with article 3 of the state Constitution, §§ 1 and 17, and subdivision 8 falls with it.

(2) Subdivision 8 of section 15 conflicts with article 1, of the state Constitution and the Fourteenth Amendment of the federal Constitution. Considering the second criticism first.

[4] Article 1, § 6, of the state Constitution, is the Bill of Rights, and the due process of law clause and the just compensation clause are invoked. Under the Fourteenth Amendment the equal protection law clause is invoked. No question is open under the provisions of the state and federal Constitutions, invoked after the decisions above cited (particularly in Mountain Timber Co. v. Washington and New York Central R. R. Co. v. White,) except whether or not the amount fixed in the statute is unfair or unreasonable. There may be an extravagant and arbitrary amount fixed. Is the amount here fixed such? All reasonable presumptions are in favor of the validity of the act, and the burden of proof and argument is upon those who seek to overthrow it. Mountain T. Co. v. Washington, supra, 243 U. S. 237, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642. The sum fixed in the statute is not great, is not larger than could readily be awarded, had the deceased left dependents. There is no evidence in this case showing that the sum fixed is so extravagant or arbitrary as to constitute an abuse of power. The court cannot say that $900 is an unfair or unreasonable sum for the purposes intended.

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As to the first criticism, subdivision 8 of section 15 reads:

"An employee, who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the state board of vocational education is being rendered fit to engage in a remunerative occupation. shall receive additional compensation necessary for his maintenance; but such additional compensation shall not exceed ten dollars a week. The expense shall be paid out of special fund created in the following manner: The insurance carrier shall pay to the state treasurer for every case of injury causing death, in which there are no persons entitled to compensation, the sum of nine hundred dollars. The state treasurer shall be custodian of this special fund and the Industrial Commission shall direct the distribution thereof."

This subdivision is a part of chapter 760 of the Laws of 1920. The fund so provided for is payable to an employee who has been injured and totally or partially incapacitated for a remunerative occupation, and who is entitled to compensation under the Workmen's Compensation Law only. Section 1 of article 3 of the state Constitution is:

"The legislative power of this state shall be vested in the Senate and Assembly."

And section 17 is:

"No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be be applicable, except by inserting it in such act."

Chapter 760 of the Laws of 1920 is entitled:

"An act to accept the provisions of any law of the United States making an appropriation to the states for the rehabiliation of physically handicapped persons, to amend the Workmen's Compensation Law, in relation to the maintenance of employees undergoing rehabiliation, and to amend the education law, in relation to the rehabilitation. of physically handicapped persons, and making an appropriation therefor."

The first section enacts subdivision 8 of section 15 as above quoted. The second section amends the Education Law (Consol Laws, c. 16), and enacts a new article (47. the Rehabilitation Law. being sections 1200 to 1210. It creates an advisory commission for the rehabilitation of physically handicapped persons, as defined in the act; it enumerates the powers of the commission in section 1204, fixes duties upon the Industrial Commission and the department of health and the department of education, and authorizes the department to receive gifts and donations for the purposes of this article, which may be offered unconditionally. Section 1210 is as follows:

"*Acceptance of Laws of the United States.* The state of New York through its legislative authority:

"1. Accepts the provisions of any law of the United States making appropriation to be apportioned among the states for vocational rehabilitation of disabled persons;

"2. Empowers and directs the Board of Regents of the University, hereby designated the New York state board for vocational education, to co-operate with such agency as the federal government shall designate to carry out the purposes of such law;

"3. Appoints the state treasurer as custodian of all money given to the state by the United States under the authority of such law, and such money shall be paid out in the manner provided by such act for the purposes therein specified;

"4 Authorizes the Board of Regents of the University as the state board for vocational education and the Industrial Commission to formulate a plan of co-operation in accordance with this act, which shall be effective when approved by the Governor of the state."

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The attack upon this law is formulated in this manner: The whole chapter (the Rehabilitation Law) is built around section 1210. This is void, because based on the acceptance of the federal statute, and the whole act falls with section 1210.

[5] This position is untenable. In the sections of the chapter prior to section 1210 funds in this state are provided. The uses to which these funds are put are defined, and a board is appointed for administering these funds, in compliance with the instruction in the statute. Here is a complete act, entirely separable from section 1210, maintainable and operative without it, and I can conceive no reason why the Legislature would not have wished the statute to be enforced with section 1210 rejected. People ex rel. Alpha P. C. Co. v. Knapp, 230 N. Y. 48, 59, 129 N. E. 202. Under these sections the award as made in this action may be lawfully used.

[6] We turn, then, to section 1210. The federal government had made provisions for vocational education and had apropriated funds to be apportioned among the states to that end. By section 1210 the law for the use and distribution of those funds only is accepted. It does not accept the federal law for distributing any of the state funds, and it delegates to the board it names administrative powers only. It is not a surrender of the legislative power of this state to any outside legislative body. The act is no more than an acceptance of the fund and then providing a board or body which may receive the federal fund and co-operate with the federal authorities, so that this federal fund may be available to the state of New York and its citizens to be used, as it must be, in the manner required by the government which supplied the funds.

[7] The Rehabilitation Law is the legislative act of the Senate and Assembly of the state of New York, and it does not make any existing law of this state (or of the United States) a part thereof, nor does it enact that any existing law shall be applicable within the prohibition of article 3 of our state Constitution. The purpose of section 17 of article 3 of our Constitution is stated in People ex rel. Commissioners v. Banks, 67 N. Y. 568, 575:

"The evil in view, in adopting this provision of the Constitution, was the incorporating into acts of the Legislature, by reference to other statutes, of clauses and provisions of which the Legislature might be ignorant, and which affecting public or private interests in a manner and to an extent not disclosed upon the face of the act, a bill might become a law, which would not receive the sanction of the Legislature if fully understood."

In Choate v. City of Buffalo, 39 App. Div. 379, 57 N. Y. Supp. 383, chapter 466 of the Laws of 1892 was considered, which provided that land taken by the city of Buffalo for public parks—

"shall be under the control and management of the said park commissioners, and shall be maintained and improved, the same as the existing systems of parks and approaches in said city, as provided in and by title eleven of chapter one hundred and five of the laws of eighteen hundred and ninety-one, and the other provisions of said chapter applicable thereto."

And it further provided:

"The same powers of control, maintenance, construction and jurisdiction which are conferred by title eleven of chapter one hundred and five of the laws of eighteen hundred and ninety-one, upon the city of Buffalo * * * over public parks, approaches, streets, roads and avenues in said title mentioned, shall extend and apply to all parks and approaches authorized by this act."

The court held that these provisions were not in conflict with section 17 , art. 3, of the Constitution of this state.

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In People v. Davis, 78 App. Div. 570, 79 N. Y. Supp. 747, the court held that a statute declaring the Sanitary Code to be binding and in force in the city of New York does not violate this section of the Constitution,, and (78 App. Div. on page 576, 79 N. Y. Supp. on page 751) said:

"The Sanitary Code, when declared to be binding and in force. was not an existing law of the state within the meaning of that section of the Constitution, and it was not by any Act of the Legislature declared applicable to, or made or deemed a part of, such act."

The federal government has distributed funds to the states before (chapter 30 of the Land Grant Act, Laws of the United States 1862). and our Legislature has provided for their use by Cornell University (Laws of 1863, c. 20; Laws of 1865, c. 585; Laws of 1880, c. 317; Laws of 1891, c. 56; Education Law, §§ 1030 to 1039).

We conclude that chapter 760, Laws of 1920, without section 1210 thereof, provides a complete and valid law for raising a rehabilitation fund in this state and administering that fund for the purposes therein declared; that section 1210 provides for acceptance and administration of the federal fund only, in accordance with the act of Congress; and that such provision does not offend against our constitution and is valid.

The award should be affirmed. All concur, except Henry T. Kellogg J., dissenting.

GODFREY v. BROOKLYN EDISON CO.

(New York Supreme Court. Special Term, Kings County. March 21. 1921.)

187 New York Supplement, 263

MASTER AND SERVANT—NO BINDING ELECTION UNDER COMPENSATION LAW UNTIL AWARD.

Under Workmen's Compensation Law, § 29, as amended by Laws 1917, c. 705, until there has been an award of compensation to an injured employee, he is free to forego compensation under the Compensation Law and pursue his right to recovery of ordinary damages from the true tortfeasors; it not being the electing to claim compensation under the Compensation Law, but the actual awarding of it, which is decisive and binding.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

Action by Richard Godfrey against the Brooklyn Edison Company. On motion by plaintiff for judgment sustaining demurrer to a separate defense. Motion granted.

Belfer & Belfer, of Brooklyn, for plaintiff.
Ingraham, Sheehan & Moran, of New York City, for defendant.

KELBY, J. This action is brought to recover for personal injuries alleged to have been caused by the negligence of the defendant. The defense, which is demurred to, alleges that plaintiff, at the time of the injury, was employed by the Audley Clarke Company, and made a claim, under the Workman's Compensation Law (Consol. Laws, c. 67) for compensation, and accepted compensation from the Audley

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Clarke Company, and therefore is not the real party in interest; these facts being pleaded in bar of recovery. The direct attack on the defense is that it does not allege that there ever was any award made under the Compensation Law, and it is contended by the plaintiff that. until there has been an award, he is free to forego compensation under the law and pursue his right to recovery of ordinary damages from the direct tort-feasors. What is involved is the interpretation of section 29 of the Law, as amended by Laws 1917, c. 705. This reads as follows:

"If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents shall, before any suit or any award under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commission may by rule or regulation prescribe. If such injured employee, or in case of death, his dependents, elect to take compensation under this chapter, *the awarding of compensation shall operate as an assignment of the cause of action against such* other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation," etc.

The words which have been italicized mark the changes in the law made by the amendment. The prior law contained the word "claim" in place of the word "award," and in place of the words beginning "the awarding of compensation," etc., contained the words "the cause of action against such other shall be assigned."

It appears from the cases which arose under the law before the amendment that it was the practice of the commission to have the claimant include in his notice of claim a formal printed assignment of the claim against the tort-feasor. This evidenced and effectuated the subrogation of the state insurance fund to the right to recover the damages. The old law contained nothing to indicate that the divesting of title to that right of action was intended to be postponed until payment of the award, but, on the contrary, the express import was that it should take effect on the election to take compensation under the law; the forms prescribed by the commission containing a formal assignment, and the language of the assignment itself all evidence the same intent. Sabatino v. Crimmins Construction Co., 102 Misc. Rep. 172, 168 N. Y. Supp. 495, 499. It was also said in that case that the amendment of 1917 had the purpose to dispense with the formal instrument of assignment. and that "it evidently postponed rather than advanced the time of the transfer of title." This is the only intent apparent in the amendment, and it is the clear intent. It postpones the divesting of the title, to the cause of action against the tort-feasor, until the actual award of compensation. That is now the operative and effective things, where formerly it was the election, follwed by the assignment as a procedural requirement, which had that effect. It has been pointed out that—

"The reason for the [old] statutory declaration as to election is founded upon the common-law rule that there should not be a double satisfaction for the same injury." Miller v. N. Y. Railways Co., 171 App. Div. 316, 319, 157 N. Y. Supp. 200, 201.

The reason for the amendment rests upon an even closer analogy to the common law. It adopts the rule that—

"Where a party has two or more remedies for the same wrong. in which the measure of damages might be different, electing one and pursuing it to judgment is a bar to any other remedy." Miller Case, supra, 171 App. Div. at page 319, 157 N. Y. Supp. at page 202.

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It is not now the electing to claim compensation under the law, but the actual awarding of it, which is decisive and binding. Compensation paid before the award is to be regarded as "advance payments" under section 20a of the law, and, in the words of that section, is made "at the employer's risk" of the employee, before any actual award, withdrawing his claim for compensation under the law, and resting on his right to ordinary damages.

The motion for judgment is granted.

INDUSTRIAL COMMISSION OF OHIO v. WEIGANDT.

(No. 16545.)

(Supreme Court of Ohio. Jan. 18, 1921.)

130 Northeastern Reporter, 38.

(Syllabus by the Court.)

1. MASTER AND SERVANT — INJURY FROM SCUFFLE BETWEEN WORKMEN HELD "OCCASIONED IN COURSE OF EMPLOYMENT" WITHIN COMPENSATION LAW.

While an employee in compliance with his duty was in the factory where he was employed, going to his machine, he was struck in the eye and injured by a file, which flew from its handle during a friendly scuffle for it by two other employees. *Held*. the injury was one occasioned in the course of the workman's employment within the Workmen's Compensation Law.

(For other cases. see Master and Servant, Dec. Dig. § 373.)

2. MASTER AND SERVANT — TEST OF RIGHT TO AWARD FROM INSURANCE FUND UNDER COMPENSATION LAW IS WHETHER EMPLOYMENT HAD SOME CAUSAL CONNECTION WITH INJURY.

The test of right to award from the insurance fund under the Workmen's Compensation Law, for injury in the course of employment is not whether there was any fault or neglect on the part of the employer. or his employees. but whether the employment had some causal connection with the injury. either through its activities, its conditions. or its environments.

(For other cases. see Master and Servant, Dec. Dig. § 371.)

3. MASTER AND SERVANT — COMPENSATION LAW DOES NOT COVER INJURY DISCONNECTED WITH EMPLOYER'S BUSINESS.

The provisions of the law do not cover an injury which had its cause outside of and disconnected with the business in which an injured workman was employed. Fassig v. State ex rel., 95 Ohio St. 232, 116 N. E. 104, approved and followed.

(For other cases. see Master and Servant, Dec. Dig. § 371.)

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4. MASTER AND SERVANT—COMPENSATION LAW LIBERALLY CONSTRUED.

The statute was intended to provide a speedy and inexpensive remedy as a substitute for previous unsatisfactory methods and should be liberally construed in favor of employees.

(For other cases. see Master and Servant. Dec. Dig. § 348.)

Error to Court of Appeals. Shelby County.

Proceedings under the Workmen's Compensation Act by Ernest Weigandt. employee, against the Sidney Tool Company. employer. to recover for personal injuries. The claim was rejected by the Industrial Commission, and on appeal to the Court of Common Pleas judgment for the employee was rendered. which judgment was affirmed by the Court of Appeals. and the Industrial Commission brings error. Affirmed.

The defendant in error, Ernest Weigandt. was an employee of the Sidney Tool Company. On October 13, 1917. he arrived at the plant of the company a short time before work commenced, had punched the time clock, and was proceeding toward the machine where his duties were performed. Two other employees had gotten into a friendly scuffle with reference to a file which one of them held in his hand. While this scuffle was in progress Weigandt passed near by. and the file in question flew from the handle in which it was and struck him in the left eye, destroying its sight. Defendant in error within time filed his claim for compensation with the plaintiff in error commission. The commission thereafter rejected the claim on the ground that the injury was not sustained while in the course of claimant's employment. The defendant in error filed his appeal in the court of common pleas. In his petition the facts were alleged substantially as above. Plaintiff in error interposed a demurrer, which was overruled by the court. and thereafter issues of fact were made up and the case tried before a jury. There was a verdict in favor of the defendant in error. and the judgment entered on this verdict was affirmed by the Court of Appeals. This proceeding is brought to reverse that judgment.

John G. Price. Atty. Gen.. R. R. Zurmehly, of Columbus, and Robert E. Marshall. of Sidney. for plaintiff in error.

Chas. C. Hall and H. K. Forsyth. both of Sidney. for defendant in error.

JOHNSON. J. The decisive question is whether the facts. which are substantially undisputed, bring the case within the Workmen's Compensation Law. Was the defendant in error injured "in the course of his employment," within its meaning?

There has been divergence of judicial decision concerning the scope of the quoted phrase and its application to different circumstances.

The Ohio law was passed pursuant to section 35, article 2 of the Constitution adopted in September, 1912. pertinent parts of which are as follows:

"For the purpose of providing compensation to workmen * * * for * * * injuries * * * occasioned in the course of such workmen's employment. laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers * * *. Laws may be passed establishing a board which may be empowered to classify all occupations. according to their degree of hazard, to fix rates of contribution to such fund according to such classification."

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The act now in force, under which defendant in error claims (103 O. L. 72-92). was passed pursuant to the grant of power contained in the above provision of the Constitution. and provides (section 1465—68. General Code). for compensation to "every employee * * * who is injured * * * in the course of employment."

The act was in effect an amendment of the act of May 31, 1911 (102 O. L. 524-548), which provided for the establishment of a state insurance fund from premiums paid by employers and employees in the manner prescribed in the act. The validity of the earlier statute was upheld by this court, and the general scheme of the law, with the provisions for the establishment and disbursement of the insurance fund, was sustained as a valid exercise of the police power by the Legislature. It was pointed out in the decision that the act was not compulsory. State ex rel. Yaple v. Creamer. Treas. of State. 85 Ohio St. 349, 97 N. E. 602. 39 L. R. A. (N. S.) 694.

After this decision, section 35. article 2. was adopted as an amendment to the Constitution. It is evident that the paramount purpose of the the amendment was to leave no doubt as to the power of the Legislature to pass a compulsory act for the establishment of an insurance fund to be administered by the state. to which fund employers should be compelled to contribute without regard to any fault or neglect on their part.

[2] These successive advanced steps expressed the growth of public sentiment. It came to be believed that employees should receive compensation for injuries received in the course of their employment, unless the injury was caused by the willful neglect of the employee; that upon just and scientific consideration such injuries should be regarded as a charge upon the business upon which the employees are engaged. This principle and the position in the line of causation which employers and their enterprises sustain in industrial pursuits are the foundations upon which laws that compel employers to contribute to state compensation funds are based.

Legislation of this character has been finally sustained as within the police power by the Supreme Court of the United States in N. Y. C. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1. Ann. Cas. 1917D. 629; Mountain Timber Co. v. Washington. 243 U. S. 219. 37 Sup. Ct. 260, 61 L. Ed. 685. Ann. Cas. 1917D, 642. and Arizona Employers' Liability Cases, 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. 1058. 6 A. L. R. 1537.

In these cases the essential considerations in favor of the employer, which are necessary to give validity to the legislation. are stated and found to be present. the quid pro quo for the burdens imposed on him.

[3] The constitutionality of the Ohio statute as upheld in Fassig v. State ex rel. Turner Atty. Genl.. 95 Ohio St. 232. 116 N. E. 104. In that case the employer of the injured employee had not contributed to the state insurance fund. and had not been granted by the Industrial Commission the privilege to compensate directly his injured employees. The validity of section 27 of the act, which relates to noncontributing employers, was attacked, and in argument against the validity it was contended that the phrase "in the course of employment" would permit an award to be made for an injury which had its cause outside of and disconnected with the employment; that as this would compel employers to compensate for injuries with which neither they, nor their business. had any causal connection. and with which they had nothing whatever to do. it would be a taking of property without due process of law and a denial of the equal protection of the law as required by the state and federal Constitutions.

In the argument of that case attention was called to another application for award which was then pending. or was soon to be pending.

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That application was for an injury caused by the rejected lover of an employee, who went to the factory where the employee was engaged "in the course of [her] employment." and, having entered the factory. shot and wounded her. This was cited as showing unconstitutional results which would flow from the provisions of the statute. This court was of the opinion that the phrase in question was not intended to be given the extensive meaning which those opposing the validity of the law contended the language required; and the syllabus in the Fassig Case included the proposition that such provisions do not cover any injury which has its cause outside of and disconnected with the employment. It will be noted that the language of the amended section of the Constitution is "for * * * injuries * * * occasioned in the course of such workmen's employment." The language of the statute is "every employee * * * who is injured * * * in the course of employment." Of course the Legislature would not have the power to make any broader provision than the Constitution authorized it to make.

Webster defines the word "occasion," viz.: "To give occasion to. to cause. to produce;" and the Century defines it: "To cause incidentally or indirectly; bring about or be the means of bringing about or producing." The language of the Constitution is "occasioned in the course of such workmen's employment."

The rule is familiar that. where the language will permit, such construction will be given to a statute as will not render it obnoxious to the state or federal Constitution.

We think it clear that the framers of the Constitution intended to provide that the employment should have some causal connection, directly or incidentally. with the injury, either through its activities, its conditions. or its environments.

The claim is not against the employer. It is solely against the insurance fund raised by the state. But nevertheless the fund is created by compulsory contribution of employers who are classified and rated as stated above.

[4] We are likewise impressed that this law is intended to provide an inexpensive, humane remedy as a substitute for outworn and unsatisfactory methods, and it should be liberally construed in favor of employees.

[1] Measured by these considerations. how stands this case? Were the employer and his enterprise in the line of causation? We think they were.

The claimant was in the plant of his employer, proceeding to his machine in full compliance with his duty. when he was injured. At the time he was engaged both parties knew and understood the circumstances and conditions necessarily a part of the factory life. One of the conditions is the presence of machinery, in repair or out of repair; the condition of the factory itself. in repair or out of repair; and another circumstances is the presence of other employees engaged in and about the plant. Every one realizes the ordinary risks that flow from the presence of fellow servants. All parties must be held to have contemplated the possibility of injury connected with that situation. The Legislature contemplated it. The factory and machinery and employees constitute one entire situation. The presence of the employee in a factory with other employees involves the hazard of injury from the machinery. the work itself, or the acts, negligent or not negligent, of other employees. If an employee. while a part of that situation. receives an injury as the result of an occurrence incidental to the conduct of the business. that injury was received in the course of his employment.

In the recent case of Leonbruno v. Champlain Silk Mills et al., 229 N. Y. 470, 128 N. E. 711 (October 19, 1920). the Court of Appeals of New York says. "The risks of such associations and conditions were risks of the employment."

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In this case the scuffle for the file between the other employees was a thing not at all unlikely to occur. It was an event of the sort that is of frequent occurrence between workmen. It must be remembered that the claim or award is not based on any neglect or fault of the employer or of any of his employees. The injury in this case was caused by an occurrence occasioned in the environment, and it was an injury "occasioned in the course of the employment" and because of the employment. See. also. Industrial Commission of Ohio v. Pora. 100 Ohio St. 218, 125 N. E. 662. An entirely different situation would exist if some outsider, a third person, not connected with the plant of the employer. or the business. were to step into the plant and shoot the employee because of a grievance wholly disconnected with the enterprise, and the same observation might be made if the employee himself should engage in something outside of and foreign to his employment. None of the grounds upon which injuries of employees are regarded as a charge upon the business would be present. It would not be an injury occasioned in the course of employment within the meaning of our statute.

For the reasons given. the judgment in this case will be affirmed.

Judgment affirmed.

Wanamaker, Robinson, Jones. and Matthias, JJ.. concur.

Marshall, C. J.. and Hough, J., took no part in the consideration or decision of the case.

DUMBLUSKEY v. PHILADELPHIA & READING COAL & IRON CO.

(Supreme Court of Pennsylvania. March 7. 1921.)

112 Atlantic Reporter, 745.

MASTER AND SERVANT — EVIDENCE HELD TO SHOW COMPENSABLE INJURY TO WORKMAN DEVELOPING PNEUMONIA CAUSING DEATH.

In a proceeding under the Workmen's Compensation Act (Pa. St. 1920. § 21916 et seq.) to obtain compensation for the death of a servant bumped by a stick of lumber. evidence of medical experts *held* competent and sufficient to show that the injury sustained in course of employment decreased the vitality and resisting power of the pleura and lung tissue. that pneumonia and influenza developed as a second infection which caused his death, and that there was a direct connection between the injury and death.

(For other cases. see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Court of Common Pleas, Schuylkill County; H. A. Bechtel, Judge.

Proceeding by Mrs. Anna Dumbluskey under the Workmen's Compensation Act (Pa. St. 1920. § 21916 et seq.) to obtain compensation for the death of her husband, opposed by the Philadelphia & Reading Coal & Iron Company. the employer. An award of compensation was affirmed by the court of common pleas. and the employer appeals. Affirmed.

Argued before Frazer. Simpson, Kephart. Sadler. and Schaffer. JJ.

John F. Whalen. of Pottsville, for appellant.
Henry Houck, of Shenandoah. for appellee.

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PER CURIAM. Plaintiff petitioned the Workmen's Compensation Board for an award of compensation for the death of her husband. The referee found, inter alia:

That "the injury that decedent sustained on February 24, 1920. while in the course of his employment, decreased the vitality and resisting power of the pleura and lung tissue; that pneumonia and influenza developed as a secondary infection which caused his death. We find here a direct connection between the injury to the man and his death."

The Board subsequently. on appeal. approved the action of the referee, and the common pleas of Schuylkill county in turn. on appeal, affirmed the finding of the Board.

The question before us is the sufficiency of the testimony to sustain the findings. It appears from the evidence that deceased and a fellow workman were engaged in "putting up a set of timber at the face of the buggy gangway" in one of defendants mines, and while placing in position a stick of lumber 6 feet long and 12 inches in thickness, known as a collar, deceased was "squeezed or bumped" by the collar. He immediately complained to his fellow workman of the injury and of pain in his side. left the mine, and went to his home. His wife testified that upon examination of his body on his return home she found a "streak of red, a red mark turning to a black." Dr. Scanlon. the family physician. described the mark as "being on the right side about the ninth or tenth rib, and was a slight abrasion like a scratch, a discoloration in an area of about two or three inches in diameter." Dr. Austra said he found "a discoloration of the skin. It was ragged like, but was not in any way scarred or circumscribed. It had an outline like the map of Europe." During the illness of deceased four doctors were called from time to time. The family doctor was of the opinion the inury received by deceased caused traumatic pleurisy which later developed into pneumonia. All the physicians agree that death was the result of pneumonia which followed either traumatic pleurisy or influenza; the latter being prevalent at the time. None. however, testified that the development of traumatic pneumonia from an injury such as was indicated by the mark on the body of deceased was improbable or impossible.

The testimony before the referee and Compensation Board, referred to above. was clearly competent and ample to sustain the findings of fact and conclusions of law set out in the award.

The assignments of error are overruled, and the judgment of the court below affirmed.

KIERCOK v. PHILADELPHIA & READING COAL & IRON CO.

(Supreme Court of Pennsylvania. March 7. 1921.)

112 Atlantic Reporter, 746.

MASTER AND SERVANT—COMPENSABLE INJURY TO WORKMAN BY LOG SHOWN.

In a proceeding under the Workmen's Compensation Act (Pa. St. 1920, § 21916 et seq.) to obtain compensation for the death of a servant. a finding that the jarring or knocking of a cant hook from the servant's hand caused a subsequent hemorrhage from the kidneys or bladder, resulting in death, *Held* sustained by the evidence.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

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Appeal from Court of Common Pleas. Schuylkill County; Charles E. Berger, Judge.

Proceeding by Mrs. Mary Kiercok under the Workmen's Compensation Act (Pa. St. 1920. § 21916 et seq.), to obtain compensation for the death of her husband. opposed by the Philadelphia & Reading Coal & Iron Company. the employer. There was an award of compensation. which was affirmed by the court of common pleas. and the employer appeals. Affirmed.

Argued before Frazer. Walling. Simpson, Sadler, and Schaffer, JJ.

John F. Whalen. of Pottsville, for appellant.
Henry Houck, of Shenandoah, for appellee.

PER CURIAM. An award by the Workmen's Compensation Board in plaintiff's favor was affirmed by the lower court. Defendant appealed. Under the statement of the questions involved the validity of the award depends upon "whether there was sufficient competent testimony in the case on which to base a finding that claimant's husband, while employed by appellant. sustained an injury which resulted in his death." Plaintiff's claim is that her husband. who had been in defendant's employ for more than 14 years, on July 7, 1919. received injury while at work. which resulted in his death nine days later. At the time of receiving his injury deceased, with two other fellow workmen, was engaged in rolling a log approximately 28 feet in length and 16 inches in diameter. They were using cant hooks to turn the timber when the hook used by one of the workmen slipped, throwing the log back and causing it. plaintiff claims, to jar or strike her husband. inflicting the injury from which he subsequently died. To establish this contention the evidence of two persons working with Kierock was that the timber, a V-shaped stick. required considerable effort to roll, that the cant hook of one of the workmen slipped, allowing the log to roll back, "jarring" or knocking the hook from Kiercok's hand. This happened at practically quitting time, and upon Kiercok's arrival home he was faint and weak, and was, undressed and put to bed by members of his family. A doctor was called. who found him passing blood and suffering from a hemorrhage from the kidneys most likely, or from the bladder." which condition the doctor said probably resulted from a jar of the body or a strain. An examination by the doctor disclosed "a tenderness and immobility. He was sore all across the lumbar region * * * and particularly over the bladder." Kiercok was sent to the hospital on the 16th day of July, and died on the 18th. Other physicians called by defendant testified a jar to a person. such as indicated above, might rupture a blood vessel and produce the condition from which Kiercok suffered.

The testimony received to establish the facts above set forth was clearly competent and sufficient to sustain the conclusion that—

"The decedent met his death because of an accidental injury suffered in the course of his employ with the defendant company."

The assignments of error are overruled, and the judgment affirmed.

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LESKO v. LEHIGH VALLEY COAL CO.

(Supreme Court of Pennsylvania. March 7, 1921.)

112 Atlantic Reporter, 768.

MASTER AND SERVANT — APOPLEXY SUFFERED BY COAL MINER HELD NOT SHOWN TO BE COMPENSABLE INJURY.

Where there was evidence that a coal miner doing his usual work became partially paralyzed as a result of cerebral apoplexy, and that he was afflicted with an enlarged heart and arteriosclerosis. but no witness testified tht the apoplexy was brought on by his work. a finding that the injury was not an accident within the Compensation Act of 1915 (Pa. St. 1920, § 21916 et seq.) was justified.

(For other cases. see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Court of Common Pleas, Schuylkill County; Richard H. Koch. Judge.

Proceedings under Workmen's Compensation Act to recover compensation for injuries. by Mike Lesko. employee, opposed by the Lehigh Valley Coal Company, employer. A dismissal of the petition by the Workmen's Compensation Board was affirmed by the court of common pleas, and claimant appeals. Affirmed and appeal dismissed.

Argued before Frazer. Walling, Simpson, Sadler, and Schaffer. JJ.

Roger J. Dever, of Wilkes-Barre. for appellant.
Daniel W. Kaercher. of Pottsville, for appellee.

PER CURIUM. Plaintiff, 65 years of age, a miner in defendant's employ. presented his petition to the Workmen's Compensation Board for compensation alleging having received injury while working at his regular employment at defendant's colliery. The board dismissed his petition and the court of common pleas of Schuylkill county affirmed its action. Claimant appealed.

The testimony upon which the board based its conclusion in substance is that on August 26, 1918, claimant, while employed at defendant's colliery breaking rock. his usual work. was noticed by his fellow workmen "to cease work, rest on the frame of the coal chute. and move his hand and leg up and down"; that at the time his body was shaking, and he would have fallen to the floor except for the support given him by others. He was sent to his home in an ambulance. and at once attended by a physician, who found him unconscious and paralyzed on the right side. the result of cerebral apoplexy. Other medical testimony. additional to that of the doctor first called, was to the effect that claimant was afflicted with an enlarged heart and also arteriosclerosis, which caused his arteries to degenerate and become weakened. They, however. did not say the apoplexy from which he was suffering was brought on by the work in which he was engaged. From this testimony the board found:

"That at the time of the cerebral hemorrhage and the consequent apoplexy the claimant was performing the kind of work he had been engaged in off and on during the entire day; that there was no unusual happening in the course of his work. nor marks nor evidence of external violence to his person nor was there shown any sudden unlooked for occurrence in the course of his work calling for any extra exertion or strain, other than that required by his usual and ordinary labor for the

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day, and that what happened to him was not an accident within the meaning of the Compensation Act of 1915." (Pa. St. 1920, § 21916 et seq.)

The evidence referred to being competent and ample to support the finding of facts indicated. we must accept them as final and conclusive and sustain the action of the board in dismissing claimant's petition.

The order of the board is affirmed. and the appeal dismissed.

TRACEY v. PHILADELPHIA & READING COAL & IRON CO.

(Supreme Court of Pennsylvania. March 14, 1921.)

112 Atlantic Reporter, 740 ,

MASTER AND SERVANT—EVIDENCE HELD TO SHOW COMCOMPENSABLE INJURY TO WORKMAN DEVELOPING CARDIAC COLLAPSE FOLLOWING STRAIN.

In a proceeding under the Workmen's Compensation Act (Pa. St. 1920. § 21916 et seq.) to obtain compensation for the death of a servant, testimony of medical experts *held* competent and sufficient to sustain a finding that cardiac collapse and death resulted from overstrain in removing a buggy from one location to another.

(For other cases, see Master and Servant, Dec. Dig. § 405[4].)

Appeal from Court of Common Pleas. Schuylkill County; Richard H. Koch. Judge.

Proceeding by Mrs. Michael Tracey under the Workmen's Compensation Act (Pa. St. 1920, § 21916 et seq.) to obtain compensation for the death of her husband, opposed by the Philadelphia & Reading Coal & Iron Company. the employer. An award of compensation was affirmed by the court of common pleas, and the employer appeals. Affirmed.

Argued before Frazer. Walling. Simpson. Sadler, and Schaffer. JJ.

John F. Whalen. of Pottsville, for appellant.
Roger J. Dever. of Wilkes-Barre, for appellee.

PER CURIUM. Plaintiff's husband was employed as a repair man in and about defendant's colliery. On October 3. 1918. while engaged with other workmen "in taking a buggy or a small car up a breast" in defendant's mine, he received a sprained back, which injury it is claimed developed into cardiac collapse, resulting in his death on the following November 1st. The compensation board adopted plaintiff's theory and awarded compensation. which action, on appeal, was affirmed by the common pleas of Schuylkill county whereupon defendant appealed to this court. The question before us is "whether there was sufficient in the testimony to warrant the finding of law that death of appellee's husband was the result of an injury received while in the employ of appellant."

The testimony adduced before the board shows that deceased. while engaged with other workmen in removing a "buggy" from one location to another, sprained his bacg and overstrained his heart by overlifting which was followed by cardiac collapse. resulting in his death. That

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cardiac collapse may result from overlifting and overstrain clearly appears from the medical experts examined at the hearing before the board. Dr. Holderman, who had not attended deceased. but qualified as an expert. testified:

"The only possible evidence that I can see was that he died of overlifting and overstrain of the heart. * * * One cannot say positively that a strain caused a dilation of the heart; but I think I would be justified in saying that the strain caused it. because he has a history of an accident, and I think that might be a probable cause of this cardiac collapse. Cardiac collapse can follow from overexertion or everstrain."

The attending physican said death was the result of cardiac collapse. and that such collapse could be the result of strain, and that he knew of no other cause in this case.

The evidence referred to was competent and ample to sustain the conclusion reached by both the referee and compensation board that cardiac collapse resulting in the death of claimant's husband followed overlifting and overstraining while working in defendan'ts colliery.

The assignments of errors are overruled, and the judgment is affirmed.

VANTREASE v. SMITH ET AL.

(Supreme Court of Tenessee. Feb. 26, 1921.)

227 Southwestern Reporter. 1023

1. MASTER AND SERVANT—"EMPLOYER" WITHIN COMPENSATION ACT NEED NOT HAVE TEN PERSONS WORKING AT A FIXED PLACE.

One using the services of more than 10 persons and having more than 10 persons regularly in his employ is an "employer" whithin the meaning of the Workmen's Compensation Act. §§ 2—4. 6. 19, and such 10 persons need not be regularly engaged in work at the place of the injury. and need not work in the same county.

(For other cases. see Master and Servant, Dec. Dig. § 361.)

(For other definitions. see Words and Phrases. First and Second Series, Employer.)

2. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT ELECTIVE. AND HENCE NOT DISCRIMINATORY.

The workmen's Compensation Act is elective, and hence cannot be declared discriminatory.

(For other cases, see Master and Servant, Dec. Dig. § 347.)

Appeal from Circuit Court, Davidson County; A. B. Neil, Judge.

Action by R. E. Vantrease against A. J. Smith and others. Judgment for defendants, and plaintiff appeals. Affirmed and remanded.

Pitts & McConnico. and Seth M. Walker, all of Nashville, for Vantrease.

Wm. Hume. of Nashville. for appellees.

McKINNEY. J. On May 29, 1920. the plaintiff, R. E. Vantrease. while employed at the sawmill of the defendant. A. J. Smith. in Nashville. accidentally had two of his fingers crushed.

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The defendant, Smith, has never had more than 6 persons employed at said mill at one time. The affidavit of the defendant. copied into the record, upon this question is as follows.

"Affiant states: That for a number of years he has been engaged in the business of buying, selling, and dealing in cedar. including the manufacture of logs. posts. etc. That continuously since 1915 his office has been located near the corner of Stewart street and McEwen avenue, in the city of Nashville. Davidson county, Tenn.. and which location is sometimes referred to as the north side of Cedar street. near the Nashville. Chattanooga & St. Louis Railroad. That adjoining affiant's office at the location aforesaid affiant has been mainting a distributing yard and also a sawmill. which is equipped with two cut-off saws and one side edger.

"That affiant's business required the employement of different crews of workmen, from time to time, who are moved from one job to another as occasion requires, and that affiant has had such crews of workmen in his employ in the counties of Davidson. Wilson, Williamson. Rutherford, Jackson, Putnam. and Maury. all in Tennessee. For illustration, affiant would purchase a tract of timber. and then organize a crew of workmen, who would cut the timber and transport the same. That this method of doing business. by affiant. has been carried on for several years. so that at times affiant would have large numbers of persons in his employ which would be connected with the several crews of workmen in the different counties and at the different locations where affiant was engaged in preparing his material for the market. That during all of this period of several years the office of affiant has been located at Nashville, Davidson county, Tenn.. at the address above mentioned.

"Affiant further states from July 1, 1919, up to and including May 29, 1920. he has had more than 10 persons regularly employed, and has been continuously and regularly using the services of more than 10 persons for pay.

"Affiant also states that from July 1, 1919 up to and including May 29. 1920. he had more than 10 persons in his regular employ, and was using the services of more than 10 persons for pay near Springhill. Maury county, Tenn., and who were engaged in hauling and loading cedar. That on May 29, 1920, there were 16 persons in the employ of affiant at Springhill. Maury county, Tenn., and there were 4 persons in affiant's employ at his distributing yard at Nashville, Davidson county. Tenn.. in addition to 1 employee in affiant's office.

"Affiant states that at no time from July 1. 1919. up to and including May 29, 1920, was there ever less than 10 persons in his regular employ, but. to the contrary. during all of said period there were more than 10 persons in his employ. and whose services affiant was using for pay."

Acting upon the theory that he had more than 10 persons in his employ, the defendant undertook to bring himself within the provisions of the Workmen's Compensation Act (Laws 1919. c. 123) by procuring indemnity insurance. and giving the prescribed notice to the State Insurance Commissioner. The defendant did not, however, comply with subsection (d) of section 6 of said act, which provides that an employer, which provides that an employer, with a force of less than 10 persons. desiring to accept the benefits of the act. shall give notice to the State Factory Inspector.

The question is, Did the defendant have as many as 10 persons regularly in his employ at the time of the injury, within the meaning of that term as it appears in said act?

On behalf of the plaintiff it is insisted that the act does not apply for the reason that the intention of the act was that 10 or more persons must be reguraly engaged in work at the place of the injury; on the other hand, the defendant insists that the language employed is not

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subject to such a restricted meaning, but is applicable in all cases where the defendant has as many as 10 persons reguraly in his employ, whether they work in the same place or in the same county or not.

The section of the act (chapter 123 of the Acts of 1919) that are in any sense pertinent to the issue here involved are as follows:

"Sec. 2. Be it further enacted. that in this act, unless the context otherwise requires:

"(a) 'Employer' shall include any individual, firm, association or corporation, or the receiver. or trustee of the same, or the legal representatives of a deceased employer. using the services of not less than ten persons for pay. If the employer is insured it shall include his insurer. unless otherwise herein provided.

"(b) 'Employee' shall include every person, including a minor. in the service of an employer, as 'employer' is defined in paragraph (a) above, under any contract of hire. apprenticeship, written or implied. Any reference herein to an employee who has been injured shall. when the employee is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable under this act."

"Sec. 3. Be it further enacted. that from and after the taking effect of this act, every employer and every employee. except as herein stated. shall be presumed to have accepted the provisions of this act. respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and shall be bound thereby, unless he shall have given prior to any accident resulting in injury or death. notice to the contrary in the manner herein provided."

Section 4 provides, in substance, that either the employer or employee may except himself from the provisions of the act by giving notice. and by filing same 30 days prior to any accident resulting in injury or death.

"Sec. 6. Be it further enacted, that this act shall not apply to:

"(a) Any common carrier doing an interstate business while engaged in interstate commerce.

"(b) Any person whose employment at the time of injury is casual that is, one who is not employed in the usual course of trade. business. profession or occupation of the employer.

"(c) Domestic servants and employers thereof; nor to farm or agricultural laborers and employers thereof.

(d) In cases where less than ten persons are regularly employed; provided. however. that in such cases the employer may accept the provisions of this act by filing written notice thereof with the State Factory Inspector at least thirty days' before the happening of any accident or death, and may at any time withdraw the acceptance by giving like notice of withdrawal."

"Sec. 19. Be it further enacted. that when an accident happens while the employee is elsewhere than in this state which would entitle him or his dependents to compensation had it happened in this state, the employee or his dependents shall be entitled to compensation under this act if the contract of employment was made in this state, unless otherwise expressly provided by said contract."

From the foregoing it appears that an "employer" is one who uses the services of not less than ten persons for hire, and that the act shall not apply in cases "where less than ten persons are regularly employed."

[1] The defendant was using the services of more than 10 persons. and had more than 10 persons regularly in his employ, so that he falls strictly within the letter of the statute. The idea that the employment refers to a certain or fixed place is refuted by section 19 of the act, which provides that where an employee is injured while out of the state he shall nevertheless be compensated if. at the time, he were acting within the scope of his employment under a contract made in the state. It is manifest. therefore, that the Legislature intended that the contract of

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employment, and not the place of the accident, governs the recovery. Had the plaintiff been injured while on a mission for the defendant to Wilson county, and while acting within the scope of his employment. he would be entitled to recover according to all of the authorities. This of itself is a refutation of the place or group theory.

On the other hand. it is very plausibly argued that the numerical provision of the act can only be explained upon the theory that the employees should work in conjunction, or at the same place. It is also insisted that other acts of this character have been sustained solely upon the ground that the classification was reasonable, because it was more dangerous to have a large number of servants and employees working together in the same group or establishment than to have a less number of employees and servants so working together. and authorities are cited to support this theory.

[2] The act in question is not subject to an attack of this character for the reason that it is elective in its nature. and hence cannot be discriminatory.

It is not necessary for us to determine the legislative intent in limiting the application of the act to 10 or more employees. Suffice it to say that the Legislature said in plain and unequivocal terms that where an employer had as many as 10 persons in his employ. the act should apply, without attaching thereto any restriction as to place. or any provision that such employees should work in conjunction.

The act in question is very broad and comprehensive in its scope, and, under a liberal construction should be given the interpretation we have placed upon it.

As to injuries not covered by the original petition, that is subject to future determination.

The judgment of the circuit court will be affirmed, and the case remanded.

UNITED STATES FIDELITY & GUARANTY CO. v. NELSON.

(No. 7980.)

(Court of Civil Appeals of Texas. Galveston. Jan. 13, 1921.)

228 Southwestern Reporter. 616

1. MASTER AND SERVANT — COMPENSATION NOT ALLOWED UNLESS EMPLOYEE INCAPACITATED FOR AT LEAST ONE WEEK.

Under Acts 1917. c. 103. pt. 1, § 6 (Vernon's Ann. Civ. St. Supp. 1918. art. 5446—8), no compensation can be paid an employee for an injury which does not incapacitate the employee for at least one week.

(For other cases, see Master and Servant Dec. Dig. § 385.)

2. MASTER AND SERVANT—INSURANCE OF COMPENSATION ESSENTIAL.

As under the Employer's Liability Act. pt. 1, § 3 (Vernons's Sayles' Ann. Civ. St. 1914. art. 5246i) and pt. 4. § 2 (article 5246yyyy), employees of subscribers have no right of action against their employer, but are remitted for recovery to the association created by law or the insurance company carrying the risk involved. it is essential to recovery against an insurance company by an employee to show that such insurer was carrying the risk.

(For other cases. see Master and Servant, Dec. Dig. § 383.)

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Appeal from Galveston County Court; Geo. Q. McCracken. Judge.
Proceeding by Olaf Nelson under the Employer's Liability Act against the United States Fidelity & Guaranty Company for compensation for injuries accidentally suffered by plaintiff. an employee. From a judgment in favor of plaintiff. defendant appeals. Reversed and remanded.

Hunt & Teagle, of Houston. for appellant.
O. S. York, of Galveston. for appellee.

GRAVES, J. In this cause appelle. Nelson, was given a verdict and judgment against appellant. United States Fidelity & Guaranty Company, for $450 as compensation, under the Texas Employers' Liability Act (Vernon's Sayles' Ann. Civ. St. 1914. arts. 5246h-5246zzzz) for injuries alleged to have been accidentally suffered by him while employed by the Sea Board Transportation Company at Galvestion.

[1] An examination of the record upon appeal discloses at least two fatal omissions: First. there was no allegation in his petition that Nelson was either paritally or totally incapacitated for a period of at least one week, or for any specified length of time; second, there was no proof that appellant. United States Fidelity & Guaranty Company. had insured the payment of any compensation to him as such employee. Section 6. part 1, of the Compensation Act specifically provides that no compensation shall be paid for an injury that does not incapacitate the employee for a period of at least one week. Vernon's Ann. Civ. St. Supp. 1918, art. 5246—8; Acts 1917, ch. 103, pt. 1. § 6.

[2] By section 3. part 1 (Vernons' Sayles' Ann. Civ. St. 1914. art. 5246i), and section 2, part 4. (article 5246yyyy) of the act. the employees of subscribers have no right of action for damages against their employers, but are remitted for a recovery of the compensation provided for solely to the association created by the law. or the insurance company carrying the risk involved; it necessarily follows that no recovery could be had against a company not shown by the evidence to have sustained any such relation. as was the situation with reference to appellant here.

The judgment is reversed. and the cause remanded.

Reversed and remanded.

MANN v. CITY OF LYNCHBURG

(Supreme Court of Appeals of Virginia. March 17. 1921.)

106 Southeastern Reporter 371.

1. MASTER AND SERVANT — CITY AND NOT STATE EMPLOYER OF POLICEMAN.

If a policeman is an employee within the Workmen's Compensation Act. the city. as the party using his services for pay, and not the state is liable for benefits.

(For other cases, see Master tnd Servant, Dec. Dig. § 364.)

2. MASTER AND SERVANT—COMPENSATION CASE FULLY DETERMINED IN PUBLIC INTEREST, THOUGH SUBMITTED ON LIMITED CERTIFICATION.

The question whether a policeman is an employee within the protection of the Workmen's Compensation Act will be determined as one

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of a public nature. though the case is submitted to the Supreme Court of Appeals on a limited certification. presenting merely the question whether the city or the state is the employer.

(For other cases, see Master and Servant, Dec. Dig. § 417[5].)

4. MASTER AND SERVANT—POLCEMAN NOT WITHIN COMPENSATION ACT DEFINING "EMPLOYERS" AND "EMPLOYEES."

Under Workmen's Compensation Act. § 2. declaring in subdivision (a) that "employers" shall include the state or any municipal corporation, and in subdivision (b) that the term "employees" shall include every person in the service of another under any contract of hire. the relation of employer and employee does not exist between a municipality and a policeman, so as to create a liability for benefits, for a policeman is a public officer.

(For other cases, see Master and Servant, Dec. Dig. § 364.)

(For other definitions, see Words and Phrases. First and Second Series. Employee; Employer.)

Questions Certified from the Industrial Commission.

Claim by Willie H. Mann against the City of Lynchburg or the Commonwealth of Virginia for compenasation under the Workmen's Compensation Act for the death of Lee Arthur Mann. On questions certified by the Industrial Commission. Questions answered, and claimant denied compensation.

N. C. Manson, of Lynchburg, John R. Saunders, Atty. Gen., and J. D. Hank, Jr., Asst. Atty. Gen., for city of Lynchburg and the Common-wealth.

PER CURIAM. The Industrial Commision of Virginia, pursuant to the provision of section 61 of the Workmen's Compensation Act (Acts 1918, p. 637). has certified to this court for its decision certain questions of law arising in the above entitled proceeding.

We quote as follows from the certificate of the commission:

"The claimant, Willie H. Mann. in her own right and in behalf of her two infant children, Bernard Mann. of the age of 13 years and Arthur Mann, of the age of 10 years, has filed her application for hearing before the Industrial Commission of Virginia. setting up the claim of herself and infant children as dependents of her husband. Lee Arthur Mann. a policeman of the city of Lynchburg. who was killed in the line of duty on the 25th day of March. 1920.

"In said application claimant asks that the compensation be paid as provided by the statute, either by the city of Lynchburg or the commonwealth of Virginia. as liability under the statute may be determined.

"The facts of the case may best be stated in the agreed statement of facts. which is in the words and figures following to wit:

"'Agreed Statement of Facts.

"'I. The claimant, Willie H. Mann. was the lawful wife of Lee Arthur Mann. who died in the city of Lynchburg, Va., on the 26th day of March, 1920, from the effects of a pistol shot wound in the head inflicted by John H. Williams (colored) on the night of the 25th of March, 1920.

"'II. The deceased. Lee Arthur Mann. left surviving him. as his only heirs at law and distributees. his widow. the aforesaid Willie H. Mann, and her two children to wit. Bernard Mann. who was born on the 9th day of December, 1907, and is therefore aged

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12 years. and Arthur Mann, who was born on the 12th day of November, 1910, and who is therefore aged 9 years. The said widow and children of the deceased were entirely dependent upon him for support.

"'III. The deceased was in every respect a duly and lawfully appointed, qualified and constituted policeman for the city of Lynchburg, Va.

"'IV. The deceased in the performance of his duty as a policeman of the city of Lynchburg, along with a fellow policeman of the said city. sought on the night of the 25th of March. 1920, to place the aforesaid John H. Williams under arrest, upon a charge of carrying a concealed weapon and upon a suspicion. which has since been confirmed by his own confession, that he was wanted in the state of South Carolina for the crime of murder. The said John H. Williams in resisting the said arrest inflicted a pistol shot wound upon the deceased. from the effects of which the latter died on the following day.

"'V. The arrest of the said John H. Williams sought to be made by the deceased and his fellow officer was in every respect a lawful arrest. made in a lawful and proper manner by proper officers.

"'VI. The average weekly wage was $26.25. and he was paid monthly by the city of Lynchburg.

"'VII. The method of appointing policemen for the city of Lynchburg. and which was followed in the appointment of the deceased, is set forth in the charter of the city of Lynchburg. (See Acts of the General Assembly of 1918, page 238. and special section 10 of chapter VI of the charter. on pages 251 and 252 of said Acts.)

"'VIII. The duties of the members of the police force of the city of Lynchburg. including those of the deceased, are prescribed by law. and include the enforcement within the said city of the laws of the commonwealth of Virginia and the ordinances of the city of Lynchburg. and the detention and arrest of offenders thereof. (See section 2991., Code of Virginia for 1919; section 10 of chapter VI of the charter of Lynchburg. supra.) The members of the Lynchburg police force were also made conservators of the peace under the charter of the city of Lynchburg. (See section 4798 of Code of Virginia, 1919.)

"The city of Lynchburg contends that the killed policeman was not 'the agent, employee or servant' of the city of Lynchburg, but was 'the agent. employee or servant' of the state of Virginia. and that under the terms of the Workmen's Compensation Act the state is the true employer and is alone liable to pay the compensation stipulated to be paid under the terms of the act to the claimants as dependents of the said Lee Arthur Mann.

"The contention of the state is that the city of Lynchburg is by the clear intendment of the Workmen's Compensation Act alone liable, as the employer of the killed policeman, to pay the compensation therein provided to the said dependents..

"The questions of law which are here respectfully certified to this honorable court for its decision and determination are:

"1. Was the city of Lynchburg the employer of the policeman. Lee Arthur Mann. at the time of his death. and is it, as such. liable to pay the compensation to the claimants in the act provided? or

"II. Was the commonwealth of Virginia the employer at said time, and as such liable to pay said compensation?"

[1] From the briefs of counsel for the city of Lynchburg and the commonwealth of Virginia it appears to be agreed that no question is to be raised by either of the defendants as to the right of the claimant. Willie H. Mann. to recover from one or the other. The necessary result is that for the purposes of this case both defendants concede that Policeman Mann was an employee either of the city or the state, within the meaning of the statute. Upon such concession. eliminating any consideration of the statutory definition of an employee. we answer that in our

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opinion. as between the two defendants, the city of Lynchburg, as the party "using the services for pay," would be liable for the compensation conceded to be due from one or the other of the parties.

[2] If this were a question between private persons or corporations. we might well stop where the briefs of counsel stop, and refrain from passing upon the question as to whether either of the defendants are liable for the compensation claimed. The question, however. is one of a public nature. and we feel that we should answer it as fully as if it had been submitted to us without the limitation above indicated.

[3. 4] Section 2 of the act, so far as pertinent. is as follows:

"(a) 'Employers' shall include the state and any municipal corporation within the state or any political division thereof. and any individual, firm. association or corporation. or the receiver or trustee of the same. or the legal representative of a deceased employer, using the service of another for pay. If the employer is insured it shall include his insurer so far as applicable.

"(b) 'Employee' shall include every person. including a minor. in the service of another under any contract of hire or apprenticeship, written or implied, except one whose employment is not in the usual course of the trade. business occupation or profession of the employer. Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representatives. dependents and other persons to whom compensation may be payable."

While it is plainly provided in the act that the term "'employers' shall include the state and any municipal corporation within the state." it by no means follows that all persons in the service of the state, or of the municipal corporations therein. are entitled to the benefit of the act; for example. the Governor. Attorney General, members of the State Corporation Commission. judges. mayors. and city managers are all in a sense servants of the state or city. but the act plainly does not extend to any of these persons, and they do not fall within the definition of the statute, which provides that—

"'Employee' shall include every person. including a minor. in the service of another under any contract of hire or apprenticeship. written or implied."

The statute is to be liberally construed to the end that its wise and humane purpose may be advanced; but we cannot extend its provisions by construction, so as to cover persons or occupations not within its scope and intent.

The act, as its title shows. relates to industrial accidents, and its well-known purpose was to substitute for the unsatisfactory common-law remedies a speedier and simpler and more equitable form of relief for personal injuries sustained by persons engaged in hazardous occupations. It would seem clear from the history and purposes and general provisions of the act that the Legislature did not have in mind as beneficiaries any other persons than such as are commonly understood as falling within a contractual relationship of master and servant. It often happens that cities and towns employ large forces of men in connection with municipal undertakings. such as the construction of sewers, the building of streets. the operation of rock quarries, and other similar and more or less hazardous occupations akin to those undertaken by individuals and industrial corporations. The Legislature undertook to make an improvement upon the remedies hitherto existing in cases of employees receiving personal injuries. and who might or might not, according to the particular facts of the case. have a cause of action against the employer on the ground of negligence or breach of duty. and manifestly the idea was that this remedy should be provided for those who theretofore stood in such a relationship as that there might be in cases

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of negligence a liability on the employer. Griswold v. Wichita 99 Kan. 502, 162 Pac. 276, L. R. A. 1918F. 187, 189. Ann. Cas. 1917D, 31. The case of a city policeman does not, as we think, fall within the reason and purpose of the act, and this conclusion is greatly strengthened by the language which the Legislature used in its enactment.

It is no longer open to question in this state that a policeman is a public officer. See Burch v. Hardwicke. 30 Grat. (71 Va.) 24, 32 Am. Rep. 640; Smith v. Bryan. 100 Va. 199, 40 S. E. 652; Sherry v. Lumpkin. 127 Va. ——, 102 S. E. 658. And this is the holding generally in other states. See Blynn v. Pontiac. 185 Mich. 35. 151 N. W. 681. 683; Griswold v. Wichita. supra. The act in question, as we have seen. is limited to persons in service of the state or city under a contract of hire. A public officer does not perform his duties under contract, express or implied. but by virtue of the law creating the office. His compensation is a matter of statute or ordinance. and does not depend upon the amount or value of the services performed, but is incident to the office. Unlike an employee working under contract. an officer acquires no vested right to have the office continued during the time for which he is elected or appointed, since the authority creating the office may abolish the same during the term of the incumbent. or change the compensation and the duties to be performed. The following authorities may be cited as sufficient in support of the foregoing propositions: Booker v. Donohoe, 95 Va. 359. 363. 28 S. E. 584; Nichols v. MacLean, 101 N. Y. 526. 533. 5 N. E. 347. 54 Am. Rep. 730; Mechem on Public Officers, §§ 463. 855; U. S. v. Hartwell. 6 Wall. 385. 393. 18 L. Ed. 830; Hall v. Wisconsin, 103 U. S. 5, 26 L. Ed. 302.

While it is true, with respect to the decided cases in other states which have dealt with a similar question, that most of them have turned upon the peculiar language of the local statute, and therefore cannot be said to be of any very great assistance in the construction of the Virginia Compensation Act, the case of Sibley v. State, 89 Conn. 682, 96 Atl. 161. L. R. A. 1916C, 1087, is so pertinent in its reasoning that we feel justified in quoting from it at length. That was a case in which the Supreme Court of the state of Connecticut held that a sheriff was not an employee of the state within the operation of the Workmen's Compensation Act, which rendered the state liable for injuries to its employees, but defined an employee as any person who has entered into or works under contract of service with an employer. The commissioner held otherwise, and the Connecticut court, in reversing that finding, said in part:

"That the injury which caused Sheriff Sibley's death arose out of and in the course of his employment, so as to entitle him to compensation, provided he was an employee of the state within the meaning of the act, has not been questioned before us. The respondent's claim is that, according to the definition of the word 'employee' given in section 43 of part B of the act. Sibley was not an employee of the state.

"Part B. § 43, gives the following definition of 'employee' and 'employer': '"Employee" shall mean any person who has entered into or works under any contract of service or apprenticeship with an employer. "Employer" shall mean any natural person, corporation, firm, partnership, or joint-stock association, the state. and any public corporation within the state using the services of another for pay; it includes also the legal representative of any such employer.'

"The commissioner held that the sheriff, while in the performance of his duties as such, was an employee of the state within the meaning of the statute. As the statute, by defining 'employee," leaves no question as to its meaning, the commissioner must have held, and his memorandum of decision shows that he did hold, that the sheriff was working under a contract with the state while performing the duties of his office. In this he was in error.

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"* * * The office of sheriff is thus a public office as defined by us in State ex rel. Stage v. Mackie, 82 Conn. 398, 401, 26 L. R. A. (N. S.) 660, 74 Atl. 759, and numerous other cases, and by, so far as we know, all courts and text-writers. The incumbent of such an office holds it as a trust from the state not resting upon contract. State ex rel. Rylands v. Pinkerman, 63 Conn. 176, 182, 22 L. R. A. 653, 28 Atl. 110. He is a preserver of the public peace; he is not the hired servant of a master; no contract relation exists between him and the community or state. Farrell v. Bridgeport, 45 Conn. 191, 195. In Seymour v. Over-River School Dist., 53 Conn. 502, 509, 3 Atl. 552, as showing that a teacher in a school district is not a public officer, it was said: 'He is not usually elected or appointed but is employed—contracted with.'

"Mechem, Public Officers, §§ 855, 856, says: 'The relation between an officer and the public is not the creature of contract, nor is the office itself a contract. So his right to compensation is not the creature of contract. It exists, if it exists at all, as the creation of the law, and when it so exists it belongs to him "not by force of any contract, but because the law attaches it to the office." * * * Unless * * * compensation is by law attached to the office none can be recovered.'

"Compensation to a public officer is a matter of statute, and not of contract, and it does not depend upon the amount or value of the services performed, but is incidental to the office. State ex rel. Evans v. Gordon, 245 Mo. 12, 149 S. W. 638, 641; Leonard v. Terre Haute, 48 Ind. App. 104, 93 N. E. 872. A salary is attached to the office to enable the incumbent the better to perform the duties of his office. State ex rel. Atty. Gen. v. Hawkins, 44 Ohio St. 98, 110, 5 N. E. 228. It is the substantially universal rule that a person who is elected or appointed to a public office to which no salary or compensation is attached by law can recover no compensation for his services, although he qualifies and performs its duties, and for the reason that no contractual relation exists between him and the governmental agency by whom he is elected or appointed.

"But it is urged in behalf of the claimant that the statute attaching a salary to the office of sheriff raises an obligation or duty on the part of the state to pay it, and that, if it refuses to pay, the law will give the sheriff an action quasi ex contractu upon the obligation, and that the officer was thus under a quasi contract of service with the state. If, for the argument's sake this were to be conceded, it would not advance the claimant's cause. A quasi contract is no contract. Maine, Ancient Law (3d Am. Ed.) 332, quoted with approval in Keener's Law of Quasi Contract, p. 6. The term 'quasi contract' describes a situation where there is an obligation or duty arising by law upon which the same remedy is given as would be given if the obligation or duty arose out of contract. The term itself implies that the obligation or duty is not a contractual one. As we said in Powers v. Hotel Bond Co., 89 Conn. 143, 145, 93 Atl. 245, the Workmen's Compensation Act is founded upon the theory of a contract existing between workman and employer. The contract may be established by evidence showing that an express contract was entered into by the parties or by evidence of facts and circumstances from which as an inference of fact it can legally be found that a contract of employment existed between them. There must be a real contract of employment either expressed or implied, or there is no employee within the definition and meaning of the statute.

"It is said in behalf of the claimant that the compensation act must be construed so as to be consistent with itself, and that as the definition of 'employer' specifically says that it shall mean the state when using the services of another for pay, the definition of 'employee' should be so construed as to be harmonious, and not contrary to the definition of 'employer.' And it is said that as an employer presupposes an em-

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ployee and vice versa, and as the state was using the services of Sheriff Sibley for pay, it was his employer and the sheriff its employee.' *The argument is more ingenious than convincing. If, as it assumes, the state used the services of the sheriff for pay when he was exercising for the public good a portion of the sovereign power of the state as a public officer and received the salary attached to the office, and if this made him an employee of the state, he was not, as we have shown, an employee under a contract.* But we think he was not an employee, and that the state was not using his services for pay. He was performing a duty which he owed to the state, and the salary which was attached to the office was not given in payment for his services, but, as is said concerning public officers in State ex rel. Atty. Gen. v. Hawkins, supra, to enable him to perform his statutory duty as one of the public functionaries of the state exercising a portion of its sovereign powers. *The state, like public municipal corporations and private firms and individuals, may be and is a large employer of persons by contract.* The state and the person or persons whom it employs to care for the lawns surrounding the Capitol are as much employer and employee as are the householder and the person who is employed by him to mow his lawns; but no one would say that the Governor and others public officers who exercise the sovereign powers of the state and receive as such officers the salary attached by law to their offices are mere employees of the state. While exercising those powers they represent the state. The office is a trust and not an employment; the salary attached is for the maintenance of the office, and not a payment for the incumbent's services." (Italics added.)

The case of McCarl v. Borough of Houston, 263 Pa. 1, 106 Atl. 104, deals with the case of a policeman under a statute which is somewhat similar in its provisions to the Virginia statute, and reaches a conclusion different from that reached in the Sibley Case and approved by us in the instant case. In the McCarl Case, however, the statute, involved did not use the expression. "contract of hire," nor, as we think, any exactly equivalent language in the definition of the term "employee," but declared that the term should be treated as "synonymous with servant, 'and includes all natural persons who perform services for another for a valuable consideration.' " .

The decision in the McCarl Case seems to us to write into the statute terms which are not there, and to bring into the operation of the act a class of persons for whose benefit it was not intended. Of course, as already pointed out above, there is a sense in which every officer is a servant, and in which every officer performs services for pay, but this is no more true of policemen than of any of the other officers of the state or municipality. If any such officers are to be included within the provisions of the statute, the amendment should be made by the Legislature, and not by the tribunals called upon to construe and enforce the law.

It follows that we are of opinion that neither the city of Lynchburg nor the state of Virginia can lawfully be required to pay the compensation claimed in this proceeding.

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KLIPPERT v. INDUSTRIAL INS. DEPARTMENT OF WASHINGTON ET AL. (No. 16081.)

(Supreme Court of Washington. Feb. 15, 1921.)

196 Pacific Reporter, 17.

1. MASTER AND SERVANT—COMPENSATION AWARD INTENDED TO BE COMMENSURATE WITH DISABILITY.

The purpose of the Workmen's Compensation Act is to substitute for an unscientific and burdensome system a system which will make an award in all cases, regardless of the cause or manner of infliction, limited in amount, but commensurate in some degree with the disability suffered.

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

3. MASTER AND SERVANT—WORKMAN AWARDED SCHEDULE COMPENSATION FOR LOSS OF EYE HELD ENTITLED TO FULL SCHEDULE COMPENSATION FOR SUBSEQUENT LOSS OF MAJOR ARM.

A servant who lost an eye and was awarded $1,200 and was again injured, resulting in the loss of his major arm at the shoulder, was also entitled to an award of $1,900 for the loss of the arm under the Workmen's Compensation Act (Laws 1909, p. 362) § 4, subds. (f) and (g), the maximum of $2,000 in subdivision (f), relating to nothing else than an unscheduled disability, which may be rated by the commission as a permanent partial disability.

(For other cases, see Master and Servant, Dec. Dig. § 385[1].)

Mount and Mackintosh, JJ., dissenting.

En Banc.

Appeal from Superior Court, Whatcom County; Ed. E. Hardin, Judge.

Proceeding by Fred Klippert under the Workmen's Compensation Act to obtain compensation for personal injuries. From a judgment for personal injuries. From a judgment reversing the decision of the Industrial Insurance Department of Washington as to the amount of compensation, the latter and the Commissioners thereof appeal. Affirmed.

Lindsay L. Thompson and Frank P. Christensen, both of Olympia, for appellants.

Newman, Howard & Kindall, of Bellingham, for respondent.

HOLCOMB, J. On December 4, 1917, respondent while engaged in an extrahazardous occupation received an injury which resulted in the loss of one eye by enucleation, for which he received compensation from the Industrial Insurance Commission in the sum of $1,200. On July 9, 1919, he was again injured while engaged in an extrahazardous occupation, which injury resulted in the loss of his major arm at the shoulder. He duly made claim to the appellant commission for compensation for the latter injury, and on November 25, 1919, he was awarded time loss from October 9, 1919, to November 6, 1919, in the sum of $48.45, and

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an award for permanent partial disability in the sum of $800. The commission in making the award for permanent partial disability notified respondent that under the statute the award for the injury would have been $1,900, but by reason of the award of $1,200 previously made for the loss of an eye it was limited to the sum of $800 as compensation for the second injury, since the statute provides that $2,000 is the maximum amount payable by law for a permanent partial disability. Notice of appeal from this final award was given by respondent, and he filed a complaint, setting forth the facts herein stated, praying for judgment reversing the decision of the commission, and that it be directed by the court to award respondent the sum of $1,900 for the loss of his major arm, and for time loss in the sum of $48.45.

Appellant's demurrer to the respondent's complaint was by the court overruled, and judgment reversing the decision of the commission and directing it to award to respondent the sum of $1,900 for the loss of his major arm, and the sum of $48.45 for time loss, was entered upon appellant's announcement that it would stand upon its demurrer and decline to further plead. From this judgment entered July 27, 1920, the commission appeals to this court, and contends that the lower court erred in (1) overruling defendant's demurrer to the claimant's complaint, and (2) in directing that an award be made to plaintiff in any sum in excess of $800 for the loss of his major arm.

Workmen's Compensation Act, § 5, as originally enacted (Laws 1911, p. 345), provided as follows:

"(f) Permanent partial disability means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments are severed, or any other injury known in surgery to be permanent partial disability. For any permanent partial disability resulting from an injury, the workman shall receive compensation in a lump sum in an amount equal to the extent of the injury, to be decided in the first instance by the department, but not in any case to exceed the sum of $1,500 00. The loss of one major arm at or above the elbow shall be deemed the maximum permanent partial disability. * * *

"(g) Should a further accident occur to a workman already receiving a monthly payment under this section for a temporary disability, or who has been previously the recipient of a lump sum payment under this act, his future compensation shall be adjusted according to the other provisions of this section and with regard to the combined effect of his injuries, and his past receipt of money under this act."

These two sections were before this court in the case of Biglan v. Industrial Insurance Commission, 108 Wash. 8, 182 Pac. 934, wherein it was held that one who has suffered a permanent partial disability and received a lump sum payment therefor, upon the sustaining of a second permanent partial disability his compensation is to be adjusted according to the combined effect of his injuries and his past receipt of money under the act. The Biglan Case was decided upon a case arising under the original act above quoted. The Legislature amended the law in 1917 (Laws 1917, p. 81) and also in 1919 (Laws 1919, p. 362) so that the law now reads as follows:

"(f) Permanent partial disability means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments were severed where repair is not complete, or any other injury known in surgery to be permanent partial disability. For the permanent partial disabilities here specifically described, the injured workman shall receive compensation as follows:

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Loss of one leg amputated so near the hip that an artificial limb cannot be worn	$2,000.00
Loss of one leg at or above the knee so that an artificial limb can be worn	$1,900.00
Loss of one leg below the knee	$1,300.00
Loss of the major arm at or above the elbow	$1,900.00
Loss of major hand at wrist	$1,600.00
Loss of one eye by enucleation	$1,200.00
Loss of sight of one eye	$ 900.00
Complete loss of hearing in both ears	$1,900.00
Complete loss of hearing in one ear	$ 500.00

"Compensation for any other permanent partial disability shall be in the proportion which the extent of such other disability shall bear to that permanent partial disability above specified which most closely resembles and approximates in degree of disability such other disability, but not in any case to exceed the sum of two thousand dollars ($2,000.00). * * *

"(g) Should a further accident occur to a workman who has been previously the recipient of a lump sum payment under this act, his future compensation shall be adjudged according to the other provisions of this section and with regard to the combined effect of his injuries, and his past receipt of money under this act.

"Should such further accident result in the permanent total disability of such injured workman, he shall receive the pension to which he would be entitled notwithstanding the payment of a lump sum for his prior injury."

Section 4, c. 131, Laws 1919.

The amendment last quoted above is the same as that amendment made to the 1911 law and subdivisions (f) and (g), section 1, by chapter 28, Laws of 1917, and appellants contend that these amendments are substantially the same as the 1911 act, except that the law now specifies and sets forth a schedule of awards to be made by the commission for the specific injury, and that the maximum amount to be received is raised from $1,500 to $2,000. In the 1911 act it is specified that the loss of one major arm above the elbow shall be deemed a permanent partial disability. The 1919 act does not specify what injury constitutes a maximum, but it is therein specified that $2,000 is the sum to be awarded for the loss of one leg amputated so near the hip that an artificial limb cannot be worn, and it recites that the payment shall not in any case exceed the sum of $2,000. Appellants therefore contend that this case is governed by our decision in Biglan v. Industrial Insurance Commission, supra.

The statute we had before us in the Biglan Case did not provide for a specific schedule of compensation to be awarded to injured workmen. The present statute does provide a specific schedule and declares that for the permanent partial disabilities here specifically described the injured workman shall receive compensation as follows: "Loss of the major arm at or above the elbow $1,900; loss of one eye by enucleation $1,200." The general provision following the schedule relates to compensation for any other permanent partial disability, and declares that it shall be in proportion to the extent that such other disability (that is not in the schedule above) shall bear to that permanent partial disability above specified which most clearly resembles and approximates in degree of disability such other disability, but not in any case to exceed the sum of $2,000. This maximum of $2,000 clearly relates to nothing else than an unscheduled disability which may be rated by the commission as a permanent partial disability.

The enactment of this specific schedule of awards certainly indicates that from experience in the operation of the industrial insurance com-

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pensation system it was found best to fix and make certain specific amounts for specific injuries, and not leave injuries to be classified by the commission with only the maximum for their guidance.

[1] We have always endeavored to interpret the Industrial Insurance Act liberally with a view of accomplishing the result intended which was, as stated in the first case we decided bearing upon the act and upholding its constitutionality, to substitute for an unscientific and burdensome system a system which will make an award in all cases regardless of the cause or manner of infliction, limited in amount, it is true, but commensurate in some degree with the disability suffered. State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466. See, also, Peet v. Mills, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916A (N. S.) 358, Ann. Cas. 1915D, 154; Stertz v. Industrial Insurance Commission, 91 Wash. 588, 158 Pac. 256, Ann. Cas. 1918B, 354; Foster v. Industrial Insurance Commission, 107 Wash. 400, 181 Pac. 912.

[2, 3] There is some uncertainty as to the meaning of subdivision (g) of the amendment of 1919, providing that—

Where "a further accident occurs to a workman who has been previously the recipient of a lump sum payment under this act, his final compensation shall be adjudged according to the other provisions of this section, and with regard to the combined effect of his injuries and his past receipt of money under this act."

Thus, under the last clause of the above subdivision the commission, acting with cautious discretion, thought that they were required to deduct the amount already received from the maximum amount possible to be received by a disabled workman under the act. But statutes must be construed as a whole, and that construction given where possible that will harmonize the entire statute and make it sensible and effective. 2 Lewis' Sutherland's Statutory Construction (2d Ed.) § 489. Applying these principles to the construction of the statute before us, it is manifest that in enacting the schedules provided in the acts of 1917 and 1919, materially changing the phraseology and legal effect of the original act of 1911, the Legislature intended to provide for all cases of disability permanent in character but partial in effect, and in adopting the schedule therein to provide for definite amounts for those certain specified injuries; the amount being graduated according to the magnitude of the injury. To the extent of such specific provisions the law is mandatory, and. being mandatory. cannot be enlarged or contracted beyond its express terms. The provision in the last paragraph of subdivision (f) of section 4, of the act of 1919, providing for compensation for other permanent partial disability, is very general, broad, and comprehensive, and leaves no room for distinction between the injuries specifically provided for in the schedule and those which fall under these general provisions. In re Maranovitch, 65 Ind. App. 489, 117 N. E. 530; In re Good (Ind.) 117 N. E. 520. It is probable that the last clause of subdivision (g) refers to the general provisions of the last paragraph of subdivision (f), or to injuries to the same member which has been previously compensated within the maximum, and to which a subsequent injury was sustained, and still leave the injured workman only permanently partially disabled; as ,for instance, where he may lose a leg below the knee and receive $1,300, and afterwards, while engaged in a hazardous occupation, sustain another injury resulting in the loss of that leg at or above the knee, so that an artificial limb could be worn, thus leaving him entitled to only the difference between $1,300 and $1,900; or he might sustain the loss of the same leg so that an artificial limb could not be worn, entitling him to $2,000, and in that case the commission would be required to regard the combined effect of his injuries, and his past receipt of

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money, so that he would be entitled to the difference between what he had received and what he would be entitled to for the maximum of the scheduled loss; otherwise it would be impossible to harmonize the provisions of subdivision (g) with the rest of the act. Subdivision (f) provides that for the permanent partial disabilities here specifically described, "the injured workman shall receive compensation as follows," and then fixes the amount for each such injury, and where it provides for compensation of $1,200 for the loss of an eye by enucleation, and $1,900 for the loss of the major arm above the elbow.

We consider that the Biglin Case, supra, does not govern this case. We are of the opinion that the present statute means exactly what it says, and that the commissioin was in error in its award, and the trial court was right.

The judgment of the trial court is affirmed.

Parker, C. J., and Tolman, Fullerton, and Bridges, JJ., concur.

Mount and Mackintosh, JJ., dissent.

MILLER v. UNITED FUEL GAS CO. (No. 3661.)

(Supreme Court of Appeals of West Virginia. March 1, 1921.)

106 Southeastern Reporter, 419.

(Syllabus by the Court.)

1. MASTER AND SERVANT — COMPENSATION ACT APPLIES UNCONDITIONALLY ONLY TO EMPLOYEES IN INTRASTATE COMMERCE.

With respect to an employer engaged in both interstate and intrastate commerce, section 52 of the Workmen's Compensation Act (chapter 15P, Code 1918, Code Supp. 1918, c. 15P, § 52 [sec. 708]) applies the provisions of the act unconditionally only to those of his employees whose work is wholly intrastate and clearly separable and distinguishable from work in interstate commerce.

(For other cases, see Master and Servant, Dec. Dig. § 365.)

2. MASTER AND SERVANT—COMPENSATION ACT MUST BE ACCEPTED BY EMPLOYER AND EMPLOYEES ENGAGED IN INTERSTATE AND INTRASTATE COMMERCE.

But where the work done within the state is so closely related to the interstate business of the employer that it cannot clearly be distinguished and separated from it, the act is made to apply only upon the condition that the employer and such employee voluntarily accept its provisions by filing with the commissioner written acceptances approved by him.

(For other cases, see Master and Servant, Dec. Dig. § 365.)

3. MASTER AND SERVANT — EMPLOYER ENGAGED IN INTERSTATE AND INTRASTATE BUSINESS NOT DEPRIVED OF COMMON-LAW DEFENSES IN ABSENCE OF ACCEPTANCE OF COMPENSATION ACT.

Where the employer and his employees have not so elected to submit to the act, the former is not deprived of his common-law defenses.

(For other cases, see Master and Servant, Dec. Dig. § 365.)

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4. COMMERCE—MASTER AND SERVANT—INSPECTION OF INTERSTATE PIPE LINE FOR GAS HELD "INTERSTATE COMMERCE," REQUIRING MUTUAL ACCEPTANCE OF WORKMEN'S COMPENSATION ACT.

An employee of an interstate carrier of gas, inspecting within the state an integral part of its pipe line transportation system, through which gas continuously passes destined for indiscriminate interstate and intrastate use, in search of a leak, known to exist, is engaged in work so closely related to interstate commerce as to be part of it; and, in the absence of a mutual election to submit to the Workmen's Compensation Act (Code 1913, c. 15P [secs. 657–711]), the employer is not deprived of his common-law defenses at the suit of the employee for injuries sustained by him while engaged in such inspection and repair work.

(For other cases, see Commerce, Dec. Dig. § 16, Master and Servant, Dec. Dig. § 365.)

(For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.)

5. MASTER AND SERVANT—EMPLOYMENT IN INTERSTATE COMMERCE HELD QUESTION FOR COURT.

Where, in such case, there is no conflict in the evidence respecting the character of defendant's business and the nature of plaintiff's employment, the question whether the latter was or was not so closely identified with interstate commerce as to be part of it is for the court, not the jury, to determine.

(For oher cases, see Master and Servant, Dec. Dig. § 284[1].)

7. MASTER AND SERVANT—EMPLOYER FAILING TO ACCEPT COMPENSATION ACT NOT LIABLE FOR INJURIES NOT CAUSED BY HIS NEGLIGENCE.

Though an employer within the terms of the Workmen's Compensation Act (Code 1913, c. 15P [secs. 657-711]) fails to avail himself of the benefit of the statute, he is not liable for an injury sustained by an employee in the course of his employment, in the absence of negligence on the part of the former which is the proximate cause of the injury

(For other cases, see Master and Servant, Dec. Dig. § 351.)

9. MASTER AND SERVANT—REASONABLE CARE TO FURNISH REASONABLY SAFE PLACE FOR WORK SUFFICIENT.

An employer has performed his duty to provide a reasonably safe place within or upon which his employees may work, when he has exercised reasonable care and diligence in that regard.

(For other cases, see Master and Servant, Dec. Dig. § 101, 102[8].)

Error to Circuit Court, Roane County.

Proceedings by Otha A. Miller against the United Fuel Gas Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

R. G. Altizer, of Charleston, C. C. Douthitt. of Huntington, and Pendleton. Mathews & Bell, of Spencer, for plaintiff in error.

Thos. P. Ryan, of Spencer, and Chas. E. Hogg, of Point Pleasant, for defendant in error.

LYNCH, J. The purpose of this writ is to review a judgment for plaintiff entered upon a verdict in an action to recover damages for personal injuries resulting from the bursting of defendant's gas pipe line

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on July 29, 1916. At the time of the accident plaintiff and a fellow employee were engaged in searching for a leak which had developed in the line, to which duty they had been assigned by defendant's superintendent. The line in question was a gathering or feed line, four inches in diameter, designed to collect and confine gas from numerous wells in the vicinity and transport it in succession to another 4-inch line, thence through an 8 or 10-inch line to a compressor station, and by an 18-inch main trunk line to Ravenswood on the Ohio river, where the gas is metered, sold, and delivered to the Ohio Fuel Supply Company, by whom it is transported across the river and sold and distributed to patrons of the latter in Ohio. A minor portion of the gas so gathered and transported is sold en route to various consumers in this state but the remainder is carried in the line without material break across the state line into Ohio, thereby becoming a commodity of interstate commerce. The two portions, however, that sold within the state and that without, are commingled in the one transportation system, and no attempt is made to separate them. We have hitherto had occasion to refer to the combined interstate and intrastate character of this portion of defendant's business, and therefore it is unnecessary to enter into further discussion of it. Roberts v. United Fuel Gas Co., 84 W. Va. 368, 99 S. E. 549; United Fuel Gas Co. v. Hallanan, 105 S. E. 506, 516, 517.

Plaintiff and W. B. Hughes had ascertained the approximate location of the leak and were engaged in digging along the side of the line, which was buried about 18 inches beneath the surface of the ground, in order to determine the exact source of the leakage and repair the line to stop the flow. Hughes was digging with a pick, and plaintiff was removing the lossened dirt with a shovel, when, from some unacountable and unexplained cause, the pipe burst, throwing both of them a considerable distance, filling their eyes with dirt, mud, and gravel, and dazing them by the force of the explosion. A phsyician hastily summoned removed the dirt and other substance from their eyes as best he could and rendered other necessary assistance. Plaintiff was removed to his home, where his eyes were kept bandaged for four days. After two weeks he returned to his work and remained with the company for more than a year, usually engaged in performing the same character of work as before the injury. Since then he has been and now is employed by the Atlantic Refining Company as foreman in charge of its line repair work at an increased daily compensation.

The declaration and its three counts charge defendant with negligence in a threefold aspect: (1) In failing to keep its pipe line in a reasonably safe condition and state of repair, and in permitting too great a volume of gas to remain in the pipe at high pressure; (2) in failing to shut off the gas in the line before directing plaintiff to locate the leak; (3) in failing to lay a line sufficiently strong to carry with reasonable safety the volume of gas transported through it. The declaration also averred the failure of the defendant to comply with the requirements of the Workmen's Compensation Act (Code 1913, c. 15P [secs. 657-711] by paying into the compensation fund the premiums required by law.

In addition to its demurrer to the declaration and plea of not guilty, defendant tendered and the court permitted it to file three special pleas denying that it was subject to the Workmen's Compensation Act of this state and setting up the common-law defenses of contributory negligence, assumption of risk, and fellow servancy.

Plaintiff's instructions Nos. 1 and 2, given, and defendant's instruction No. 2, refused, raise the question whether the failure of the latter to elect to contribute to the workmen's compensation fund operated to deny it the protection of the common-law defenses invoked by the

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special pleas. In effect plaintiff's two instructions informed the jury that if they believed from the evidence that at the time of the injury the defendant was engaged in both interstate and intrastate commerce, and that plaintiff was engaged in work affecting the latter only, and that such work was clearly separable and distinguishable from the defendant's interstate business, then as to the work in which plaintiff was engaged defendant was subject to the Workmen's Compensation Act, and, not having availed itself of the provisions thereof, could not rely upon the common-law defenses.

[1-3] With respect to an employer engaged in both interstate and intrastate commerce, we have held that section 52 of the Workmen's Compensation Act, as it appears in Barnes' 1916 Code, c. 15P (Code Supp. 1918, c. 15P, § 52 [sec. 708], applies the provisions of the act unconditionally only to those of his employees whose work is wholly intrastate and clearly separable and distinguishable from interstate commerce. Suttle v. Hope Natural Gas Co., 82 W. Va. 729. 97 S. E. 429; Roberts v. United Fuel Gas. Co. 84 W. Va. 368. 99 S. E. 549. But where the work done within the state is so closely related to interstate commerce that it cannot clearly be distinguished and separated from it, the act is made to apply only conditionally, that is, when the employer and employees voluntarily accept its provisions by filing with the commissioner written acceptances approved by him; and where they have not so elected to submit to the act, the employer is not deprived of his common-law defenses. Barnett v. Coal & Coke Ry. Co., 81 W. Va. 251, 94 S. E. 150.

[4, 5] Was the work engaged in by plaintiff at the time of the injury clearly separable from the interstate portion of defendant's business, or were both so closely allied or related as to be inseparable? The gas line was an integral part of defendant's general and extensive pipe line system through which gas passed for indiscriminate interstate and intrastate use. It was already in existence and dedicated to the transportation of gas. Though not a main trunk line, yet it fed and supplied the latter with the article of commerce which both were designed to carry and then did carry, just as the least important spur and lateral railroad lines gather and concentrate the commodities they carry towards the main trunk lines for transportation to their ultimate destination. Plaintiff's work in locating the leak in the line had for its purpose and object the repair and improvement of existing interstate transportation facilities already devoted to the purposes intended to be served by them. The Suttle and Roberts Cases, cited, are unlike this case in that neither of them relates to the transportation phase of the gas industry, but rather to the production and preliminary construction features. In the former, plaintiff's decedent was assisting in the erection of a derrick over a gas well preparatory to cleaning it out. In the opinion the court said:

"The production department of the gas industry is clearly separable from the transporting or marketing branch. All work in connection with the production of gas, that is, with bringing it to the surface where it may be confined and reduced to possession, is local in nature and clearly separable and distinguishable from the marketing or interstate portion of the industry." 82 W. Va. p. 738, 97 S. E. 433.

Similarly in the Roberts Case, plaintiff was engaged at the time of his injury in excavating a ditch preparatory to laying a pipe line to be used in the interstate and intrastate transportation of gas, but not yet completed or put in use. Therefore the line was not yet stamped with the character of the commerce which it was to carry after completion. Work on it was merely preliminary to the transportation to which later it would be devoted, and hence wholly intrastate. See, also, McKee v. Ohio Valley Electric Ry. Co., 78 W. Va. 131, 88 S. E. 616.

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But when the instrumentality has already been devoted to interstate commerce, and has assumed its place as a link in the chain of such transportation, employees engaged in repairing it or doing other work thereon generally are held to be engaged in work so closely allied to interstate commerce as not to be clearly separable from it. Pederson v. Del. L. & W. R. Co., 229 U. S. 146. 33 Sup. Ct. 648, 57 L. Ed. 1125. Ann. Cas. 1914C. 153; Southern Ry. Co. v. Puckett. 244 U. S. 571, 37 Sup. Ct. 703, 61 L. Ed. 1321. Ann. Cas. 1918B. 69; New York Cent. R. Co. v. Porter. 249 U. S. 168. 39 Sup. Ct. 188, 63 L. Ed. 536; Kinzell v. Chi M. & St. P. Ry. Co., 250 U. S. 130, 39 Sup. Ct. 412. 63 L. Ed. 893; So. Pac. Co. v. Ind. Acc. Com., 251 U. S. 259. 40 Sup. Ct. 130. 64 L. Ed. 258; Erie R. Co. v. Collins. 253 U. S. 77, 40 Sup. Ct. 450, 64 L. Ed. 790; Erie R. Co. v. Szary, 253 U. S. 86. 40 Sup. Ct. 454. 64 L. Ed. 794. In the Pedersen Case. cited, it was held that an employee carrying bolts to be used in repairing an interstate railroad was engaged in interstate commerce within the meaning of the federal Employers' Liability Act. The test there laid down and followed in subsequent cases is:

"Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? "

The court further said, at page 152 of 229, U. S. at page 649 of 33 Sup. Ct. (57 L. Ed. 125. Ann. Cas. 1914C. 153):

"True. a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those * * * engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."

The cases cited all relate to actions for injuries brought under the federal Employers' Liability Act, but they are especially applicable here on the question whether plaintiff's work was clearly separable and distinguishable from interstate commerce. or so closely identified with it as to be part of it. For reasons already stated we are of opinion that it falls within the latter class. and therefore that defendant, not having elected to accept the provisions of the Workmen's Compensation Act as permitted by section 52. is not debarred from availing itself of the common-law defenses. The act applies unconditionally only to such employment as is clearly separable from interstate commerce.

There is no dispute upon the facts relating to the character of defendant's business and the nature of plaintiff's employment. and therefore the question whether it was or was not so closely identified with interstate commerce as to be part of it was one of law for the court and not one of fact for the jury. Hence plaintiff's instructions Nos. 1 and 2 were improperly given. The giving of similar instructions in the Roberts Case, cited. was held to be harmless error because the jury there correctly decided the question of law. while here they have rendered an erroneous decision. For the same reasons defendant's instruction No. 2 should have been given.

[6] Plaintiff's instruction No. 3 also is erroneous in telling the jury they are at liberty to consider the permanence of plaintiff's injury, and to include "any losses that may occur in the future to the plaintiff" which are proximate results of the alleged negligence. There was no serious attempt to prove permanent injury. Plaintiff and some witnesses testify to a slight deafness and loss of weight, but the evidence on that point is weak and inconclusive. The physician who attended him, introduced as a witness for defendant. did not regard his injury as serious or permanent. and it is significant that plaintiff made no attempt to cross-examine him further than to ask two or three unimportant questions. Plaintiff resumed his work with defendant two weeks after

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the date of the accident and continued for more than a year in its employ, and now holds a still better position with another company as foreman in charge of its line repair work.

[7] But there is more serious error in the case than we have yet discussed. We are of opinion that plaintiff has failed to establish any negligence on the part of the defendant. Even if the latter had been within the terms of the Workmen's Compensation Act, failure to comply with its provisions would not render defendant liable in the absence of negligence on its part which operated as the proximate cause of the injury. Watts v. Ohio Valley Electric Ry. Co., 78 W. Va. 144, 88 S. E. 659; Louis v. Smith-McCormick Construction Co.. 80 W. Va. 159. 92 S. E. 249; Wilkin v. H. Koppers Co.. 84 W. Va. 460. 100 S. E. 300. There is no evidence that the pipe line was improperly constructed or maintained. On the other hand. defendant had constructed it only six months before the accident, and in its construction had used none but entirely new material. obtained from La Belle Iron Works of Toledo, Ohio, the manufacturer, whose test showed a resistance sufficient to withstand a pressure of 1.500 pounds for each square inch of surface. The superintendent who had charge of the work testifies to its proper construction. and no one contradicts him. The explosion did not occur at a coupling. but in the pipe itself, near a point where it was bent to conform to the curve of an embankment over which it ran. But there is nothing to show that the pipe was improperly strained in bending it, or that the work was done carelessly or negligently; indeed, the testimony is to the contrary. The declaration charges failure to shut off the gas pending the search for the leak, but that alone does not constitute negligence, because the usual and customary and perhaps the only way to locate a leak in one of several pipes forming parts of a pipe line system is by means of the escaping gas. Though tested to withstand a pressure of 1,500 pounds, the line on the day of the accident did not carry more than 350 pounds, and there is testimony to the effect that the pressure was even less than that.

[8] In view of the positive testimony clearly disclosing the proper construction of the line out of new pipes so tested, its periodic inspection, the absence of any knowledge on defendant's part of a fatal defect likely to cause such an accident, and the failure of plaintiff to show by proof that it was due to some negligent act or omission to act on the part of defendant, there is nothing to support a finding of liability against it, and the mandatory instruction directing a verdict for defendant should have been given. Plaintiff was engaged in a dangerous work and well knew the risk and hazard attending it. Before he can recover for the injury he must show actionable negligence on the part of defendant. McCreary v. C. & O. Ry. Co., 77 W Va. 305, 87 S. E. 374. "In an action for tort, the plaintiff bearing the burden of proof, a verdict for him cannot be found on evidence which affords mere conjecture that the liability exists, and leaves the minds of jurors in equipoise and reasonable doubt. The evidence must generate an actual rational belief in the existence of the disputed fact." Point 1, Syl., Moore v. Heat & Light Co., 65 W. Va. 552, 64 S. E. 721. When the employer has exercised reasonable care and diligence in providing a reasonably safe place within which his employees may perform the work assigned to them, he has fulfilled his duty to them in that regard. Schilling v. H. Koppers Co., 83 W. Va. 737, 99 S. E. 75.

[9] In so far as the action of the circuit court in overruling defendant's demurrer to the declaration and each of its three counts relates to the failure of defendant to comply with the Workmen's Compensation Act, and the duty to remove or reduce the gas pressure on the line while it was being repaired, and to exercise a reasonable diligence to provide a reasonably safe place to work, what has been said is perhaps sufficient. The latter requirement, however, is not universal in

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its application but is subject to modification in some circumstances. It was part of plaintiff's business to repair leaks, and he was proficient in performing that service and had knowledge of its dangerous character. In effect the work assigned to him was to make safe an unsafe portion of an interstate gas pipe line system, and while the rule referred to is not without some degree of applicability, it does not apply to its fullest extent because the employee assumes the ordinary danger and risk incident to such employment. This is one of the exceptions to the general requirements for a safe place and safe instrumentalities. 3 Labatt's Master & Servant (2d Ed.) § 924; note, 25 L. R. A. (N. S.) 321. See, also, Miller v. Berkeley Limestone Co., 70 W. Va. 643, 75 S. E. 70. In other respects the declaration seems unobjectionable.

For the reasons stated in this opinion, we reverse the judgment, set aside the verdict, and remand the case for retrial.

MORRISON v. SMITH-POCAHONTAS COAL CO. (No. 4060.)

(Supreme Court of Appeals of West Virginia. Oct. 26, 1920. On Rehearing, March 8, 1921.)

106 Southeastern Reporter, 448.

(Syllabus by the Court.)

5. MASTER AND SERVANT—PAYMENT OF PREMIUMS INTO COMPENSATION FUND NO PROTECTION AGAINST UNLAWFUL EMPLOYMENT.

Payment of premiums into the workmen's compensation fund of this state will not protect an employer against the action of an infant unlawfully employed by him in a coal mine. In such case the rights and liabilities of employer and employee are controlled by the common-law principles applicable to master and servant.

(For other cases, see Master and Servant, Dec. Dig. § 366.)

Error to Circuit Court, Wyoming County.

Action by Banner Morrison, an infant, etc., against the Smith-Pocahontas Coal Company. Judgment for plaintiff, and defendant brings error Affirmed.

Toler & Moran, of Mullens, for plaintiff in error.

Anderson, Strother, Hughes & Curd, of Welch, for defendant in error.

MILLER, J. The purpose of the present writ is to review and reverse the judgment below in favor of plaintiff for $8,000.00, for personal injuries sustained while employed in defendant's coal mine.

At the time of plaintiff's injuries, according to the declaration and proof, he was an infant between the ages of fourteen and sixteen. The declaration is in two counts, the first averring as the sole act of negligence the employment of plaintiff by defendant while the public schools of the district in which he lived were actually in session, contrary to the statute in such cases made and provided. The second count avers the failure of defendant to pay into the workmen's compensation fund the premiums prescribed by law, plaintiff's employment contrary to law as averred in the first count, his inexperience and his incapacity because

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thereof to comprehend the dangers and hazards incident to his employment, and the negligence of defendant to use all reasonable care and caution to instruct him as the manner in which he should perform his work. and to warn him as to the dangers attending his employment, by reason whereof he sustained the injuries of which he complains.

The record shows no demurrer to the declaration or either count thereof, except that after the jury had been sworn to try the issue joined on defendant's plea of not guilty, and during the trial, when plaintiff was permitted to amend each count so as to make the allegata and probata agree as to the manner in which he sustained his injuries, the defendant demurred generally to the declaration as amended, not to each count thereof, which was overruled, and the trial thereon was proceeded with to verdict and judgment.

[1] The first, second and third points of error relied on are without merit. The first and second relate to the question of variance between the allegata and probata as to the particular manner in which plaintiff sustained his injuries, cured as we have shown by the amendments of the declaration during the trial. The third point relates to the action of the court, after the amendments, in proceeding with the trial over the objection of defendant. Citing and relying on the case of Travis v. Peabody Insurance Co., 28 W. Va. 583. That case has been substantially overruled in the late case of Koen v. Brewing Co., 69 W. Va. 94, 70 S. E. 1098, holding that the question for which that case is cited did not arise therein, and that the point was obiter. The latter case gives proper construction to our statute on the subject, section 8, chapter 131 (sec. 4912) of the Code. This statute permits amendments to pleadings to meet the very case presented here, a variance between averment and proof, and provides that a continuanc not a matter of right need not be had unless rendered necessary thereby. In the case at bar defendant made no motion for a continuance, and there was no surprise or cause for a continuance presented.

[2] The fourth point of error is that the declaration as amended during the trial in each count thereof is faulty in not sufficiently averring the manner, time and place in which plaintiff's injuries were sustained, so as to show defendant's negligence. The time and place are averred, also, in the alternative, that plaintiff was mashed or thrown between the cars or between the cars and the rib of the coal. The form of this averment in the alternative was to cover the case as the facts might appear from the evidence when presented to the jury. The primary act of negligence alleged is the employment of plaintiff contrary to law. The manner in which the injuries were sustained, assuming the declaration to be good, is unimportant. In the second count the primary negligence alleged is the failure of defendant to instruct plaintiff, because of his youth and inexperience, how to do the work and avoid injury. Such averment of negligence furnishes the basis or predicate for the evidence of all such incidental facts and circumstances of omission or commission as fairly tend to establish the negligence of the primary act, according to the cases cited by defendant's counsel. Synder v. Wheeling Electrical Co., 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922; Veith v. Hope Salt & Coal Co., 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410.

[3] The fifth point of error affirmed by defendant's counsel is that the court erred in refusing to allow it to prove by its superintendent and mine boss that plaintiff's size and appearance and what he said indicated that he was eighteen years of age and an experienced brakeman. The evidence of these witnesses shows that they were in doubt, and questioned the plaintiff and required of him the statutory affidavit of parent or guardian that he was of the age rendering it lawful for him to be employed in or about a coal mine, and there is some evidence tending to show that they did get some sort of a certificate, not an affi-

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davit, of a brother-in-law of the plaintiff, not his parent or guardian, consenting to his employment, but this certificate was not produced. In Norman v. Virginia-Pocahontas Coal Co., 68 W. Va. 405, 69 S. E. 857, 31 L. R. A. (N. S.) 504, and Blankenship v. Ethel Coal Co., 69 W. Va. 74, 70 S. E. 863, we distinctly held that the fact that such employee or his parent has misrepresented his age does not preclude recovery; so held in construing our statute, sections 24 and 25, chapter 15H of the Code of 1918, which does not excuse an employer from requiring the affidavit because of the appearance or false representation of the employee or his friend as to his age. To be protected the employer is bound to require the proper affidavit of parent or guardian.

A sixth proposition presented by counsel is that the court below committed prejudicial error in permitting one of defendant's expert witnesses to be asked and to answer, on cross-examination, whether if some other expert who did not testify in the case had given it as his opinion that the particular condition of plaintiff was caused by the injury sustained, he would say such opinion was correct or incorrect. Counsel for plaintiff say the question and answer were not objected to. We find with respect to the testimony of Dr. Hunter, one of the experts, there was an objection and an exception, but with respect to the evidence of Dr. Wood, the other expert, there was no objection or exception to the question asked him, nor to his answer thereto, which was favorable to defendant. However, the opinions of the experts not examined by plaintiff were brought out on cross-examination of plaintiff by defendant's counsel, wherefore we can see no error in the rulings of the court of which defendant can complain. The seventh proposition is covered by the sixth, and we make the same reply.

[4, 5] The eighth proposition urged, and the only one argued by defendant's counsel, is that the violation of the statute against employment of minors within the prohibited ages does not constitute actionable negligence unless such violation thereof is the proximate cause of the injury; that an employer as a matter of law is not chargeable with all injuries that result during the unlawful employment, but is liable only for those injuries against which the statute is intended to guard. And the argument is that section 33, chapter 10, Acts 1915 (Code Supp. 1918, c. 15H, § 36 a. xxxiii [sec. 495—33]), prohibiting the employment of boys between the ages of fourteen and sixteen years, was not intended to protect them from personal injuries as was section 32 (sec. 495—32) thereof, inhibiting the employment of boys under the age of fourteen years, but that its purpose was to provide for their education and protect them therein. Our answer to this proposition is that the question does not seem to fairly arise on the record. A demurrer to the first count would likely have presented the question, but so far as the record discloses there was no demurrer to either count until after the trial began, and then the demurrer after the amendments were made was general and not to each count, and as the second count is concededly good, the demurrer was properly overruled. The question might have been presented by instructions, but though the order giving judgment on the verdict and filing the only bill of exceptions, No. 1, indicates that instructions to the jury were given and refused, no such instructions appear, and the bill of exceptions does not purport to contain or identify any such instructions. Nor does the question arise on the motion for a new trial, for as the second count is good and there was evidence introduced sufficient to support the case made thereby, we can not say the verdict is not well founded on pleadings and proof.

It is true, the defendant proved payment of the proper premiums into the workmen's compensation fund so as to protect against damages sustained by anyone lawfully employed in its mines. But as the jury must have found the plaintiff was unlawfully employed while the schools in his district were in session, defendant was not protected against ac-

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tion by plaintiff by the workmen's compensation fund. The protection given by the statute does not extend to persons unlawfully employed. Section 9, chapter 15P, (sec. 665), of the Code, specifically provides that the act shall not apply to employers of employees whose employment is prohibited by law. And we have recently decided that in cases not falling under the compensation law the common-law rights and liabilities of employer and employee must control in actions of negligence. Barnett v. Coal & Coke Ry. Co., 81 W. Va. 251, 94 S. E. 150.

Wherefore, we must affirm the judgment.

Williams, J. absent.

On Rehearing.

Two additional propositions are urged for reversal. First, that plaintiff, a boy over fourteen years of age, was not, while and where employed by defendant, residing in the sub-district or independent school district with intent to make such district his home, and was not, within the provisions of section 69 of chapter 45 of the Code 1916, (Code 1913, sec. 2110), entitled to attend the free schools of said district, wherefore his employment by the defendant was not unlawful, and defendant was protected by its compliance with the workmen's compensation law; second, that the evidence shows plaintiff to have been a skilled work hand, acquainted with the duties of his employment, and that the theory that he was not properly instructed as to the dangers of his employment was unavailing and should have been disregarded by the trial court and by the jury.

[6] The argument adduced in support of the first of these propositions is that section 33 of chapter 10, Acts 1915 (section 25, chapter 15H, Code 1916 [Code Supp. 1918, c. 15H, § 36a xxxiii] sec. 495—33), relating to mines and labor, and sections 69, 72 and 74 of the chapter relating to education (Code 1913, secs. 2110, 2113, 2115), being in pari materia, should be read together, and the former chapter interpreted in the light of the latter. In this view we entirely agree with counsel. Section 33 of said chapter 10, makes it "unlawful for any person, operator, agent or mine foreman, to employ or permit any boy between the ages of fourteen and sixteen years, to work in or about a coal mine at any time in which a free school is in session in the school district where said boy resides." And section 72 of chapter 45 of the Code requires every person having under his control a child between the ages of eight and fifteen years to cause him to attend some free school for a period of twenty-four weeks yearly, beginning with the opening of the school term, and makes it a misdemeanor and imposes a penalty for failure to do so; and section 74 of that chapter makes it an offense punishable in like manner for any person to induce any such child to unlawfully absent himself from school, or to harbor or employ him, when the school in the district in which the child lives is in session.

Defendant relies on the evidence that plaintiff's father resided in Virginia, and that when on the witness stand plaintiff said his home was in Virginia, and that after being hurt in defendant's coal mine he said he wanted to go home. He did so testify, but he also testified that he had been working in West Virginia in a coal mine before being employed by defendant, and during his employment by defendant that he at least had a temporary residence with a relative, Rokle, in the school district where he was employed, and who undertook to make out a certificate which was shown or delivered to defendant, giving his consent to the boy's employment, but not sworn to by him. Plaintiff was employed by defendant during the months of November and December, 1917. It is contended by defendant's counsel that such residence in the State did not give plaintiff the status of one residing within the school district with intent to make such district his home, within the meaning

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of section 69 of said chapter 45 of the Code, entitling him to attend the free schools thereof, wherefore his employment could not have been unlawful as contemplated by the provisions of the mining statute referred to. On the other hand counsel for plaintiff insist that these mining laws inhibiting the employment of boys between the ages of fourteen and sixteen years have their safety as well as their education in view, and that the provisions of the chapter on education and those of the mining statutes can not be construed as strictly in pari materia. Our opinion, however, is that as they relate to boys between the ages of fourteen and sixteen years, the purpose is education, not safety; for when over fourteen years of age, if the schools are not in session, boys may be lawfully employed in or about coal mines, and be subject to the laws pertaining to master and servant the same as adult employees.

The question is therefore squarely presented. What construction should be given to the words of said section 69 of chapter 45, "residing in a sub-district or independent district with intent to make such district their home"? It will be observed that the statute does not say "*permanent* home." Counsel for defendant, however, contend that the statute uses the word "home"in the sense of "domicil," and that the domicil of an infant is that of his parent or guardian, and that he is incapable of chosing a domicil other than that of his parent or guardian. For some purposes this may be true. For example, for the purpose of determining the rights of administration of his estate, or of inheritance. White v. Tennant, 31 W. Va. 790, 8 S. E. 596, 13 Am. St. Rep. 896; or in the case of a pauper, in deterimning the place of his residence or domicil for the purpose of his support. Town of Salem v. Town of Lyme, 29 Conn. 74; or for the purpose of determining the proper forum in divorce proceedings, Blumenthal v. Tannenholz, 31 N. J. Eq. 194; or in bankruptcy proceedings. In the matter of John M. Wrigley, 8 Wend. (N. Y.) 134.

But when the question is one relating to the education of the youth of the land, no narrow construction of the statute ought to be indulged in. In Yale v. West Middle School District, 59 Conn. 489, 22 Atl. 295, 13 L. R. A. 161, it was decided that a child living with a domiciled resident and tax payer of a school district as a member of his family with the expectation on the part of all parties interested that this relationship will continue permanently, although she has never been formally adopted and may not have a domicil in the technical sense of that term in the district, has a residence in the district for school purposes and can not be compelled to pay tuition as a non-resident. In State ex rel School District No. 1 of Waukesha v. Thayer, 74 Wis. 48, 41 N. W. 1014, it was held that a minor may have for school purposes a residence other than that of his parents. And in that case it was decided that where the mother deserted by her husband and unable to support their minor children, found a home for the child in Waukesha, where he worked and boarded and had no other home, was a resident of Waukesha for school purposes, although the mother herself was employed as a school teacher in Milwaukee and boarded there.

And so we hold that although the domicil of the plaintiff in this case for some purposes may have been that of his parents in Virginia, nevertheless as he left his home in Virginia, with or without their counsel, and was allowed to labor and appropriate his earnings, and was liable to become a citizen and resident of this State, the State thereby became interested in his education and good citizenship. In the light of these facts we should not give the statute such a narrow construction as to relieve him or his employer from the compulsory provisions of the statute. A narow construction thereof might permit the persons thereby prohibited, to employ boys from adjoining school districts or adjoining counties of the State, if perchance the schools in such counties or dis-

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tricts did not happen to be in session at the particular time, which would be bad policy and lead to evasions of the law and render it abortive.

As to the second proposition relied on, relating to failure to instruct, it is conceded that plaintiff was not instructed. We can not say from the evidence that he was so skilled or acquainted with the dangers to which his employment subjected him as not to call for instruction, or that these dangers were so open and apparent that instructions were not necessary. The record shows that the jury were instructed, but not what the instructions were. Presumptively they were properly instructed on the duty of an employer in the premises, and that they found against the defendant on the conflicting evidence relating to the necessity to instruct.

For the reasons formerly given and now adhered to, as well as for the additional reasons now presented, we adhere to our former opinion to affirm the judgment.

ZINN v. CABOT. (No. 4185.)

(Supreme Court of Appeals of West Virginia. March 1, 1921.)

106 Southwestern Reporter, 427

(Syllabus by the Court.)

1. MASTER AND SERVANT — EMPLOYER NOT ASSENTING TO COMPENSATION ACT ONLY FOR INJURY RESULTING FROM NEGLIGENCE.

An employer whose business comes within the purview of the immunity afforded thereby, is not liable to an employee injured in his service, unless such injury results from his negligence.

(For other cases, see Master and Servant, Dec. Dig. § 351.)

2. MASTER AND SERVANT — COMPENSATION ACT ONLY DEPRIVES NONASSENTING EMPLOYER OF DEFENSE OF ASSUMED RISK FROM OWN NEGLIGENCE.

The provisions of the Workmen's Compensation Act denying to employers who do not comply with its terms the common-law defense of assumption of risk does not mean that the employer is liable in damage for every injury received by an employee in his service, but only deprives him of the defense that the employee assumed the risk of injury resulting from the employer's negligence, because such employee knew of such risk and remained in the service with such knowledge.

(For other cases, see Master and Servant, Dec. Dig. § 356.)

Error to Circuit Court Roane County.

Action by W. H. Zinn against Godfrey L. Cabot. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Thos. P. Ryan, of Spencer, and Hogg & Hogg, of Point Pleasant, for defendant in error.

Pendleton, Mathews & Bell, of Spencer, for plaintiff in error.

RITZ, P. The defendant by this writ of error seeks reversal of a judgment in favor of the plaintiff for damages for personal injuries received by him while in defendant's employ, upon the ground that the court misdirected the jury, that the verdict is not supported by the evidence, and that the same is excessive.

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The defendant had a gas well in Roane county, the casing in which had become broken so as to admit water into the well. To repair this damage a string of smaller casing was inserted in the inside of the casing then in the well down to the point where the same was broken, at which point what is known as a wall packer was to be placed thereon, which would have the effect of supporting the inside casing and also of stopping the leak in the larger casing. The plaintiff was employed by the defendant to assist in doing this work. The casing consisted of sections of iron pipe, and in order to get these in the well an appliance called an elevator was fastened to one end thereof upon which was a collar and the casing raised in a vertical position by the derrick, and then dropped into the well until the upper end thereof was even with the surface of the derrick floor This section was then held in that position while with an other elevator another section was raised and screwed into the collar end of the section thus suspended in the well, after which the elevator used to hold the first section was released, and the sections thus screwed together were dropped down until the top of the second section was level with the derrick floor, and this process was continued alternately using the elevators for securing the string of casing in the well and raising the new section to be attached thereto. At the time of the plaintiff's injury the string of casing had been completed, and had reached the point at which the wall packer was to be placed thereon. In order to attach this wall packer and make it operate, it was necessary to drop what is termed a bailer into the casing by means of which a disk was broken releasing the springs in the wall packer, and making it catch on the side of the outside casing. The string of casing at that time projected somewhat above the derrick floor. It was being supperted by one of the elevators around a collar at the derrick floor. The other elevator had been used to raise a short piece of casing which extended above the floor, and which was to be removed when the string of casing had been lowered to its permanent position. In order to drop this bailer in it became necessary to disengage the elevator attached to the top of the string of casing, for the reason that it obstructed the opening. This elevator was disconnected and propped up with what is called a casing pole. The bailer was then dropped in the well and the disk broken, and the plaintiff, under instructions from the foreman, got up on a stool for the purpose of hooking up the elevator, when the safe fell and caught his hand between a hook or link and the top of the casing, and severed two of his fingers.

The proof shows beyond contradiction that his work was being done in the usual and ordinary way. It is shown that the ordinary and usual way in which to support the elevator which had been disengaged was to prop it up with a casing pole, and it is shown that the casing pole used on this occasion was of the kind which is ordinaryily used at oil and gas wells. It is not shown, nor is there any indication, that there was negligence in the method of doing the work. There is some suggestion in the plaintiff's evidence that the casing pole was greasy, but it is not indicated how this contributed, if it did contribute, to the accident. About all that the plaintiff's evidence shows in this regard is that the casing pole fell and his fingers were caught between a link or hook and the top of the casing. The pole was supported at the bottom against a pile of pipe or some pieces of timber fastened to the floor of the derrick three feet from the base of the casing in the well. As to just how it engaged the elevator at the top does not appear. Whether it fell because it was improperly secured at the bottom or improperly secured at the top is not indicated. As before stated, there is no suggestion in the plaintiff's evidence as to what caused it to fall. The defendant's foreman, who was present and in charge of the work, testifies that when the plaintiff got up on the stool for the purpose of hooking the elevator back, he lost his balance and fell against the pole, and this is the only explanation made in any of the evidence as to

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the cause of the accident. The plaintiff denies this, however, and says that he did not touch the pole prior to the accident, and did not lose his balance and fall against it.

[1, 2] It appears that the defendant did not avail himself of the benefits of the Workmen's Compensation Act (Code Supp. 1918, c. 15P), and is therefore deprived of certain defenses of which he could have taken advantage prior to the passage of that act. However, even since the passage of it is not liable in damages for every injury sustained by his employees. The basis of such an action is negligence, and, unless some negligence, is traced to the employer, there is no cause of action. This negligence may be some defect in the working place, or may be some improper method of doing the work by some of the injured employee's fellow servants, but, unless there is some failure upon the part of the employer to do something which he should do for the employee's safety, or the commission of some act by him or his servants which results in the injury, there can be no recovery. It is true the statute deprives the employer who fails to take advantage of the Workmen's Compensation Act, among other defenses, of the defense of assumption of risk, but we have repeatedly held that this did not mean that the employee did not assume some risk. He still assumes the risks arising from his own negligence and ordinarily incident to the employment. The risks which he does not assume are those which come from the master's negligence, of which he has notice, and which prior to the enactment of the Workmen's Compensation Law, because of his knowledge thereof and his remaining in the employment after such knowledge, he was held to have assumed, nothwithstanding they were produced by the negligence of the employer. De Francesco v. Mining Co., 76 W. Va. 756, 86 S. E. 777; Watts v. Railway Co., 78 W. Va. 144, 88 S. E. 659; Louis v. Construction Co., 80 W. Va. 159, 92 S. E. 249; Wilkin v. Koppers Co. 84 W. Va. 460, 100 S. E. 300. There being no evidence in this case indicating that there was any negligence upon the part of the defendant which contributed to the injury, the peremptory instruction asked for should have been given.

[3, 4] Inasmuch as the case must go back for a retrial, it is necessary for us to pass upon the instructions given on the motion of the plaintiff. The first instruction given informs the jury that the defendant cannot rely upon the defenses of contributory negligence, assumption of risk, or the negligence of fellow servants. The instruction should not have been given. It is true that under the statute the defendant could not rely upon the defense of assumption of risk, but giving instruction to the jury in the broad language which was used in this case was equivalent to directing a verdict for the plaintiff. As before stated, under our decisions the employee does assume certain risks, and it is only those risks which result from the master's negligence which are not assumed. This instruction in its literal sense, and as it would ordinarily be understood, would hold the defendant responsible for an injury from any cause, even one caused by the plaintiff's own negligence. It is true the court gave on behalf of the defendant an instruction to the effect that before recovery could be had they must find that the denfendant had been negligent. These two instructions, giving to the language its ordinary meaning, were conflicting. The instruction given in this regard on behalf of the denfendant was proper, but we are unable to say whether the jury followed the correct instruction given on motion of the defendant or the too comprehensive instruction given on the motion of the plaintiff. It is error to give inconsistent instructions for the very good reason that the jury is left to decide which theory of the law as thus presented is correct, and renders it impossible for the court to determine upon what legal principle the verdict is based. Penix v. Grafton, 86 W. Va. 278, 103 S. E. 106.

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Criticism is made of another instruction given on behalf of the plaintiff to the effect that the jury in ascertaining his damages could consider his physical condition before the accident as compared with his physical condition immediately thereafter; it being argued that the evidence does not show that there was any difference in his physical condition before and after the accident. This crticism is not well taken. The fact appears that two of his fingers were severed from his hand, and this certainly made a difference in his physical condition.

[5] The defendant insisted that he is entitled to have a judgment rendered here, notwithstanding the verdict of the jury, and asks that be done. A judgment non obstante veredicto must be based upon the merits of the case as disclosed by the pleadings, and not in any sense upon the evidence introduced upon a material issue properly joined. Where the pleadings make a case for relief, a judgment will not be desires the conclusive judgment of the court upon the evidence, he should evidence does not prove the case made by the pleading. If a party desires the conclusive judgment of the court upon the evidence, he should demur thereto. Holt v. Elevator Co., 78 W. V. 785, 90 S. E. 333, L. R. A. 1917A, 1194; Shafer v. Trust Co., 82 W. Va. 618, 97 S. E. 290.

For the reason aforesaid, the judgment of the circuit court is reversed the verdict of the jury set aside and a new trial awarded.

EAU CLAIRE SAND & GRAVEL CO. v. INDUSTRIAL COMMISSION OF WISCONSIN ET AL.

(Supreme Court of Wisconsin. March 8, 1921.)

181 Northwestern Reporter, 718

MASTER AND SERVANT—UNGUARDED PULLEY HELD EXPOSED TO CONTACT," JUSTIFYING INCREASED COMPENSATION BY WAY OF PENALTY.

Where part of the machinery of a sand and gravel crane consisted of a long belt carrier driven by pulley 36 inches in diameter and reached by a platform, the pulley was "exposed to contact" within Order No. 2 of the Industrial Commission, requiring all pulleys over 18 inches in diameter which are exposed to contact to be guarded, and hence a workman caught in the unguarded pulley while applying dressing may be awarded increased compensation by way of penalty because his injury resulted from the failure to comply with the Commission's orders.

(For other cases, see Master and Servant, Dec. Dig. 387.)

Appeal from Circuit Court, Dane County; E. Ray Stevens, Judge.

Action by the Eau Claire Sand & Gravel Company against the Industrial Commission of Wisconsin and Charles Cleveland to review an award of the Commission giving to defendant Cleveland an increased compensation under the Workmen's Compensation Act (St. 1919, §§ 2394-1 to 2394-32). From a judgment confirming the award of the Commission, plaintiff appeals. Affirmed.

Workmen's compensation. The respondent Cleveland was injured October 2, 1919, while in the employ of the plaintiff. Upon a proper proceeding before the Industrial Commission the Commission awarded the respondent Cleveland compensation amounting to $1,959.15 and awarded him the further sum of $368.48 increased compensation by way of a penalty assessed by reason of the failure of the plaintiff to guard its machinery in accordance with the orders of the Industrial Commission. The Commission found:

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"That the applicant's injury was proximately caused by a failure of the respondent to comply with safety orders of the Industrial Commission, namely, orders 1 and 2, and that by reason thereof this applicant is entitled to additional compensation from the respondent equal to 15 per cent. of the primary amount, or $368.48."

This action was begun to review the award of the Commission giving respondent Cleveland the increased compensation. Upon the trial in the circuit court the award of the Commission was confirmed, and from the judgment of confirmation tht plaintiff appeals.

John B. Fleming, and A. H. Shoemaker, both of Eau Claire, for appellant.

Wm. J. Morgan, Atty. Gen., and W. W. Gilman, Asst. Atty. Gen., for respondents.

ROSENBERRY, J. (after stating the facts as above). The respondent Cleveland was employed at a sand and gravel crane. A part of the machinery consisted of a belt carrier about 200 feet long which was constructed on an incline and was operated by a motor. The belt was driven by a pulley, and as it moved upward carried sand in the sag of the belt. The belt was 20 inches wide, and the pulley at the upper end was 22 inches wide, and 36 inches in diameter. A platform was built near the pulley at the upper end of the belt, and it was at this pulley that the respondent Cleveland was injured. At the time of his injury he had gone to the platform with a stick of dressing for the purpose of applying it to the pulley, the belt having stopped. In response to a signal, the superinttendent stopped the machinery and was then told by the respondent Cleveland to start it again. The respondent Cleveland continued to apply the dressing to the pulley while the belt was in motion, and in so doing the glove which he was wearing became fastened to the pulley and his hand and arm was drawn in between the belt and the pulley. The belt and the pulley, at the place where the injury occurred, were unguarded. Order No. 2 of the Industrial Commission is as follows:

"All pulleys over eighteen inches in diameter which are exposed to contact must be guarded."

Order No. 1 is in part as follows:

"All belts, ropes or chain driving machinery or shafting, and all secondary belts, ropes or chains; in short, all belts, ropes or chains, exposed to contact except belts which are so small or those which move so slowly that there is no possibility of danger must be guarded. * * *

"Note (a). The term 'belt' or 'secondary belts' means belts which transmit power and do not apply to sanding or polishing belts, or belts used for abrasive purposes; such belts must be guarded where possible."

The Industrial Commission found that the pulley at which the respondent Cleveland was injured came within the provisions of Order No. 2. This finding was confirmed by the trial court. The trial court correctly held that the finding was supported by substantially credible evidence and could not be set aside for that reason. It is contended that the pulley in question is not covered by Order No. 2 because not exposed to contact within the meaning of that order. The circumstances of this case show that it was exposed to contact in the ordinary course of the company's business. We do not think the phrase "exposed to contact" means to continuous or frequent contact, but to contact in the ordinary and usual course of the operation of the plant without regard to its frequency. We shall not attempt to determine whether the belt in question transmits power within the meaning of Order No. 1. It is not necessary to a decision of this case.

Judgment affirmed.

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Injury resulting from assault by workman upon fellow workman while latter is engaged in work of master is "accidental personal injury arising out of and in course of employment". Stasmos v. State Indust. Comm. (Okla.) 671
Employee, assaulting another and injured by him could not recover compensation for injury. Stein v. Williams Printing Co. (N. Y.) 664
Epileptic's injury by fall during work held "in course of employment", but not one "arising out of employment", and compensation for his injuries cannot be awarded against his employer — phrase "in course of employment" relates to time, place, and circumstances under which accident occurred and means that it happened while employee was at work in his employer's services. Cox v. Kansas City Refining Company (Kan.) 604
Where employee had organic heart trouble and strenuous work combined with breathing dust-laden air in inclosed building brought on attack of heart trouble causing instant death, condition of air or fact that it was dust-laden was proximate cause of death—death from heart trouble due to dust-laden condition of air held "injury proximately caused by accident". Carroll v. Indust. Comm. (Colo.) 720
Where nature of employment is such as to expose a worker to a wrongful act by another worker, which may reasonably be said to have been induced by the peculiar condition of the employment, the manner in which it was carried on, and the appliances required, such act may reasonably be said to "arise out of the employment".—While fact that employer may have anticipated such an accident as liable to happen is not ground of liability since negligence is not an element in determination of the award, it affords some light upon question whether injury may reasonably be said to "arise out of the employment". Socha v. Cudahy Packing Company (Neb.) 768
Night watchman, employed by company which furnished subscribers with protection against burglary, suffered death arising "out of" his employment, when he was accidentally shot by police officer then in pursuit of burglars, though they had not entered the building which the watchman was protecting. Heidemann v. American District Telegraph Co. (N. Y.). 777
Ulcer is "disease" or "infection"; "injury" or "personal injury" as used in act means only accdental injuries arising out of and in course of employment and such disease or infection as may naturally and unavoidably result therefrom. Pinto v. Chelsea Fibre Mills (N. Y.) 807
Employee, whose head was bumped, was not entitled to compensation for sleeping sickness of which he became a victim subsequent to accident, in absence of evidence that disease was caused by accident. Donovan v. Alliance Electric Co. (N. Y.) 785
Injury from scuffle between workmen in factory where injured was employed held "occasioned in course of employment". Indust. Comm. v. Weigandt (Ohio) 823

§ 374. —— INJURY AS PROXIMATE CAUSE.

§ 375. —— SCOPE OF EMPLOYMENT.

(1). In general.

Fall of driver from truck driven for him by another held not accident arising out of employmennt. Morris & Co. v. Indust. Comm. (Ill.) 41
Laundry employee injured in pressing skirt for fellow employee after working hours and when such work was forbidden, was not entitled to compensation. Hinton Laundry Co. v. De Lozier (Tenn.) 860
If employee receives injury in act of violating employer's instructions, injury does not arise out of employment. Rockford Cabinet Co. v. Indust. Comm. (Ill.) 230
Injury to engineer attempting to restore broken electric wire cross-arm held one "arising out of and in course of employment". Young v. Mississippi River Power Co. (Iowa.) 421
Injury to mine cager driving mule held one "arising out of employment" under circumstances as stated. Hafer Washed Coal Co. v. Indust. Comm. (Ill.) 575
Act applies to employee on employer's premises doing what is incident to work. Bell's Case (Mass.) 749

(2). Injury received while going to or from work.

Employee of railway, injured while riding to work on pass on company's train was injured in employment. Tallon v. Interborough Rapid Transit Co. (N. Y.) 90
Injury to employee on way to work held to arise in course of employment. Procaccino v. E. Horton & Sons (Conn.) 31
"Employment" is question of fact, not limited to exact time when employee reaches work place or ceases work. Indian Creek Coal & Mining Co. v. Wehr (Ind.) 47

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Where evidence showed injuries by accident but failed to show extent that existing disease was aggravated by such injuries, recovery is allowable for disability, disregarding effects of disease. Fox v. United Chemical & Org. Prod. Co. (La.) 62
Where railroad company permitted employees to ride to and from work, but contract of employment did not obligate it to transport them, employee injured on station platform waiting for train was not killed in employment—employment continues throughout transportation of employee by employer if contract of hiring positively or inferentially so stipulated. Kowalek v. N. Y. Consol. R. Co (N. Y.) 215
Employee, injured while crossing street during working hours to get cup of coffee pursuant to custom of men, and while talking to prospective customer, held injured by accident in employment. State Indust. Comm. v. Voorhees (N. Y.) 238
Where coal miner upon quitting work rode with other employees toward surface of mine and was injured by collision, held that accident arose out of and in course of employment. Chance v. Reliance Coal & Mining Co. (Kan.) 201
Surviving parents of minor, injured in attempt to board train carrying workmen home, held entitled to compensation. Farris v. Louisiana Long Leaf Lumber Co. (La.) 292
Where entire town including railroad track was on employer's land and only usual crossing was private way leading to employer's buildings and employee was struck by train when returning to work on such way, injury was sustained in course of employment. Lumbermen's Reciprocal Ass'n v. Behnken (Tex.) 363
Injury sustained by employee on way home after completing day's work does not arise out of employment. Koubek v. Gerens (Minn.) 339
Servant injured by passing vehicle is not in course of employment if injured when going to midday meal after leaving employer's premises. Jack v. Morrow Mfg. Co. (N. Y.) 476
Electrician, injured by slipping on street while going to work, held not injured in "hazardous employment"; "arising out of and in course of employment". Keller v. Reis & Donovan, Inc. (N. Y.) 481
Where employer permitted employees to eat lunch upon premises, death of employee which occurred while returning to place of work in elevator operated by employer, after having procured luncheon outside, for purpose of eating it within place of work, arose out of and in course of employment. Johnson Coffee Co. v. McDonald (Tenn.) 512
Where employer agreed to furnish employees free transportation to and from work and arranged with railroad for such transportation and where employee who was directed to board wrong work train and, on discovery of mistake, was injured while boading following regular train which would carry him to his work, he was injured by accident which arose out of and in course of employment. Central Const. Corp. v. Harrison (Md.) 681
Unless incidents of an employment be exceptional, the relation between master and servant is suspended when servant leaves his place of actual employment at close of day's work to go to his home — strike breaker, injured after leaving factory in company of superintendent was not entitled to compensation. Rourke's Case. (Mass.) 639
Injury while going to change clothes held to "arise out of and in course of employment". Western Coal & Mining Co. v. Indust. Comm. (Ill.) 596
Trainman deadheading with permission from train dispatcher, where under rules of company employees were paid while deadheading into terminal, though not on duty, was in employ of railroad at such time. Payne v. Indust. Comm. (Ill.) 577
Employer cannot confer on employees going to and from work right to cross railroad tracks adjoining its premises at place not a public crossing so as to make injury by train compensable where it had acquired no right to use such crossing.—Under circumstances as stated, where employee was struck by train while crossing tracks, injury did not arise out of and in course of employment. Bell's Case (Mass.) 749
Injury received by employee when using freight elevator in leaving building to go home held not to "arise out of employment". Dulac v. Dumbarton Woolen Mills (Me.) 731
Injury received by employee answering call as city fireman held not compensable as one "arising out of and in course of employment". White v. Eastern Mfg. Co. (Me.) 745
Injury in automobile collision while on way to work held not to "arise out of and in course of employment": it occurring while he was on his way to his place of work and before the time he was to go to work. Schultz v. Champion Welding & Mfg. Co. (N. Y.) 778

§ 376. —— NATURE OF INJURY.

(1). In general.

(2). Disease in general

Held that injury aggravating disease to cause disability justified award. Blackburn v. Coffeyville Vit. Brick & Tile Co. (Kan.) 58

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Testimony that when injured, employee had tuberculosis and that injury hastened its progress was enough to warrant finding against employer's insurer. Glennon's Case (Mass.) 210
Compensation may be awarded though there was pre-existing disease, if it was aggravated and accelerated by injury. Rockford City Traction Co. v. Indust. Comm. (Ill.) 283
Where in attack of caisson disease brought on by negligence of fellow employee, workman fell and was killed, injury arose out of employment —such injury did not result from "occupational disease". Williams v. Missouri Bridge & Iron Co. (Mich.) 335
Defendants of employee held entitled to compensation for aggravation of existing diseased condition. Patrick v. J. B. Ham Co. (Me.) 432
If employee's injury contributed to progress of disease of tuberculosis which caused his death, death will be held covered by contract of insurance and employer's insurer cannot escape liability. McGoey v. Turin Garage & Supply Co. (N. Y.) 661
Where there was evidence that servant's personal injury resulted in weakened vitality and resistence, so that latent tuberculosis was aggravated into active tuberculosis from which he died, dependents were entitled to compensation. Republic Iron & Steel Co. v. Markiowicz (Ind.) .. 602
Accidents which happen to employee on way home from work are not regarded, as a rule, as arising in course of employment. Bell's Case (Mass.) 749

§ 377. DEFENSES TO CLAIMS FOR COMPENSATION.

Employer has performed duty to provide reasonably safe place within or upon which his employees may work when he has exercised reasonable care and diligence in that regard. Miller v. United Fuel Gas Co. (W. Va.) 847

§ 378. —— IN GENERAL.

Verdict in favor of servant, holding master guilty of negligence, relieved not only servant but master from liability. Peer v. Babcock (N. Y.).. 341

§ 379. —— MISREPRESENTATIONS BY EMPLOYEE IN OBTAINING EMPLOYMENT.

§ 380. —— WILLFUL MISCONDUCT OF EMPLOYEE IN GENERAL.

Statutory disallowance of compensation for deliberate failure to use guard held inapplicable. Farris v. Louisina Long Leaf Lumber Co. (La.) 292
Where mine superintendent and manager in presence of deceased spoke of locking up electric motors to prevent their use by night shift, and where they had refused to leave one out for deceased, but motors had not been locked up, when deceased was killed while using one, his death was not in consequence of violation of rule by employer. Sesser Coal Co. v. Indust. Comm. (Ill.) 584
Where employee killed himself while delirious from injuries, such delirium having been caused by pain resulting from diseased condition caused by electric shock which he received in course of employment, widow was properly awarded compensation. Lupfer v. Baldwin Locomotive Works. (Pa.) 683
Use by employee of freight elevator in leaving place of work to go home held not "willful" within act. Dulac v. Dumbarton Woolen Mills (Me.) 731

§ 381. —— INTOXICATION.

§ 382. —— SATISFACTION OR RELEASE.

Claimant's settlement with third party without consent of employer, did not affect his claim against employer except as to amount—settlement of such claim for less than amount did not destroy claim of his dependents after his death. Solomone v. Degnon Contracting Co. (N. Y.). 121
Amount received by employee from third party in lifetime is not chargeable against claim of dependents except to extent actually received. Solomone v. Degnon Contracting Co. (N. Y.) 121
Injured employee is not required to establish fact that agreement for release of further liability was entered into by reason of fraud of employer before he can have cause reopened—where injured's agreement releasing further liability is signed and approved by commissioner, equitable grounds for setting aside release must be established before case can be reopened—if injured believed results of injury were ended at time he signed release, but it afterwards developed that further pain was attributable to injury, fact would justify reopening of case. Vodopich v. Trojan Mining Co. (S. D.) 507
Award not barred by agreement between injured and employer unless approved by commissioner. Maxwell's Case (Me.) 429

(B) COMPENSATION.

§ 383. ACCIDENT OR INSURANCE FUNDS, AND CONTRIBUTIONS THERETO.

Right of cancellation of policy could be exercised by insurer only as prescribed therein—policy canceled by insurer held canceled under clause

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giving parties mutual right of cancellation—notice of cancellation of policy is valid under one of provisions for cancellation not repugnant to other terms of policy—employee's assent to cancellation of policy by insurer was not necessary. Altinovitch's Case (Mass.) 443
If under laws of Texas employee was protected by policy issued by employer's insurer, such protection was not lost because employer failed to pay proper premium to insurer. Home Life & Accident Co. v. Orchard (Tex.) 688
It is essential to recovery against insurance company by employee to show that such insurer was carrying the risk. U. S. Fidelity & Guaranty Co. v. Nelson (Tex.) 835

§ 384. AMOUNT AND COMPUTATION OF AWARD.

§ 385. —— DISABILITY BENEFITS

(1). In general.

Injured workman's loss of earning capacity is measured by average weekly earnings—basis of computation, when he has worked less than year, cannot be that prescribed where one has worked substantially a year.—Wage scale of fellow employee who had worked more than year was available for purpose—full wage scale of claimant should be presented. Thibeault's Case (Me.) 65
Average prevailing wage for less than "net period of two calendar weeks", held basis for compensation—where servant worked sporadically, new contract being made for each day's work, compensation for injury must be based on average wage prevailing in occupation. Mazzi v. Smedley Co. (Conn.) 393
Compensation cannot be paid employee for injury which does not incapacitate employee for at least one week. U. S. Fidelity & Guaranty Co. v. Nelson (Tex.) 835
Act is intended to provide system which will make award in all cases, regardless of cause or manner of infliction, limited in amount, but commensurate in some degree with disability suffered. Klippert v. Indust. Ins. Dept. (Wash.) 843
Person holding title of executive managing officer of a corporation and at the same time being its employee and performing the work of such, in which he is injured, should be allowed to draw compensation based only on wages received by him in his capacity as employee. Skouitchi v. Chic Cloak & Suit Co. (N. Y.) 772

(2). —— Injury to arm, hand, or finger.

(3). —— Injury to leg or foot

(4). —— Loss of arm, hand, or finger.

(5). Total Disability.

(6). —— Loss of arm, hand, or finger.

(7). —— Loss of leg or foot.

(8). Partial disability.

(9). —— Loss of or injury to eye.

Carpenter previously blinded in one eye and retaining 25 per cent vision in other eye after injury held entitled to compensation award for "loss of eye" and not for total disability. Collins v. Albert A. Albrecht Co. (Mich.) 309

(10). —— Injury to arm hand, or finger.

Method of determining percentage of loss of use of arm is at best matter of rough estimation and approximation. Johnson v. U. S. R. Administration (N. Y.) 249
Award for partial permanent loss of use of arm authorized if justified by facts. Hafer Washed Coal Co. v. Indust. Comm. (Ill.) 575

(11). Permanent disability.

Fact that workman has performed some labor since he was injured is held under evidence to be no ground for overthrowing finding that injury resulted in partial permanent disability. Chance v. Reliance Coal & Mining Co. (Kan.) 201
Workman awarded schedule compensation for loss of eye held entitled to full schedule compensation for subsequent loss of major arm. Klippert v. Indust. Ins. Dept. (Wash.) 843
Liability for compensation prescribed in statute for injuries enumerated therein is absolute and not dependent upon actual decrease in earnings. Chiovitte v. Zenith Furnace Co. (Minn.) 756

(11¼). Loss of or injury to eye.

Compensation for partial loss of sight should be paid for time in proportion which injury bears to total loss.—Term "member" as used in statute includes the eye. Chiovitte v. Zenith Furnace Co. (Minn.) 756

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(11½). Loss of or injury to ear.

(12). —— Loss of arm, hand, or finger.

There must be actual physical loss of more than one finger or permanent loss of use of finger before commission has jurisdiction to make award for proportionate loss of use of hand, and, slight injury to three fingers does not constitute "loss of more than one finger". Clayton v. Foundation Co. (N. Y.) 223

Loss of part of phalange of finger held not "loss of phalange of finger". Maxwell's Case (Me.) 429

Major portion or more than one-half of a "phalange" of a finger must be removed before same is "substantially" lost, so as to constitute "loss of first phalange". Forbes v. Evening Mail (N. Y.) 471

Sawyer, who lost one-third of motion in terminal joint of index finger, did not lose use of such finger or phalange if it could fulfill some of its natural functions in any employment for which he was adapted, and even award of partial loss of use could not stand. Stringham v. Ashton (N. Y.) 490

Expressions "loss" and "loss of use" should be given their ordinary meaning in construing act and loss of use of both hands is not necessarily loss of both hands — when normal use of hands is entirely taken away, there is "loss" of their use without actual severance of hands — injuries to employee's hands, whereby joints of wrist and fingers were stiffened so that he could not grasp small objects and one of the hands could not be raised at the wrist, held not loss of both hands. Ballou v. Indust. Comm. (Ill.) 565

(13). —— Injury to arm, hand, or finger.

(14). —— Injury to leg or foot.

Employee whose leg was amputated ten inches above ankle joint held entitled to compensation for loss of leg. Payne v. Indust. Comm. (Ill.).. 577

(15). Temporary disability.

Period of temporary total incapacity is that period immediately after accident during which injured employee is totally incapacitated for work—where workman suffered broken arm, such period was that during which he was unable to work because of broken bone and, after it had completely knitted and stiffness disappeared, any disability then existing was permanent. Mt. Olive Coal Co. v. Indust. Comm. (Ill.)..... 272

(16). Expenses of medical or surgical treatment and nursing.

(17). Deductions or set-offs, and duty of claimant to reduce loss.

Finding of board that employer voluntarily paid employee compensation for full period of refusal to accept services of employer's physician shows that refusal lasted only until payment ceased, so that employer waived right to refuse compensation. American Coal Mining Co. v. Decourcey (Ind.) 398

(18). —— Submission to surgical operation.

Commission cannot compel claimant to submit to operation but can determine extent to which disability is attributable to such refusal—if operation is not attended with danger to life, health, or of extraordinary suffering and if, according to best opinion, offers reasonable prospect of relief, claimant must either submit or release employer from obligation to maintain him—where workman sustained broken arm and only remaining disability was adhesions in tendons curable by mere manual manipulations under laughing gas but workman refused to submit, his permanent disability was held due to such refusal and not to accident. Mt. Olive Coal Co. v. Indust. Comm. (Ill.) 272

Whether operation requested for cure of employee's injury is reasonably essential, is for discretion of commission based upon evidence submitted to it and court cannot interfere with finding except where commission has acted unreasonably or abused discretion. O. W. Rosenthal & Co. v. Indust. Comm. (Ill.) 286

Employee refusing to submit to operation for hernia cannot recover compensation for period of time beyond that which would have been required for his recovery after operation if danger incident to such operation was practically negligible. Schiller v. Baltimore & O. R. Co. (Md.) 620

(19). Excessive award.

(20). Commutation of payments and award of gross sum.

Where injured servant had wife and eight minor children wholly dependent upon him, with no property or income, and was unable to perform manual labor and desired lump sum to purchase farm, but had been earning large salary prior to injury and since had drawn over $60 a

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month and was 15 months after accident penniless and in debt, held that commission's refusal to award lump sum was not abuse of discretion. Kokotovich v. Indust. Comm. (Colo.) 553

§ 386. —— DEATH BENEFITS.

(1). In general.

Words "average amount contributed weekly" are used in ordinary, not technical, sense. Indian Creek Coal & Mining Co. v. Kutter (Ind.)..... 44

Where servant received fatal injuries a few days after starting work, never having worked before except three weeks for relative as harvesting helper, amount earned in harvesting should not enter into computation of weekly wage—board was not required, for purpose of determining such child's weekly contributions to dependents to include any period of time other than term of employment with employer. Hoosier Veneer Co. v. Stewart (Ind.) 289

(2). Deductions.

Where municipality paid policeman's salary from date of injury to death it is not entitled to credit on account of such payments in proceedings under act. Ogden City v. Indust. Comm. (Utah.)..... 249

(4). Commutation of payments and award of gross sum.

Where widow was left without property and with seven small children four Lump sum award to widow and daughter for purchase of farm is not within power of commission. Lauritzen v. Terry & Tench Co. (N. Y.)..... 110

of whom were under five, lump sum award was not abuse of discretion—it was not abuse of discretion for court to discount weekly payments at 5% instead of 6%. Lumbermen's Reciprocal Ass'n v. Behnken (Tex.).. 363

(5). Apportionment of payments.

§ 387. —— DOUBLE COMPENSATION.

Commission was without authority to allow compensation for temporary total disability in addition to compensation for loss of leg above knee. Spring Canyon Coal Co. v. Indust. Comm. (Utah.)..... 251

Act provides compensation for period of incapacity between date of injury and date of determination of complete loss of use of injured arm or limb. Wrenn v. Conn. Brass Co. (Conn.) 563

Workman caught in unguarded pulley while applying dressing may be awarded increased compensation by way of penalty because his injury resulted from failure to comply with commission's orders. Eau Claire Sand & Gravel Co. v. Indust Comm. (Wis.) 861

§ 388. PERSONS ENTITLED TO COMPENSATION FOR DEATH OF EMPLOYEE (DEPENDENTS).

Dependents' cause of action against third party is independent and not derived from rights as employee. Solomone v. Degnon Contracting Co. (N. Y.) 121

Where minor son made substantial contributions to mother's support and assisted her, fact that she was not dependent on him for bare necessities of life, furnished by husband, will not prevent award for partial dependency. Ogden City v. Indust. Comm. (Utah.)..... 249

Dependency entitling parties to compensation is to be determined as of time of accident—children whose father is living may be allowed compensation as being dependent upon mother. Johnson Coffee Co. v. McDonald (Tenn.) 512

Dependency of parent claiming benefits for son's death must exist at time of injury but it may not be necessary to show that contributions were made at precise time of injury. Globe Grain & Milling Co. v. Indust. Comm. (Utah.) 245

Where mother, awarded custody of child, abandoned him, disappeared and was presumptively dead, father was under legal duty to provide for him as "dependent"—where father had voluntarily resumed responsibility for child's support and taken boy to live with him, relation of parent and child was restored as though it had never been disturbed—child under 18 is conclusively presumed dependent though working out for board. Pacific Gold Dredging Co. v. Indust. Accident Comm. (Calif.) 266

"Dependent" is one who is sustained by another or relies upon another for support or reasonable necessaries consistent with position in life—where deceased, father, and sister, gave earnings to mother, for upkeep of home, mother and minor sister, not wage earning, were partially dependent. Rockford Cabinet Co. v. Indust. Comm. (Ill.) 280

Dependency of parents on minor child is question of fact to be determined from evidence. Hoosier Veneer Co. v. Stewart (Ind.) 289

In determining whether claimant in proceeding is dependent, conditions at time of death must be reckoned. Hoffman v. Van Benthugsen (N. Y.).. 473

Voluntary contributions are not necessarily evidence of dependency—dependency is determined by conditions at time of injury—if invalid dependent is able to support himself in any branch of physical or mental endeavor, he cannot be said to be "incapacitated". Morgan v. Butte Central Min. & Mill. Co. (Mont.)..... 462

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Finding of support entitling parents to compensation for death of minor son contributing to payment on home held justified — where minor contributes his earnings to his family, with whom he resides, amount necessarily used for his individual care and support from general family purse should be deducted from his earnings in determining amount of his contributions to support of his dependents, notwithstanding parent's legal duty to support him. Milwaukee Basket Co. v. Indust. Comm. (Wis.) 706

Where adult son lived with parents paying them his board and lodging and contributing nothing else to family purse excepting presents, made payments upon home to family as he had agreed to do if his father would purchase one, his parents are not entitled to award for his death. Wisconsin-Minnesota Light & Power Co. v. Indust. Comm. (Wis.) 707

Limitation of compensation to nonresident dependent sharing in lapsed awards defined. Indust. Comm. v. Colo. Fuel & Iron Co. (Colo.) 551

Test as to dependence is whether employee's contributions were relied upon by dependent for his or her means of living, the class and position in life of dependent being considered — one steadily employed who did not require son's earnings for own or family's living expenses, but who applied such earnings toward payment of purchase price of house, held not dependent. Atwood v. Conn. Light & Power Co. (Conn.) 558

Test of dependency is whether contributions were relied on by dependent for his means of living, judged by position in life etc. — child contributes to support of its parents when it contributes a substantial sum to the support of family. Richardson Sand Co. v. Indust. Comm. (Ill.) 581

Dependency of father and mother of employee must exist at time of employee's death to entitle them to compensation. Hermann v. Amer. Ry. Express (N. Y.) 669

Award is properly made for benefit of deceased employee's minor son who has lived in distant state, where there is no proof of emancipation, which may be established by proof that he had supported himself and that his father had not contributed to his support. Auburn & Alton Coal Co. v. Indust. Comm. (Ill.) 727

Divorce decree awarding custody of minor children to mother does not affect father's legal liability to support minor son, and award of benefits to son for father's death is proper. Panther Creek Mines v. Indust. Comm. (Ill.) 725

Where decedent and his sister had lived from childhood with aunt, finding was warranted that deceased was member of her family rather than head of family of which she was member. Stafford's Case (Mass.)..... 754

"Dependent" is limited to one who must rely on contributions of employee for some substantial portion of his necessary support.—Questions of entire or partial dependency shall be determined as the fact may have been at the time of injury.—Status of claimant in society and his reasonable needs and expectations should be considered in determining question of dependency.—Claimant must show actual dependency.—Portion of child's contributions paid for luxuries to be deducted from contributions by son to family in determining amount contributed by employee to support of partial dependent on which amount of compensation is based.—Only portion of earnings used for lawful support considered in determining partial dependency. MacDonald v. Employers' Liability Assur. Corp. (Me.) 737

Child of undivorced wife, living in adultery with unmarried man held entitled to death benefits as "dependent" member of his "family" or "household" in good faith. Moore Shipbuilding Corp. v. Indust. Accident Comm. (Cal.) 713

§ 389. SUBROGATION TO RIGHTS OF INJURED EMPLOYEE.

Amount received by employee from third party in lifetime is not chargeable against claim of dependents except to extent actually received. Solomone v. Degnon Contracting Co. (N. Y.)..... 121

Employer resisting claim and denying interest in right of action against wrongdoer cannot sue. Rorvik v. North Pacific Lumber Co. (Ore.) .. 674

§ 390. PAYMENT OF COMPENSATION

§ 391. —— PERSONS LIABLE.

§ 391¼. ——

Though letter from board to insurance carrier stated that award would be complied with up to certain time by payment thereof, tender thereof was not full legal tender, not including interest on deferred payments to which injured was entitled. U. S. Fidelity & Guaranty Co. of Baltimore, Md., v. Parsons (Tex.) 517

§ 391½. —— PENALTY FOR DEFAULT OR DELAY.

Periodical installments for injury do not become due until obligation of employe is definitely ascertained or settled where there is reasonable controversy over extent of injury. Osborn v. Omaha Structural Steel Co. (Neb.) 213

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Trial court properly allowed interest to injured employee against employers insurer on amount allowed employee for medical and surgical attention and for weekly payments from due date of each item under act, insurer having had notice of injury through notice of employer. Home Life & Accident Co. v. Orchard. (Tex.) 683
Payments do not carry penalties for nonpayment until obligation is definitely settled.—Where controversy is over percentage of loss of use of injured arm, and where testimony in behalf of employer admits a given percentage of permanent partial disability, such employer, to be relieved of penalty provided in act for nonpayment, must pay or tender to employee amount admittedly due.—Evidence examined, and held in part to present a reasonable controversy as to extent of injury. Hall v. Germantown State Bank (Neb.) 765
Compensation with statutory waiting time penalty properly allowed.—When employer appeals from judgment of district court in favor of his employee and it is affirmed in this court, such employer is liable for statutory waiting time penalty.—Ignorance of the law is not shield from liability for its infraction. Abel Const. Co. et al. v. Goodman (Neb.) 762

§ 392. —— AUDIT OF CLAIMS INCURRED OR PAID BY BOARDS OR COMMISSIONS.

§ 393. —— TERMINATION OF PAYMENTS.

Where liability had been fixed by agreement approved by board, subsequent insanity of claimant did not terminate liability. Ward v. Heth Bros. (Mich.) 325

§ 393¼. —— PRIORITIES.

§ 393½. —— MEDICAL ATTENDANCE AND SERVICES.

(C) PROCEEDINGS.

§ 394. NATURE AND FORM OF REMEDY.

§ 394½. ABATEMENT OR SURVIVAL.

§ 395. WHAT LAW GOVERNS.

§ 396. JURISDICTION OF COURTS.

Jurisdiction of commission is limited by act to determination of dispute concerning compensation, and on finding that claimant was not employee of insured employer, commission has no jurisdiction to adjudicate questions between employer and insurer. Porter v. Indust. Comm. Wisconsin State Register Co. v. Indust. Comm. (Wis.) 708

§ 397. BOARDS AND COMMISSIONS.

Commission may exercise powers incident to those granted by act, necessary to accomplish its object—commission's jurisdiction over self insurers is clearly implied by act. Utah Copper Co. v. Indust. Comm. (Utah) 147
Where relationship of employer and employee was constituted and both were subject to act, employer's denial of injury did not require dismissal of petition and commission had jurisdiction to determine whether injury arose in employment and, if so, to make award. Utah Fuel Co. v. Indust. Comm. (Utah) 370
Jurisdiction of board as opposed to jurisdiction of federal courts of admiralty cannot be established by considerations arising from conduct of parties. Dorman's Case (Mass.) 452

§ 397½. REPORTS OF ACCIDENT.

§ 398. NOTICE OF INJURY OR CLAIM, AND DEMAND FOR COMPENSATION.

Employer's knowledge of injury constituted substitute for written notice. Garton v. Kleinknight. (Ind.) 51
Where employer has notice that accident has happened and that employee has been injured, he has knowledge contemplated by act. Foreman's knowledge of accident is not notice to employer. Frank Martin-Laskin Co. v. Indust. Comm. (Wis.) 169
Employer, by paying funeral expenses, is not estopped from alleging want of statutory notice. Manteufel v. Indust. Comm. (Wis.) 173
Under circumstances as stated, award held subject to reversal for want of notice. Davis v. Butler (N. Y.) 226
Where injured employee deserted wife and she instituted proceedings for compensation in husband's name but later amended application to bring proceedings in own name, fact that amendment was made after expiration of statutory time for bringing proceedings held not to bar claim—constructive notice to such husband by publication held sufficient as to him. Northwestern Redwood Co. v. Indust. Acc. Comm. (Calif.) 262

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Time limitation for making claim affects right as well as remedy—letters from board to employer calling attention to failure to report accident and to insurer asking prompt attention, were not signed by board in behalf of claimant where it furnished blanks to his attorney for notice of claim—insurer is not agent of employer to receive notice of claim—requirement of claim to be made within six months cannot be varied by judicial construction. Dochoff v. Globe Const. Co. (Mich.) 311
"Knowledge" is used as meaning actual knowledge, but not absolute certainty—where employer received intelligible information of accident he cannot say he was without knowledge of accident—if injured informed overseer of accident, such knowledge is sufficient to charge employer—"second hand" subordinate of overseer is not employer's agent for purposes of receiving notice of injury to employee—amendment to provide that failure to give notice of injury shall not bar claim if insurer was not prejudiced, is not retroactive. Walkden's Case (Mass.)..... 454
Award against company, where notice was not given company, was unauthorized although proprietor of company appeared as witness. Skeels v. Paul Smith's Hotel Co. (N. Y.) 486
Letter written by workman to employer offering to negotiate for settlement amounts to arbitration, and failure of employer for over two months to respond may be regarded as refusal to consent—where workman is authorized to bring action for compensation and does so, subsequent offer of defendant to settle by arbitration does not impair right to sue. Southern v. Western States Portland Cement Co. (Kan.)..... 424
Where agents of employer's insurer of Texas employees assumed that liability was under employer's other policy with another company covering Louisiana employees, and without request from either employer or employee presented claim to other insurer, fact does not aid Texas insurer to escape liability to injured employee for award — circumstances as stated were sufficient to excuse employee's delay in filing claim until after six months — where insurer stipulated in its policy that as between employee or defendants and insurer, notice to or knowledge of injury on part of employer should be notice to or knowledge on part of insurer, insurer had notice of injury on account of notice or knowledge of employer. Home Life & Accident Co. v. Orchard (Tex.) 688
Under circumstances as stated, petition for review of compensation agreement was not too late. Hughes v. Amer. Internat'l Shipbuilding Corp. (Pa.) 681
Claim for compensation need not be in writing or made in unequivocal language or terms; terms will meet act if employer is apprised that compensation is claimed — notice to employer of claim for compensation may be waived. Smith v. Heine Safety Boiler Co. (Me.) 611
Failure of mother of illegitimate children of deceased employee to file claim for compensation for children within one year from death of employee held fatal to the right of such children to recover compensation.—Guardian's delay in filing claim for compensation precludes recovery.—Claim for illegitimate children of deceased employee should be made by mother of such children. Grillo v. Sherman-Stalter Co. (N. Y.)..... 788
Only ground on which commission may excuse giving of notice is either that notice could not have been given, or no prejudice has been caused thereby.—Notice that servant had case of diphtheria would not be notice of accidental injury arising out of and in course of employment and, if it was intended to hold employer responsible for such disease, it was the duty of claimant to give notice required containing time, place, nature, and cause of injury.—It is duty of commission to follow rules laid down by Court of Appeals, and not to treat as mere matter of form provisions requiring notice to employer of time, place, nature, and cause of injury.—Where commission acts to relieve claimant from giving notice of injury it should be only on evidence furnished by claimant that failure of notice did not operate to prejudice employer and insurance carrier, and facts on which conclusion rests, and not mere conclusion, should be given in the record. Bixby v. Cotswood Comfortable Co. (N. Y.) 783

§ 398½. ARBITRATION.

§ 399. MEDICAL EXAMINATION OF CLAIMANT.

If examination of injured employee before commission places him at disadvantage, on showing of such fact, it would be proper to continue hearing to reasonable time, to allow employee properly to present case—act requires employe to submit to examination, where employer is denying right to compensation as well as where liability is acknowledged and payment made. Jackson Coal Co. v. Indust. Comm. (Ill.)..... 190

§ 400. PARTIES.

Word "may" in act is not permissive as regards right of infant to appear with or without guardian. Gouanillou v. Indust. Accident Comm. (Calif.) 257
Under California act, under circumstances as stated, employee may sue and, in case of employer's failure to join as plaintiff, make him a defendant. Rorvik v. North Pacific Lumber Co. (Ore.) 674

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§ 401. PLEADING.

Where petition simply charged incapacity from accident, employer may be reasonably expected to meet evidence showing that disease was aggravated by such injury. Blackburn v. Coffeyville Vit. Brick & Tile Co. (Kan.) 58
Petition held sufficient to sustain award to dependents. Utah Copper Co. v. Indust. Comm. (Utah) 147
Question whether employee's injury resulted from fact that he was without employer's knowledge or consent taken to hospital where injuries were enhanced it resulting in permanent disability, was not in issue where not pleaded. Cudahy Packing Co. v. Zafiropoulos (Ind.) 116
Petition to set forth matter in dispute and petitioner's claim thereto should show nature of claim. Maxwell's Case (Me.) 429

§ 402. EVIDENCE.

§ 403. —— PRESUMPTIONS AND BURDEN OF PROOF.

Claimant has burden of establishing continuance of disability after date when physician pronounced him well and able to work. Chimora v. Internat. Ice Cream Co. (N. Y.) 96
Burden of sustaining proof of relation of master and servant is upon claimant. Aisenberg v. C. F. Adams Co. (Conn.) 28
Burden is on claimant to show that injury arose out of employment. Morris & Co. v. Indust. Comm. (Ill.) 41
Burden of proof is on claimant to show that accident arose out of employment. Gale v. Munro (N. Y.) 106
Burden is on applicant to make proof that accident occurred in employment. Rockford Cabinet Co. v. Indust. Comm. (Ill.) 280
Where employer seeks to avoid liability on ground that employee was engaged in interstate commerce at time of injury, burden is on employer. Rockford City Traction Co. v. Indust. Comm. (Ill.) 283
Burden of establishing right to lump sum compensation is imposed on moving party. Lupoli v. Atlantic Tubing Co. (N. Y.) 356
Claimant has burden of showing that disability resulted from injury occurring in course of employment. Miller v. Gardner & Lindberg (Iowa.) ... 405
Employer opposing compensation proceedings has burden of proving engagement in interstate commerce at time of injury. Lindway v. Pennsylvania Co. (Pa.) 502
Provision creating conclusive presumption that children under 16 are wholly dependent on father does not exclude proof in proceedings to recover compensation for death of mother that children were in fact dependent upon her earnings, though father was still living. Johnson Coffee Co. v. McDonald (Tenn.) 513
There is no presumption from mere fact of family relationship that parents are partially dependent on unmarried minor son and they have burden of showing such dependency to reasonable certainty by competent evidence. Milwaukee Basket Co. v. Indust. Comm. (Wis.) 703
Railroad engaged in both interstate and intrastate commerce, seeking to avoid compensaion, must prove interstate commerce employment. Payn v. Indust. Comm. (Ill.) 577
Claimant has burden to show continuance of disability. Grunsick v. Charles Schaefer & Son (N. Y.) 790
Burden of proof is on claimant Dulac v. Dumbarton Woolen Mills (Me.) 731

§ 404. —— ADMISSIBILITY.

Evidence to be produced through depositions must conform to provisions of code. Eretza v. Ft. Montgomery Iron Works (N. Y.) 98
Commission held justified under evidence in accepting testimony of employer's representative that claimant was employed to watch stowage of employer's cargo on ship by stevedores employed by captain and report to employer. Newham v. Chile Exploration Co. (N. Y.) 797

§ 405. —— WEIGHT AND SUFFICIENCY.

(1). In general.

Evidence held not sufficient to sustain finding that accident resulted from negligence of defendant. Travelers' Ins. Co. v. Healy Plumbing & Heating Co. (Minn.) 83
Evidence held to sustain finding the injury was result of "serious and willful misconduct of . . . officer" of corporate employer. E. Clemens Horst Co. v. Indust. Acc. Comm. (Cal.) 3
Award held not sustained by testimony based on hearsay statements, subsequently contradicted. State Indust. Comm. v. Downey-Snell Logging Co. (N. Y.) 129
Evidence held to show that injured employee had deserted wife and was living. Northwestern Redwood Co. v. Indust. Acc. Comm. (Calif.) 262
Evidence of claimant under act is not binding on commission because uncontradicted. Miller v. Gardner & Lindberg (Iowa.) 405

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Finding that relator had actual knowledge of accident within ninety days is sustained by evidence. Kraker v. Nett (Minn.) 457
A fact essential to be proven in order to support claim for compensation for death may not be shown by uncorroborated hearsay declarations of deceased servant alone. Jack v. Morrow Mfg. Co. (N. Y.) 476
Of two equally probable inferences as to mode in which employee fell to his death, commission may not adopt that which spells liability. Joseph v. United Kimono Co. (N. Y.) 478
Finding of commission cannot be based on mere conjecture, but must have some substantial foundation in the evidence — commission is not justified in finding for a party because there is some evidence which, if standing undisputed, would justify the award. Decatur Const. Co. v. Indust. Comm. (Ill.) 568
Evidence held sufficient to warrant finding of board that employer had knowledge of injury. Lapan's Case (Mass.) 637

(2). Relation of parties.

Evidence held not sufficient to sustain finding that decedent was in employ of city at time of accident. City of Chicago v. Indust. Acc. Comm. (Ill.) 37
Claimant's testimony that he was employed by particular company and paid by it, is sufficient to establish relation of employer and employee. Rockford City Traction Co. v. Indust. Comm. (Ill.) 283
Where teamster was injured while hauling coal for company with own team, evidence held sufficient to sustain finding that teamster was not employee. Norton v. Day Coal Co. (Iowa.) 408
Mere scintilla of evidence is insufficient on jurisdictional question to establish relation essential to award—in widow's proceeding for death of husband, evidence held to show that there was no contract of employment between deceased and company alleged to have been employer. Skeels v. Paul Smith's Hotel Co. (N. Y.) 486
Fact of employment is essential to jurisdiction of commission in making award and when put in issue, must be established by common-law evidence sufficient to support verdict of jury. Svolos v. Harry Marsch & Co. (N. Y.) 666
Evidence held to support finding that one employed to oversee manner in which alleged employer's cargo was stowed on ship by stevedores employed by captain was in employ of such alleged employer. Newham v. Chile Exploration Co. (N. Y.) 797
Evidence held to warrant inference that father of employer, in hiring contractor who employed injured claimants, was within the scope of his authority, to bind employer. Davis v. Indust. Comm. (Ill.) 723
In proceeding for injuries to lumberman's employee, evidence that employee, when injured, was engaged in employment and that employer was not engaged in farming held sufficient to sustain findings of Commission. Posey v. Moynehan (N. Y.) 812

(3). Acceptance or rejection of statute.

Evidence held sufficient to warrant finding that employee's death was caused by lead poisoning suffered in his employment. O'Donnell's Case (Mass.) 453

(4). Injury arising out of and in course of employment.

Evidence held not to show that fatal injury occurred in course of employment. Michelov v. Century Metal Spinning & Stamping Co. (N. Y.) 119
Evidence held not to show that injury occurred in course of employment. Hager v. Griffin Mfg. Co. (N. Y.) 108
Claim for death of employee in elevator shaft held not established. McMahon's Case (Mass.) 70
Evidence held to warrant finding that death of employee from train used to take employees to work arose out of and in course of employment. Indian Creek Coal & Mining Co. v. Wehr (Ind.) 47
Finding that accident arose out of employment held unsupported by evidence. Gale v. Munro (N. Y.) 106
Evidence held to sustain finding that rheumatism was not caused by injury. Jackson v. Iowa Telephone Co. (Iowa) 54
Award based on finding that death from tuberculosis was caused by injury held sustained by evidence. State Indust. Comm. v. Hires Condensed Milk Co. (N. Y.) 132
Evidence held not to sustain award for injury causing hernia. State Indust. Comm. v. Amer. Hide & Leather Co. (N. Y.) 126
Unsupported hearsay evidence held insufficient to establish injury in course of employment. McHale v. Sheffield Farms Co. (N. Y.) 115
Award for deafness from occupation, not sustained by medical testimony to prove causal connection, held not sustained by evidence. Ferst v. Dictagraph Products Corp'n (N. Y.) 100
Evidence held sufficient to sustain finding that disease was result of injury in employment Blackburn v. Coffeyville Vit. Brick & Tile Co. (Kan.) .. 58
Claimant must show by competent testimony and furnish evidence that injury occurred in connection with employment—under circumstances stated evidence held to sustain finding that death was caused in connection with employment Vulcan Detinning Co. v. Indust. Comm. (Ill.) ... 191

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There must be some evidence in addition to proof of accident from which conclusion can be drawn that injuries arose out of and in course of employment. Lorchitsky v. Gotham Folding Box Co. (N. Y.) 218
Where deceased employee might have finished work shortly after time stated and thereafter was found lying with broken ribs about 50 feet from employer's premises, without evidence to explain reason for being there, warrant of compensation cannot stand. Russo v. Jarvis Stores, Inc. (N. Y.) 237
Where disability was infection or disease of kidneys, claimed to have been result of accident, evidence held insufficient to sustain award. Kade v. Greenhut Co., Inc. (N. Y.) 232
Award must be sustained by evidence showing accident occurred in employment—evidence held to show employee's death by falling from elevator was in employment though he was forbidden use of elevator. Rockford Cabinet Co. v. Indust. Comm. (Ill.) 280
Award in favor of welder's loss of eyesight held warranted on theory that accidental breaking of safety hood exposed eyes. Rockford City Traction Co. v. Indust. Comm. (Ill.) 283
Award held sustained by deceased employee's statements regarding injury together with admissions by employer when reporting accident. Anthus v. Rail Joint Co. (N. Y.) 247
Where workman was struck in groin when a crowbar in his hands slipped, finding of commission that disability did not result from any injury in the course of employment held warranted by evidence. Miller v. Gardner & Lindberg (Iowa.) 405
Evidence held to show that fatal hemorrhage began in course of work and not before employee started work—facts held sufficient to sustain finding that death was caused by accident arising out of employment. Patrick v. J. B. Ham Co. (Me.) 432
Compensation for death by tuberculosis held not sustainable by statutory presumption, unaided by evidence. Bowman v. Gibson (N. Y.) 468
Evidence held insufficient to justify inference that accident arose from cause connected with decedent's employment. Joseph v. United Kimono Co. (N. Y.) 478
Evidence that deceased was struck and killed by train after leaving work about 1,200 feet from mine, held sufficient to support finding that he was not killed in course of employment although company had interest in property on either side of the railway. Stahl v. Watson Coal Co. (Pa.) 505
Burden is on applicant for compensation to prove by direct and positive evidence or by evidence from which such inference can be fairly drawn that accident arose out of employment—evidence held to support award for death from electrocution. Wasson Coal Co. v. Indust. Comm. (Ill.). 592
Evidence that injury accelerated progress of disease held sufficient to sustain award. McGoey v. Turin Garage & Supply Co. (N. Y.) 661
Where epileptic employee hauling water in tank on which he had to stand while filling it was drowned in partially filled tank and there was no direct evidence that he fell in as result of a fit, finding that accident arose out of employment was authorized. Miller v. Bell (Ind.) 598
Conclusion that mine examiner was killed by accident under circumstances as stated, held justified — in proceeding for death of mine examiner, evidence held to show that a rule that no one should ride electric motors except motormen and truck riders was mere paper rule and never enforced. Sesser Coal Co. v. Indust. Comm. (Ill.) 584
Award on account of a hernia could not be sustained on evidence that employee, while working handle up and down with three other men, felt pain in the groin, without evidence of any unusual happening. Noble v. Mathieson Alkali Co. (N. Y.) 810
Evidence that bell boy, missed during his hours of employment, was later found dead at bottom of elevator shaft with wound in his head, held to sustain award for accidental death in course of employment. Watkinson v. Hotel Pennsylvania (N. Y.) 817
Compensable injury to workman by log held sustained by evidence. Kiercok v. Philadelphia & Reading Coal & Iron Co. (Pa.) 828
Evidence held to show compensable injury to workman developing cardiac collapse resulting from overstrain in removing buggy from one location to another. Tracey v. Philadelphia & Reading Coal & Iron Co. (Pa.) 831
Where there was evidence that miner became partially paralyzed as result of apoplexy and that he was afflicted with enlarged heart but no witness testified that apoplexy was brought on by his work, finding that injury was not accident was justified. Lesko v. Lehigh Valley Coal Co. (Pa.) 830
Evidence of medical experts held competent and sufficient to show that injury sustained in course of employment decreased vitality and that pneumonia developed as second infection which caused injured's death and that there was direct connection between injury and death. Dumbluskey v. Philadelphia & Reading Coal & Iron Co. (Pa.) 827

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In proceeding to recover compensation for death of employee from pneumonia, evidence that employee had received slight injury to his chest the day before he was taken sick and expert testimony that injury was inciting cause of pneumonia held sufficient to sustain award. Delso v. Crucible Steel Co. of America (N. Y.) 805

Before there can be award, all elements of accidental injury arising out of and in course of employment must be shown to exist by common-law proof.—Commission may not presume that dust from hemp about which employee is working is charged with disease germs, and so, when getting into his eye, is calculated naturally and unavoidably to result in ulcer thereof and therefore, in absence of evidence to that effect, may not make award on theory of ulcer being so caused. Pinto v. Chelsea Fibre Mills (N. Y.) 807

In proceeding for compensation for death of watchman in a theater from injuries sustained at a time when he was alone in theater, evidence held to sustain finding that his injuries were caused by falling from the stage. — In death cases, same quality of evidence as to conduct of deceased is not required as in case where he is alive and can testify. O'Sullivan v. A. H. Woods Theatre Co. (N. Y.) 803

Evidence held insufficient to show a causal relation between servant's accidental injury and his death from heart disease, so as to justify award. Nester v. Pabst Brewing Co. (N. Y.) 796

In proceeding, held that there was nothing to show that diphtheria causing disability, was natural and unavoidable result of accident or anything which occurred while claimant was at work. Bixby v. Cotswood Comfortable Co. (N. Y.) 783

(5). Dependents.

Dependency must be proved by legal evidence—evidence held insufficient to establish dependency and relationship of alien claimants. Vassiliakis v. Fairfax Hotel Co. (N. Y.) 139

Held that there was evidence from finding of dependency could be made, and that injury was in employment. Levitan Embroidery Works v. Lamatina (N. J.) 87

Dependency must be proved by competent evidence—evidence held insufficient to establish dependency of alien father. Eretza v. Ft. Montgomery Iron Works (N. Y.) 98

Evidence held not to show dependency of father and mother. Hermann v. Amer. Ry. Express Co. (N. Y.) 669

Where son's contributions to support of his parents were not needed when crops on father's farm were good, but were needed when father's income was insufficient, finding that parents were dependents will not be disturbed by court. Richardson Sand Co. v. Indust. Comm. (Ill.) 581

Evidence held to justify conclusion that deceased denied custody of minor child by divorce decree had voluntarily resumed parental relations and obligations, and assumed burden of child's maintenance, education and support. Pacific Gold Dredging Co. v. Indust. Accident Comm. (Calif.) 266

Evidence held to prove that applicants were partial dependents. Hoosier Veneer Co. v. Stewart (Ind.) 289

Evidence held to show claimant's temporary total disability. Lawson v. N. Y. & P. R. S. S. Co. (La.) 426

Held that evidence did not clearly preponderate against finding of board that applicant was not a dependent. Morgan v. Butte Central Min. & Mill. Co. (Mont.) 462

In proceeding by mother to obtain compensation for death of son, facts held insufficient to show dependency. Hoffman v. Van Benthugsen (N.Y.) 473

(6). Compensation.

Evidence held not to prove disability subsequent to date when injured workman was pronounced well and able to work. Chimora v. Internat. Ice Cream Co. (N. Y.) 96

Claimant held not entitled to double damages on ground of employer's misconduct. Sciola's Case (Mass.) 72

Evidence held to prove that employee either willfully or because of pain, neglected and refused to follow instructions of physicians, to detriment of injured arm. Miller v. Diamond Ice & Coal Co. (Del.) 185

Where workman sustained injury and refused to submit to simple operation, evidence held to justify finding, suspending award on ground of such refusal. O. W. Rosenthal & Co. v. Indust. Comm. (Ill.) 286

Evidence held to justify commission basing award upon estimated loss of one-third use of arm instead of one-quarter where such was estimate of medical witnesses. Johnson v. U. S. R. Administration (N. Y.) 349

Evidence held insufficient to show that employee sustaining injuries causing stiffening of the joints of wrist and fingers was totally and permanently disabled. Ballou v. Indust. Comm. (Ill.) 565

Evidence held insufficient to support compensation award for percentage of loss of use of legs. Decatur Const. Co. v. Indust. Comm. (Ill.) 568

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Actual earnings of injured employee in other employment since receiving his injury is not conclusive on commission as to extent of impairment of earning capacity but other matters may also be considered by it — testimony by defendant of inability to do certain work is insufficient to enable commission to fix therefrom amount of impairment of his earning capacity — finding of impairment of earning capacity must be based on competent testimony — evidence held not to sustain finding of impairment of earning capacity. Old Ben Coal Corp. v. Indust. Comm. (Ill.) 589
Burden of claimant, in second claim for same injury, of showing continuance of incapacity to work, held not met. Nidds v. Sterling Ceiling & Lathing Co. (N. Y.) 802
Evidence held not to show continuing disability of claimant. Grunsick v. Charles Schaefer & Son (N. Y.) 790
Award to workman for proportionate loss of hand, based on personal examination by commissioner without considering testimony, held invalid as being arbitrary. Schermerhorn v. General Electric Co. (N. Y.) 814

§ 406. DEPOSITIONS.

§ 407. TRIAL OR HEARING BY COURT.

§ 408. —— IN GENERAL.

Suit is tried according to ordinary procedure and statute does not contemplate substitution of arbitrator for jury. Southern v. Western States Portland Cement Co. (Kan.) 424

§ 409. —— TIME AND PLACE OF HEARING.

§ 409½. —— QUESTIONS FOR JURY.

Whether driver was killed in course of employment while taking home musician employed to instruct band organized by employees of factory, held for jury. Thistle Mills, Inc. v. Sparks (Md.) 306
In action for miner's death, under law protecting employees required to be in dangerous proximity to explosives, evidence held insufficient to go to jury. New Cornelia Copper Co. v. Espinoza (U. S.) 375

§ 410. —— INSTRUCTIONS.

§ 410½. —— TRIAL OR HEARING BY COURT—VERDICT AND FINDINGS.

Held that inconsistency in findings was explained by error, not complained of, in giving instructions and that it should be disregarded. Blackburn v. Coffeyville Vit. Brick & Tile Co. (Kan.) 58

§ 411. —— JUDGEMENT OR DECISION.

Where injured is authorized to seek compensation by action, court has jurisdiction to render judgment for immediate payment of full amount Southern v. Western States Portland Cement Co. (Kan.) 424
Judgment cannot be amended by district court because of judicial error in it after time for review in Supreme Court has passed. Connelly v. Carnegie Dock & Fuel Co. (Minn.) 759

§ 411¼. —— EXECUTION AND ENFORCEMENT OF JUDGMENT OR AWARD.

§ 411½. —— NEW TRIAL.

Held that special findings are inconsistent with undisputed evidence and that amount of verdict cannot be sustained upon any theory consistent either with special findings or with undisputed facts, and new trial is ordered on sole issue as to amount of compensation. Penn v. Swift & Co. (Kan.) 609

§ 412. —— APPEAL OR OTHER PROCEEDING FOR REVIEW.

Held that there was evidence from finding of dependency could be made, and that injury was in employment. Levitan Embroidery Works v. Lamatina (N. J.) 87
Error in computation of award may be corrected and modified upon appeal without reversing judgment. Chance v. Reliance Coal & Mining Co. (Kan.) 201
Where only question was legal effect of facts not questioned by either party, decision of court is one of law, subject to review. Lupoli v. Atlantic Tubing Co. (N. Y.) 356
Findings of fact supported by sufficient evidence and findings of fact on substantially conflicting evidence will not be reversed unless clearly wrong. Christensen v. Protector Sales Co. (Neb.) 652
Further investigation after remand on an appeal held discretionary — denial of rehearing after remand on an appeal held not abuse of discretion on showing made. Venuto v. Carter Lake Club. (Neb.) 654

(7). ——

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§ 413. PROCEEDINGS BEFORE BOARDS OR COMMISSIONS.

§ 414. —— IN GENERAL.

Hearing and decisin of widow's claim for compensation for husband's death was properly by single member of board in force when hearing occurred, and not by committee on arbitration in accordance with statute in force at time of injury. Devine's Case (Mass.) 446

Inadequacy of time to procure evidence on hearing is not available, when no objection or request for adjournment is made. Quick v. Fred. E. Illston Ice Co. (N. Y.) 668

What constitutes speedy, efficient, and inexpensive procedure, required by act, is question of fact addressed to discretion of commission's chairman and his granting continuance at his own volition can be reviewed only if his discretion has been abused. MacDonald v. Employers' Liability Assur. Corp. (Me.) 737

§ 415. —— RECEPTION OF EVIDENCE.

Board could take judicial notice of safety rules prescribed by state board of labor. Sciola's Case (Mass.) 72

Commission may delegate power to take testimony to a deputy as referee. Utah Copper Co. v. Indust. Comm. (Utah) 147

Consideration of written opinion of physician submitted after close of hearings without opportunity to employer for cross-examination is error compelling reversal of award. Jack v. Morrow Mfg. Co. (N. Y.) 476

Permitting testimony before commission as to incompetent testimony before arbitrator does not waive employer's objection to that testimony, when given before arbitrator. Old Ben Coal Corp. v. Indust. Comm. (Ill.) .. 589

§ 416. —— REPORT AND FINDINGS OR AWARD.

Error of commission in giving wrong first name of injured workman in making award is sufficiently serious to require correction. Vassilakis v. Fairfax Hotel Co. (N. Y.) 139

Failure to give employer notice will bar recovery unless commission finds as fact there was no intention to mislead and that employer was not misled by such failure. Frank Martin-Laskin Co. v. Indust. Comm. (Wis.) 169

It is bad practice for commission when making findings of fact to incorporate written opinion as part of findings—findings by commission that injuries resulted either from fall on floor or from assault by stranger are insufficient to justify award. Lorchitsky v. Gotham Folding Box Co. (N. Y.) 218

Award of commission without specific findings is improper practice—award as stated held supported by sufficient findings. Jackson Coal Co. v. Indust. Comm. (Ill.) 190

Where commission's finding did not eliminate contingency of injury through employee's own unauthorized act, award of compensation held unjustified. Greenberg v. Greenberg (N. Y.) 230

Minor can disaffirm adjudication obtained in proceeding before commission in which he has not been duly represented, until barred by laches after reaching majority—if applicant at time of first application and hearing was minor, not represented by guardian she had right to disaffirm award after reaching majority—injured female employee, under 21 at time of first application and hearing was "minor" for purpose of enforcement of rights acquired under act and fact that she became 21 before award was rendered does not defeat right of disaffirmance—failure of commission to enter order setting aside first award, disaffirmed by minor does not invalidate second award. Gouanillou v. Indust. Accident Comm. (Calif.) 257

After board has denied compensation employee's letter to board requesting blanks and information as to bill, is sufficient claim for review within statutory time limit—while board performs quasi judicial duties, it is not possessed of judicial power and cannot set aside findings of aribitration board and order resubmission to new board—claimant is not entitled to transcript of evidence before board to be furnished by insurer. Jones v. St. Joseph Iron Works (Mich.) 315

Commission is required to make sufficiently detailed findings of fact, so that courts can determine whether award is supported—findings of commission as stated held insufficient as merely stating conclusion of law. Prouse v. Indust. Comm. of Colorado (Colo.) 388

Decision that only question was whether final cause of hemorrhage which occasioned employee's death was natural one or act in course of employment did not place burden of proof upon employer. Patrick v. J. B. Ham Co. (Me.) 432

Where facts pleaded before commission by employer and insurer as defense to widow's application for compensation for death of her huband constituted no defense, commission was not required to make findings with reference thereto. Miller Scrap Iron Co. v. Indust. Comm. (Wis.) 528

In proceeding for loss of toe, finding that age and hardening of the arteries greatly retarded normal recovery but that disability resulting, combined with physical condition, was proximate result of injury and is

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compensable as such, held not in conflict with finding that injury had resulted in permanent disability. Jackson v. Indust. Accident Comm. (Calif.) 541
Commission has continuing jurisdiction on showing of good cause to rescind, alter, or amend any decision or award made by it until 245 weeks from date of injury — continuing jurisdiction of commission not limited by statute conferring power, "including" right to increase or diminish award—commission has jurisdiction to amend award after expiration of time for rehearing. Kennedy v. Indust. Accident Comm. (Calif.) 543
Where evidence is not wholly undisputed, finding that claimant has not established his claim by preponderance of evidence and has not shown that he has sustained any accident arising out of and in course of employment, is insufficient to support decision denying compensation and case must be remanded for more specific findings of fact. Billick v. Indust. Comm. (Colo.) 550
Denial of further hearing on claim was not reversible error. Devine's Case (Mass.) 446
Findings reciting that deceased employee was burned in explosion while in course of employment, that proximate cause of death about one year and four months after accident, was appendicitis due to abscesses, that death was not caused by the accident and that therefore claim should be denied held mere conclusions of law, affording no basis for judgment. Weaver v. Indust. Comm. (Colo.) 555
Finding that sickness was "caused or activated by injury received," being in the disjunctive, was not finding that accident caused sickness. Donovan v. Alliance Electric Co. (N. Y.) 785
Compensation award to corporate officer, also employee, reserved, and claim remitted for additional findings. Kolpien v. O'Donnell Lumber Co. (N. Y.) 774
State of dependency must first be found as fact, except in cases where it is conclusively presumed, before employer or insurer can be held liable for payment of any sum for support of claimant. MacDonald v. Employers' Liability Assur. Corp. (Me.) 737

§ 416½. ——

On insurer's noncompliance with award of board, injured is entitled to judgment in lump sum for compensation already due and judgment for weekly installments during balance of compensation period, but not to lump sum judgment for entire period—evidence in action for noncompliance with award of board held to warrant finding that insurance carrier did not, prior to action, in good faith attempt to comply with award—injured may mature entire claim and bring suit thereon as well where there has been no payment on award of board, as where, after a payment, there has been default—for injured to authorize attorney to file suit for whole amount due under award of board is in effect a maturing on his part of the amount due. U. S. Fidelity & Guaranty Co. of Baltimore, Md., v. Parsons (Tex.) 517

§ 417. —— PROCEEDINGS BEFORE BOARDS OR COMMISSIONS—REVIEW BY COURT IN GENERAL.

(1). Nature and form of remedy.

Without application to commission for review no case can be reviewed by district court, and such application must be made within ten days—no application having been made as required, suit in district court to review decision is unlawfully brought and should be dismissed. Midget Consol. Gold Mining Co. v. Indust. Acc. Comm. (Colo.) 26
Appeal from commissioner to Supreme Court is good, though filed within time allowed for appeal to county court. O'Boyle v. Parker-Young Co. (Vt.) 696
Where Commission denied compensation, and petition for rehearing was filed after which Commission vacated previous order, heard further testimony, and made another order denying compensation, order held reviewable without further petition. Carroll v. Indust. Comm. (Colo.) 720

(2). —— Certification of questions of laws.

(3). —— Certiorari.

(3½). —— Injunction.

(3¾). —— Decisions reviewable.

(3⅝). —— Right of review.

(3⅞). —— Parties.

Jurisdiction to review award is dependent on joinder of adverse party—alien enemy beneficiary of award, is not the necessary "adverse party" to review. Milwaukee Western Fuel Co. v. Indust. Comm. (Wis.) 176

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(3¾). Proceedings for appeal or other form of review.

(4). Presentation and reservations of grounds of review.

Question of jurisdiction of Commission in proceeding may be first raised on appeal. Newham v. Chile Exploration Co. (N. Y.) 797

(4¼). Record.

Filing required papers in court as part of its records is compliance with act—such filing is condition precedent to jusidiction of court. Sciola's Case (Mass.) 72

Where findings of commission state that injuries were sustained as set forth in written opinion, court on review must consider opinion to ascertain facts. Lorchitsky v. Gotham Folding Box Co. (N. Y.)..... 218

Claimant's appeal to court of common pleas after denial of rehearing under rules is barred by statutory limitation. Indust. Comm. of Ohio v. Glenn (N. Y). 492

Transcript of proceedings before commissoner furnished by claimants is no part of record and will not be examined. O'Boyle v. Parker-Young Co. (Vt.) 696

On appeal from award of commissioner, appellant should make application to correct finding of commissioner within reasonable time after filing of his appeal — on appeal from award, appellant, on application to commissioner for correction of finding, must file with the motion or at earliest time he can procure the transcript of such portions of evidence as are relevant and material to the several corrections asked for — additional evidence relevant to corrections to commissioner's record should be filed in time — on appeal from finding and award of commissioner, commissioner should file motion to correct record with decision and certify evidence. Atwood v. Connecticut Light & Power Co. (Conn.) 558

(4½). Transfer of cause.

Filing of copy of decision of board in superior court within ten days is not condition to acquirement of jurisdiction. Sciola's Case (Mass.)..... 72

On appeal from default judgment neither certificate nor affidavit was necessary—where judgment was rendered February 14 and defendant, having moved for appeal March 6th excepted to jurisdiction of court to consider plaintiff's subsequent motion to vacate appeal, and appeal was then lodged with Court of Appeals which transferred cause, bill will not be dismissed on ground that judgment became final before appeal was made—order allowing appeal held not to have been vacated under circumstances stated—appeal may be prosecuted by either employer or employee without furnishing appeal bond. Craver v. Gillespie (La.) 300

Motions to correct finding of commissioner and to have evidence taken before him certified by him and part of the record, should be presented to him. Atwood v. Conn. Light & Power Co. (Conn.) 558

Objection that writ of certiorari to review award of commission was sued out more than twenty days after decision cannot be entertained in Supreme Court, where objecting party appeared in circuit court, moved to quash the writ on other grounds, and joined issue on merits, without making such objection—under statute, writ of certiorari to review award may be sued out within twenty days of receipt of notice of decision and need not be sued out within twenty days from making or filing of decision. Decatur Const. Co. v. Indust. Comm. (Ill.) 568

(5). Trial or review.

On appeal, evidence that claimant is suffering from particular disorder caused by injury, entitling to higher award, is not objectionable merely because fact is not alleged in complaint on file. Maddox v. Indust. Ins. Comm. (Wash.) 163

Ruling on appeal from award is law of case on subsequent appeal. Brady v. Holbrook, Cabot & Rollins, Corp. (N. Y.) 474

District court, on appeal from judgment of board refusing to commute weekly payments into lump sum, has jurisdiction to try questions of totality and permanence of injury as well as right to lump sum payment, presented as issues before board—board cannot, in refusing to commute weekly payments into lump sum, deprive district court of jurisdiction by making judgment contingent and providing that futher applications for commutation into lump sum may be made. Southern Surety Co. v. Hendley (Tex.) 522

Where question whether accident arose out of and in course of employment had been decided in favor of claimant by commission burden of proof rested upon employer and insurer to show that claimant was not employee—where question whether accident arose out of and in course of employment had been decided in favor of claimant and insurer and employer appealed, question was question of fact for jury to determine on appeal. Bell v. Steen (Md.) 628

In proceedings involving issue of whether accident which occurred while employee was boarding train on way to work arose out of and in course of employment, court's refusal to submit proposed questions of fact as

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to nature of accident, character of train, terms of contract between employer and railroad held proper—refusal to submit proposed question of fact was not error where such fact was only ultimate fact in issue and it was clearly submitted to jury by instructions granted—questions of fact should be framed and presented so that they may be passed upon by court before jury is sworn. Central Const. Corp. v. Harrison (Md.) 631

Complaint, under circumstances as stated, held not to show award denying compensation was obtained by fraud. Porter v. Indust. Comm. Wis. State Register Co. v. Indust. Comm. (Wis.) 708

Submission of issues on appeal is regulated by general practice—special issues for jury on appeal limited to facts so that court may determine whether finding of commission shall be confirmed, reversed, or modified—where verdict for either party would be equivalent to finding of only fact in controversy, verdict in that form is sufficient without submitting the fact in controversy in the form of an issue—on appeal from commission involving issue of whether compensation should have been continued beyond the time which would have been required for recovery after an operation, where only issue of fact involved was whether employee claiming total temporary disability should have submitted to the operation, court's refusal to submit issues as to character of disability, extent of injuries,, and as to amount of compensation held proper—testimony as to employee's condition at time of trial on previous appeal from award held irrelevant. Schiller v. Baltimore & O. R. Co. (Md.) 620

Reviewing court cannot examine evidence except for the limited purpose of determining whether commissioner erred in refusing to correct his finding. Atwood v. Conn. Light & Power Co. (Conn.) 558

When copies of decision of Board on claim under act and papers in connection therewith are transmitted to superior court it is the duty of that court to determine what decree the law requires on facts found by Board. Bell's Case (Mass.) 749

Agreement by parties to compensation proceeding that no question would be raised on appeal, except that as to who was employer, did not deprive employer of right to raise question of lack of jurisdiction because employment was under maritime contract. Newham v. Chile Exploration Co. (N. Y.) 797

Case is fully determined in public interest, though submitted on limited certification. Mann v. City of Lynchburg (Va.) 836

(6). —— Questions of law.

Finding of commission on question of relationship, being one of law, is not conclusive on reviewing court. Cayll v. Indust. Comm. (Wis.) 165

Finding of Board that one claiming compensation for death was not member of decedent's family must stand, when supported by evidence. Stafford's Case (Mass.) 754

(7). —— Quetions of fact.

Finding of commission that death was result of accidental injury, having support of legal evidence, will not be disturbed despite evidence of previous diseased condition. State Indust. Comm. v. Geo. W. Stiles Const. Co. (N. Y.) 134

Act does not authorize court to review or disturb findings of fact made by board, if founded on warrantable evidence.—Court should not order board to reconsider decision on question of fact. Sciola's Case (Mass.). 72

Where there was some substantial evidence to justify commission's conclusion as to dependency, award must stand. Ogden City v. Indust. Comm. of Utah (Utah.) 249

Award of board will be neither reversed nor increased on appeal where there is evidence reasonably to warrant it. Miller v. Diamond Ice & Coal Co. (Del.) 185

In reviewing finding of commission on question of dependency, reviewing court will examine record only to determine whether there is any evidence to support warrnt. . Globe Grain & Milling Co. v. Indust. Comm. (Utah.) 245

Where there is evidence to support finding of board, it will not be disturbed on appeal. Cudahy Packing Co. v. Zafiropoulos (Ind.) 196

On review, court cannot weigh evidence, and in absence of fraud is bound by decision of commission if there is legal evidence to support it. Vulcan Detinning Co. v. Indust. Comm. (Ill.) 191

Where there is some substantial evidence on record to support commission's findings, award will not be disturbed. Utah Fuel Co. v. Indust. Comm. (Utah) 370

Finding of commission that minor female employee disaffirmed award within reasonable time cannot be disturbed on certiorari. Gouanillou v. Indust. Accident Comm. (Calif.) 257

Finding of board that injury arose in employment will not be disturbed if there is evidence to support it. American Leather Product Co. v. Stone (Ind.) 289

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Where order of board has no evidential support, it is reviewable. Kling v. National Candy Co. (Mich.) 318
Where findings of board are supported by facts or inferences from testimony they must be taken as true and reviewing court will not weigh evidence. Ward v. Heth Bros. (Mich.) 325
Commission's determination of extent of claimant's injury is not reviewable —commission's finding in case is conclusive if supported by evidence—cause of claimant's mental condition was question of fact and therefore not reviewable where evidence was conflicting. Littson v. Indust. Comm. of Utah (Utah.) 526
Question whether there is evidence to sustain finding of fact by board is reviewable one of law—where point as to whether decedent was injured in course of employment is sought to be inferred from certain basic facts, which are said to have been proved, question whether there is evidence to support them is a reviewable one of law. Stahl v. Watson Coal Co. (Pa.) 505
Findings of fact made by commission are conclusive and cannot be reviewed by courts unless there was no conflict in evidence. Norton v. Day Coal Co. (Iowa.) 408
Finding of commission on substantial evidence cannot be reversed on appeal. Patrick v. J. B. Ham Co. (Me.) 422
Finding of board supported by evidence is conclusive. Devine's Case (Mass.) 446
Finding of board is conclusive if substantially supported. O'Donnell's Case (Mass.) 453
In proceeding, court on appeal from decision of board, should not reverse findings of fact except where evidence clearly preponderates against them. Morgan v. Butte Central Min. & Mill. Co. (Mont.) 462
Court cannot review commissioner's finding of fact as to dependency unless commissioner applied illegal standard or found fact without evidence. Atwood v. Conn. Light & Power Co. (Conn.) 558
Where there was conflict in evidence but there was evidence tending to show that an injured person was employee and not an independent contractor, decision of commission to that effect was conclusive. Franklin Coal & Coke Co. v. Indust. Comm. (Ill.) 571
Questions of dependency and extent thereof are questions of fact and courts will not interfere with finding on such questions if there is evidence to sustain finding. Richardson Sand Co. v. Indust. Comm. (Ill.) 581
Award will not be disturbed on appeal on ground that evidence is insufficient to support it where there is some evidence to support it. Standard Coal Co. v. Gallagher (Ind.) 603
Finding and award of board will not be disturbed where there is competent evidence to sustain it. Buckley v. Inland Steel Co. (Ind.) 598
Whether or not employee's death was result of accident arising out of employment is question of fact for board. Miller v. Bell (Ind.) 598
Finding of board must stand if there is any evdence to support it. Lapan's Case (Mass.) 637
Finding by commission, if supported by substantial testimony, cannot be reviewed by court. Doscolos v. Indust. Comm. (Utah) 693
Finding that claimant was not employee within act is finding of "fact", and cannot be disturbed by court. Porter v. Indust. Comm. Wisconsin State Register Co. v. Indust. Comm. (Wis.) 708
Court cannot review determination of Commission as to facts, if there are any facts tending to sustain it. O'Sullivan v. A. H. Woods Theatre Co. (N. Y.) 803
In proceeding for injuries to lumberman's employee Commission's finding on evidence that claimant was engaged in actual operation of lumbering, and not in farming, is one of fact. Posey v. Moynehan (N. Y.) .. 812
Commission's findings of total dependency, and that relationship of dependent child to decedent's household existed in good faith, must be accepted as established. Moore Shipbuilding Corp. v. Indust. Accident Comm. (Calif.) 713

(8). —— Harmless error.

Error as to evidence is not ground for reversal of board's award unless necessary to protect substantial rights. Sciola's Case (Mass.) 72
Award made payable from day of injury, where employer had actual knowledge but written notice was not given, was harmless error. Garton v. Kleinknight (Ind.) 51

(9). Determination and disposition of cause.

Dismissal of claimant's appeal precludes second action under appeal notice. Maddox v. Indust. Ins. Comm. (Wash.) 163
It is duty of court to enforce award of board unless there is legal reason to contrary. Sciola's Case (Mass.) 72
Board rehearing compensation case may consider evidence taken both before and after remand. Miller v. Diamond Ice & Coal Co. (Del.) 185
Court reviewing compensation case will treat finding of evidential facts as equivalent to finding of ultimate fact. Hoosier Veneer Co. v. Stewart (Ind.) 289

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Court may award lump sum, though question was not presented to board. Lumbermen's Reciprocal Ass'n v. Behnken (Tex.) 363
Supreme Court may remand cause for new trial to avoid injustice. O'Boyle v. Parker-Young Co. (Vt.) 696

§ 418. —— REVIEW OF JUDGMENT OF COURT ENTERED ON AWARD OF BOARD OR COMMISSION.

(1). Nature and form of remedy.

Where decree of court was invalid because it has no jurisdiction, no appeal could be taken therefrom—reviewing court is not bound to give any effect to decree of court entered without jurisdiction. Sciola's Case (Mass.)... 72

(2). Decisions reviewable.

Where final decree is one from which appeal will lie in equity, in absence of contrary provisions appeal lies to supreme judicial court from both interlocutory and final decrees—where statute provides against appeal from final decree, to prevent error there may be appeal from interlocutory decree. Sciola's Case. (Mass.) 72
Judgment in action against insurer for noncompliance with award of board awarding plaintiff lump sum for accrued weekly payment and providing that he recover others as they accrue, though providing that as to payments subsequently to accrue the court may have authority on application to diminish, increase, or revoke so much of said judgment as pertains to future payments, is "final judgment" from which appeal may be taken. U. S. Fidelity & Guaranty Co. of Baltimore, Md., v. Parsons (Tex.) 517

(3). Presentation and reservation of grounds of review.

(3½). Transfer of cause.

Amended act as to review on writ of error held inapplicable to pending proceedings. Vulcan Detinning Co. v. Indust. Comm. (Ill.)..... 191
If petition for writ of error or accompanying abstract is incorrect or incomplete, respondent should reply to petition, and file additional abstract so as to prevent award of writ without apparently good cause. Sesser Coal Co. v. Indust. Comm. (Ill.) 584

(4). Record.

(5). Review.

Where claim was that parties were not within act, and no application was made to commission for review as required, and therfore district court did not have question properly before it, but such court did affirm decision, Supreme Court cannot determine question whether commission had jurisdiction. Midget Consol. Gold Mining Co. v. Indust. Acc. Comm. (Colo.) 26
Where recommital of case of board was solely to correct rulings of law or findings of fact based on questions of law or evidence, action of judge may be reviewed. Sciola's Case. (Mass.) 72
What constitutes special case justifying lump sum award is left to determination of board or district court and exercise of such discretion will not be reviewed where no abuse appears. Lumbermen's Reciprocal Ass'n v. Behnken (Tex.) 363
Court will consider uncontroverted evidence as findings of fact. Prouse v. Indust. Comm. of Colorado (Colo.) 383
Agreement between counsel that only issue involved in appeal was constitutionality of statute does not preclude court from considering question of whether work in which employee was engaged was casual where record before court was sufficient for determination of such question. Blake v. Wilson (Pa.) 494
On review of judgment in action brought to review award of commission, question whether in determining amount contributed to support of parents by unmarried son, amount actually used or needed for his individual support should be deducted may be determined on suggestion of Assistant Attorney General though not necessary for disposition of case. Milwaukee Basket Co. v. Indust. Comm. (Wis.)..... 703
Where record does not show whether train causing injury to railroad employee was engaged in interstate or intrastate commerce, it will be assumed by Supreme Court that it was intrastate train. Payne v. Indust. Comm. (Ill.) 577
Judgment confirming award will not be reversed for employee's opinion of extent of injury. Hafer Washed Coal Co. v. Indust. Comm. (Ill.)..... 575

(6). —— Questions of law or fact.

Conclusion of trial court that deceased was employee within act is not controlling upon supreme court but is reviewable. Aisenberg v. C. F. Adams Co. (Conn.) 28
Supreme court cannot review correctness of commission's decision nor judgment of circuit court on question of claimant's intoxication where testimony is conflicting. Morris & Co. v. Indust. Comm. (Ill.) 41

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If wrong rule is used in computing average weekly wages, or finding of essential fact is made without proper evidence, award can be attacked on appeal. Thibeault's Case. (Me.) 65
Commissioner's conclusion, sustained by some evidence, will not be disturbed by Supreme Court. Jackson v. Iowa Telephone Co. (Ia.) 54
On appeal from district court, Supreme Court cannot reverse finding of commission on weight of evidence. Employer's Mut. Ins. Co. v. Morgulski (Colo.) 183
Finding of board, confirmed by Supreme Court, that death resulted from tuberculosis, induced by injuries sustained in regular work, must stand if thee is supporting evidence. Glennon's Case (Mass.)..... 210
Question of dependency is one of fact and is not reviewable where there is evidence to support commission's finding. Rockford Cabinet Co. v. Indust. Comm. (Ill.) 280
Findings of court on record are reviewable. Morgan v. Butte Central Min. & Mill. Co. (Mont.) 462
Where essential facts as to cancellation of policy are not in dispute, question presented by record thereon is one of law. Altinovitch's Case (Mass.) 443
Finding of chairman of commission that claimant widow had not sustained burden of proof on point of marriage was not finding of fact, but of law, based on rules of law, and being erroneous, was reversible by Supreme Judicial Court. Smith v. Heine Safety Boiler Co. (Me.)..... 611
Where order of commission has been confirmed by district court, and there is no contention of fraud, commission's findings of facts supporting order can only be disturbed on ground of gross abuse of discretion exceeding commission's powers—in reviewing award confirmed by district court, Supreme Court may consider only legal question whether there is evidence to support findings. Kokotovich v. Indust. Comm. (Colo.).. 553
Court can, on appeal, review findings on questions of fact to extent of ascertaining whether there is palpable evidence upon which decision can be sustained — Questions of law raised by pleadings are subject to revision of law court on appeal — Court, after sustaining objections to ruling of chairman on matter of law can determine case upon evidence found in report MacDonald v. Employers' Liability Assur. Corp. (Me.) 737
Findings of Commission are conclusive on Court of Appeals in a workmen's compensation case. Hubbs v. Addison Electric Light & Power Co. (N. Y.) 776

(7). Determination and disposition.

Clerical error in designation of injured leg in award can be corrected on review. Centralia Coal Co. v. Indust. Comm. (Ill.) 40
Supreme Judicial Court has power to send case back for further hearing. Devine's Case (Mass.)..... 446

§ 419. PROCEEDINGS TO INCREASE, DIMINISH, OR TERMINATE COMPENSATION.

Where employee's hand was injured in operating machine but recovered to extent that employer offerod him work at larger wages than he received at time of injury, he was not "totally disabled". Kling v. National Candy Co. (Mich.) 318
Where laborer suffered internal injuries which necessitated operations, and on his request lump payment for additional operation was made but he failed to allow such operation, employer should be relieved from further payments. Smith v. I. Stevenson Co. (Mich.) 322
"Odd lot doctrine" is that, if effects of accident have not been removed, it is not sufficient to entitle employer to reduction of award that workman has physical capacity to do some work different from that in which he was engaged at time of accident; it must also be shown that he can actually get such work and burden is on employer to show such fact. Lupoli v. Atlantic Tubing Co. (N. Y.) 356
Evidence at first hearing is essential to determination of right to increased compensation because of changed conditions—changed conditions do not constitute new case and applicant for increased compensation need not reintroduce evidence—award by board of increased compensation to injured employee because of changed conditions since first award cannot be reviewed on merits in absence of part of evidence. Indianapolis Bleaching Co. v. Morgan (Ind.) 403
Evidence held to support order denying application for relief from further payments on ground that claimant was no longer disabled. Ward v. Heth Bros. (Mich.) 325
Claim for permanent, partial disability after termination of total disability held barred by limitation—amendment requiring that applications for modifications fo awards must be filed with one year from termination of compensttion period fixed in original award applicable to prior injuries. In re Hogan (Ind.) 400
Claimant must show injury was proximate cause of his present further disability before he is entitled to further recovery—evidence held to support decision of commissioner that there was no fraud in securing by em-

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ployer of release signed by iinjured and that pain suffered by employee subsequent to release was caused by flat feet instead of sprain which was original injury—commissioner had power to determine whether injured who had released employer had made such showing of fraud in release as would justify reopening of case—error of commissioner in himself determining application of injured who had released employer to reopen case without having matter referred to a board of arbitration held harmless to employee—where injured in petition to reopen case after he had released employer did not ask that question of reopening of case be submitted to board of arbitration but appeared with counsel before commissioner and submitted matter to him, such employee should not, on appeal to Supreme Court, be permitted to complain that commissioner determined matter himself without referring it to a board of arbitration. Vodopich v. Trojan Mining Co. (S. D.) 507

Though employee was entitled to notice before order for compensation was modified to his prejudice fact that he was not notified before order was entered terminating payment of compensation does not invalidate subsequent denial of compensation. Doscolos v. Indust. Comm. (Utah) ... 693

Suspension of payments with approval of Accident Board, left open question whether partial incapacity existed. Frizzi's Case (Mass.) 752

Act providing for modification of a judgment on ground of "increase or decrease of incapacity" does not authorize a modification because of judicial error in determining amount of award. Connelly v. Carnegie Dock & Fuel Co. ((Minn.) 759

Award held properly modified. Polucci v. Emerson Norris Co. (N. Y.) 794

Injured employee's receipt reciting that total disability had ceased did not.. preclude him from recovering compensation for total disability subsequent thereto — Board's determination that employee's total disability had ceased will not prevent recovery of further compensation on recurrence of total disability — Injured employee is not required, on recurrence of total disability after apparent cessation thereof, to apply for reinstatement within a year after total disability had prima facie ceased. Fort Branch Coal Mining Co. v. Farley (Ind.) 728

§ 420. COST, FEES AND EXPENSES.

Where insurer appealed from judgment of district court reversing judgment of board refusing to commute weekly payments into lump sum, costs of suit were properly adjudged against appellant. Southern Surety Co. v. Hendley (Tex.) 532

In action under Act, even though recovery is had, attorney's fee cannot be taxed as part of costs. Abel Const. Co. v. Goodman (Neb.) 762

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